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with a Section in Sinhala

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WITH A DIGEST

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G.A.N

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DIGEST

Where an unsuccessful plaintiff in an action for a declaration that he is the lawful Viharadhipathi of a temple and entitled to its temporalities appealed and died pending the appeal, a person who claims to be his successor is entitled to be substituted in the former's place under section 404 of the Civil Procedure Code if the latter establishes that he is the lawful successor to the deceased under the Buddhist Ecclesiastical Law.

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In this application for a Writ of Certiorari the petitioner prayed for the quashing of an Order made by the Minister of Local Government under section 184 of the Urban Councils Ordinance removing the petitioner from the office of Chairman of an Urban Council.

It was argued on his behalf that as one consequence of the said Order was that the deposed Chairman was disqualified for a period of five years (under section 9(3)(c) of the Local Authorities (Elections) Ordinance) from being elected as, or voting at any election of a Senator, or Member of Parliament or a member of any local authority, the Order itself was one made in the exercise of judicial power and that a decision on this application should therefore be deferred until the decision by a bench of five judges to whom a similar question had already been referred.

Held: That in so far as the Order had the effect of removal of the Chairman from office, the Minister was duly empowered to make it under section 184 of the said Ordinance, being essentially an administrative order. In regard to the effect of the Order on his electoral and voting rights he could take any steps as he may be advised.

It was contended further on his behalf that —

(*a*) the petitioner was not given due notice of the inquiry into the petitions alleging maladministration on the part of the petitioner, as he was informed only on 27th of April, that the inquiry would be commenced on the next day — 28th April 1964.

(*b*) that the Inquiring Officer stated that the inquiry was only a preliminary one and that the petitioner had no fair opportunity to defend himself as he expected that there would be a subsequent investigation.

(*c*) that the petitioner had no proper opportunity when called upon by the Minister to show cause against the order of removal and that the Minister had failed to consider the explanations furnished.

(*d*) that he was denied an opportunity by the Minister to produce the Council's files in his defence.

Held further: (1) That as the petitioner had been previously furnished with a report on the two petitions against him and as the inquiry continued on 29th April, 8th May, 13th May as was evident from the proceedings, he had ample opportunity to present his side of the case before the inquiry terminated.

(2) That, there was no reason to doubt the good faith of the inquiring officer, and the record of the proceedings showed that the petitioner was aware that the purpose of the inquiry was to ascertain the truth of the allegations and he must reasonably have known that any explanation he had to offer would be entertained and considered. The record showed that at various stages the petitioner made statements, questioned witnesses and referred to files and no application had been made for a lawyer to represent him.

(3) That, the Minister was entitled to disagree with the explanations furnished by the petitioner in reply to the former's letter setting out in full detail the grounds for removal, and that it would be unreasonable for the Court to suppose that these explantions were not considered by the Minister before he made the Order for removal.

(4) That if the Minister was entitled to hold the petitioner guilty of maladministration because he had failed to maintain adequate supervision over the performance of the duties of the Council's officers, nothing in the Council files would serve to negative the charge of maladministration. Also, that if the production of these files could have assisted the petitioner, he had ample opportunity to produce them during the investigation.

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to take objection before the Returning Officer on Nomination Day — Can it be taken later in an election petition? — Sections 28 F, 29(1), 31, 31(1)d, 31(2), 31(3), 31(4) of Order-in-Council.

Held: (1) That any objection relating to a non-compliance with the provisions of section 9(1) of the Ceylon (Parliamentary Elections) Order-in-Council must be taken before the Returning Officer and if not so taken could not be permitted thereafter.

(2) That the omission to plead in the petition that "the alleged failure to make the necessary deposit affected the result of the election" is not a fatal defect.

Election Petition — Averments in petition alleging non-compliance with sections 48(9), 48(9A)(a), (b), (c) of the Order-in-Council and miscount of votes — Do these amount to one charge under section 77(b) of the Ceylon (Parliamentary Elections) Order-in-Council 1946? — Another paragraph alleging such general abuse and corrupt use of public office, funds, utilities and amenities, corrupt patronage and influence as to render election void under section 77(a) of the said Order-in-Council — Whether one charge — Adequacy of security required under Rules 12(2) and 12(3) of the Parliamentary Election Petition Rules.

The petitioner challenged the election of the 1st respondent by averring —

(*a*) in paragraph 4 of the petition that the election was not conducted by the 2nd respondent in accordance with the principles laid down in section 48 (9), 48 (9A) (*a*), (*b*) and (*c*) of the Ceylon (Parliamentary Elections) Order-in-Council, 1946;

(*b*) in paragraph 5 that there has been a miscount of the votes by the 2nd respondent, and that the return of the 1st respondent was undue;

(*c*) in paragraph 6, "that such general abuse and corrupt use of public office and of public funds, utilities and amenities corrupt patronage and influence prevailed before and during the said election, that by reason thereof the majority of electors have or may have been prevented from electing the candidate whom they preferred; and that the said election of the 1st respondent was rendered void by virtue of the provisions of section 77(*a*) of the Ceylon (Parliamentary Elections) Order-in-Council, 1946."

The petitioner deposited Rs. 5000/- as security being the minimum required by Rule 12(2) of the Parliamentary Election Petition Rules, 1946 and which sum would be sufficient to cover only three charges.

A preliminary objection to the hearing of the Election Petition was raised by the 1st respondent alleging that the security furnished was inadequate and praying for an order dismissing the petition.

It was submitted for the 1st respondent (1) that paragraphs 4 and 5 aforesaid contained two distinct charges; (2) that paragraph 6 referred to above contained more than one charge; (3) that particulars in paragraph 6 are vague and may give rise to a variety of charges.

Counsel for the petitioner contended that paragraphs 4 and 5 constituted one ground and relying on the dictum of Drieberg J., in *Tillekewardene v. Obeyesekera*, 33 N.L.R. 65, that the word "charges" in Rule 12(2) meant the "various forms of misconduct coming under the description of corrupt and illegal practices", and that there were no charges in respect of which he need furnish security, since the matters he has raised in his petition are only grounds for the avoidance of an election.

Held: (1) That under Rule 12(1) the furnishing of security is a *sine qua non* for the filing of an election petition. It matters not whether the averments in an election petition are termed charges, complaints, accusations or grounds. It is unreasonable to assume that Drieberg, J., in *Tillekewardene* v. *Obeyesekera* formulated a definition of the word 'charges', which was to apply in every case.

(2) That in considering whether paragraph 6 above contains one charge or several charges a relevant consideration to be taken into account is that paragraphs (*a*) and (*b*) of section77 appear to give statutory recognition to the well-known concept of freedom of election, an infringement of which was a ground for the avoidance of an election in common law. It is a concept well recognised both in England and in Ceylon.

(3) That the one 'charge' which is implicit in section 77(*a*) is that there has been no free and fair election and the averments in a petition which substantiate such an allegation together constitute one charge whatever be the number of instances, acts, facts or circumstances which are relied upon in support.

(4) That for the purpose of deciding the nature of the charges based on the particulars set out in paragraph 6 it is unnecessary to ascertain the particular category or head of the enumerated acts so long as they come under one or other of them.

(5) That on the same principles applicable to section 77(*a*), the averments in paragraphs 4 and 5 constitute one charge — the charge of non-compliance with section 77(*b*).

(6) That, therefore, the security furnished is adequate.

Per **Alles, J.** — ".....The words 'other misconduct, or other circumstances, whether similar to those before enumerated or not' were obviously intended to encompass practically every situation which would affect the freedom of election."

"Since the question has been raised, whether paragraphs 4 and 5 contain two charges or one, I have considered this matter and I am of the view that applying the same principles which I have done in respect of section 77(*a*), they only constitute one charge—the charge of non-compliance with the provisions of section 77(*b*)."

Election Petition — Allegations of publishing false statements, general intimidation, undue influence, bribery and conveying voters — All allegations except general intimidation described as having been committed by respondent himself, his agents or agent and other persons on his behalf or acting with his knowledge and/or consent.

Objection to petition that charges in alternative form vague and multifarious — Whether they disclose no charge at all or numerous charges — Prayer for striking off charges or precluding petitioner from leading evidence and for dismissal of petition on ground of inadequacy of security—Ceylon (Parliamentary Elections) Order-in-Council 1946, *sections* 56, 57(*a*), 58(1)(*d*), 67(3), 77(*c*) *and* 86(2) — *Failure to refer to section* 77 *and imprecise statements in petition — Effect — Election Petition Rules* 4(1)(*b*) *and* 12.

The petition challenging the election of the respondent contained the following allegations:

(1) publishing false statements of fact in relation to the character of his rival candidate within the meaning of section 58(1)(*d*) of the Ceylon (Parliamentary Elections) Order-in-Council, 1946.

(2) general intimidation.

(3) the corrupt practice of undue influence within the meaning of section 56 of the said Order.

(4) bribery under section 57(a) of the said Order.

(5) the illegal practice of using or employing a vehicle to convey voters in contravention of section 67(3) of the Order.

Each of the allegations in (1), (3), (4) and (5) above was stated to have been committed by the respondent by himself, his agents or agent and other persons acting on his behalf or with knowledge of consent of the respondent.

The respondent moved (*i*) that no further proceedings be had on the petition, (*ii*) that grounds 1, 3, 4 and 5 above be struck off and that the petitioner be precluded from leading any evidence thereon, and (*iii*) that the said petition be dismissed.

At the inquiry it was contended:—

(*a*) that the above charges 1,3, 4 and 5 were vague, multifarious and general in scope and did not conform to the imperative requirements of Rule 4(1)(*b*) of the Parliamentary Election Petition Rules and that the grounds and facts relied on to sustain the prayer were not briefly stated and that they should be struck off.

(*b*) that the charges in relation to section 58(1)(*d*) and to 67(3) insofar as they related to acts of the respondent by or through others were devoid of legal meaning and disclosed no offence, because under section 58 only the person committing the offence could be guilty of it and was liable to the penalties prescribed and in the case of section 67(3) only a person who commits or abets the offence could be guilty thereof.

(*c*) that charges under section 56(1) and 57(*a*) in the petition disclosed no offence as they were set out in the alternative.

(*d*) that the petition referred to contraventions of particular sections relating to corrupt or illegal practices, or election offences under sections 56, 57, 58 and 67(3) read wiith 72(1), but failed to catch up the main section relating to the ground, *viz.* section 77(*c*) of the Order-in-Council, by reference to the section or by relevant content.

(*e*) that consequently there were no valid charges on which the court should proceed to inquiry; or alternatively,

(*f*) that the petition contained more charges than five and the security of Rs. 9000/- given was inadequate and the petition must therefore be dismissed.

Held : (1) That in order to enable a court to declare an election to be void on a petition under section 77(*c*) it is sufficient to prove that a corrupt practice or an illegal practice was committed in connection with the election by the candidate or with his knowledge or consent or by an agent of the candidate.

(2) That an imprecise statement such as the one used in the petition that the respondent was guilty of these offences, in that he, his agents, or others with his knowledge committed these acts, while it would have affected a prosecution of the respondent for these offences, will not necessitate the deletion of these charges, as all that Rule 4(1)(*b*) requires is that the facts and grounds relied on for the prayer be briefly stated.

(3) That there is no requirement in the Order-in-Council or in the Rules that section 77 should be specified. It is sufficient that the complaints made should pertain to matters contemplated by section 77.

(4) That the respondent was entitled under Rule 5 to make an application to Court for the particulars of the charges alleged in order to obviate any prejudice that may be caused to him.

(5) That the submission that the charges under sections 56 and 57 having been set out in the alternative disclose no offence at all was not convincing. This method of expression is a concise way of including several complaints regarding election offences of the same species in one and the same complaint.

(6) That each of the allegations in the petition aforesaid, whether they be considered alternatively or cumulatively refer to one species of charges. Hence the security of Rs. 9,000/- is in accordance with Rule 12 of the Parliamentary Election Petition Rules.

Election Petition — Allegations of publishing false statements of fact and that respondent was disqualified for election as Member of Parliament as he directly or indirectly held contract with Government — Third allegation that the election was not conducted in accordance with the provisions of Ceylon (Parliamentary Elections) Order-in-Council 1946 *— Security deposited for three charges.*

Motion for dismissal of petition on the ground that petition did not comply with Rules 4(1)(*b*) *and* 4(*iv*) (3) *of the Parliamentary Election Petition Rules — Adequacy of security and number of charges in petition — Ceylon (Parliamentary Elections) Order-in-Council,* 1946, *sections* 42(2), 58, 77(*b*) *and* (*e*), *and* 86(2) — *Ceylon* (*Constitution*) *Order-in-Council* 1946, *section* 13(3) *c.*

The petition challenging the election of the 1st respondent alleged:—

(1) That the election was null and void as the 1st respondent by himself or his agents and/or other persons acting with his knowledge and consent made or published before or during the said election, false statements of fact in relation to the personal character and/or conduct of his rival candidate for the purpose of affecting his return at the said election and thereby committed a corrupt practice within the meaning of Section 58 of the Ceylon (Parliamentary Elections) Order-in-Council, 1946.

(2) That the 1st respondent was at the time of his election a person disqualified for election as a Member of Parliament in that, in contravention of Section 13 of the Ceylon (Constitution) Order-in-Council he directly or indirectly by himself and/or by other persons on his behalf and / or for his use and benefit held and/or enjoyed a right or benefit under a contract with the Government.

(3) That non-compliance with the provisions of Section 42(2) of the Ceylon (Parliamentary Elections) Order-in-Council, 1946, affected the election as many ballot papers delivered to the voters, were not stamped or perforated with the result that a large number of votes given in favour of the rival candidate were not counted as votes for him.

The1st respondent moved for the dismissal of the petition on the following ground:—

(*a*) that the petition only set out the grounds, but failed to set out some facts in addition to the grounds, and thereby the petitioner has failed to comply with Rule 4(1)(b).

(*b*) that Rule 5 of the Parliamentary Election Rules, 1946, could not be used as a substitute for Rule 4(1)(b).

(*c*) that when the charge went on to refer to the 1st respondent and/or other persons acting with his knowledge etc., it was not an allegation of fact at all in view of the uncertainty as to who committed the offence.

Held: (1) That having regard to Rule 5 which states that evidence need not be stated in the petition, but the Judge may on application by the respondent, order such particulars as may be necessary to prevent surprise and unnecessary expense etc., the facts set out in the petition are sufficient to comply with Rule 4(1)(b).

(2) That "the facts and grounds" referred to in Rule 4(1)(b) will not include the further particulars contemplated by Rule 5. This is implicit in the very existence of Rule 5. If the legislature intended that such particulars should be furnished under Rule 4(1)(b) then Rule 5 would be redundant.

(3) That as was held in the Pelmadulla Election Case (*Rupasinghe* v. *Karunasena*, 69 C.L.W. 49) the statement in the petition is a consice way of expressing several offences of the same species. Further the form of the charge is substantially the same as has been used in England in similar cases and sanctioned by Section 86(2) of Ceylon (Parliamentary Elections) Order-in-Council, 1946, there being no particular form prescribed in our Rules.

In respect of the 2nd ground stated in the petition it was argued:—

(*a*) that at best it was mere reproduction of Section 13(III)(c) of the Ceylon (Constitution) Order-in-Council, 1946 as subsequently amended and does not constitute a charge at all.

(*b*) that as there are numerous contracts with the Government which do not disqualifya person's candidature to a seat in Parliament such as a contract one enters into everyday when one buys a ticket to travel by train, the failure to specify the contract rendered the charge a bad one.

(*c*) that if this charge is allowed to remain in the existing form the petitioner could lead evidence of acts by the respondent, acts by his agents, and acts by persons acting with his knowledge and consent, thus distinguishing the decision in *Tilakawardena* vs. *Obeyesekere* (33 N.L.R. 65), which dealt with several instances of corrupt practice by the candidate himself.

Held: (1) That the 2nd allegation as stated falls within the grounds set out in Section 77 (though it is not specifically mentioned) and the facts necessary to constitute the charge have been set out. To state further facts in the petition relative to this charge would be to do something which Rule 5 does not require a petitioner to do.

(2) That the reference to Section 13 of the Ceylon (Constitution) Order-in-Council, 1946 seems to furnish sufficient material to the respondent that it is the type of contract contemplated by this Section that the petitioner is alleging against him. If further particulars are required, the machinery for the purpose is made available by Rule 5.

(3) That as the charge refers to the ground of disqualification provided in Section 77(e) as well as the ingredients of a disqualification falling under only one of the categories listed under Section 13 (3) viz. (c) of the Ceylon (Constitution) Order-in-Council it seems that whoever may be responsible for the acts complained of, all the acts resulted in one disqualification of the candidate.

(4) That even if the allegation was that the respondent directly or indirectly enjoyed rights and benefits under more than one contract with the Crown, the complaint would refer to one species of charges and must therefore be considered to form only one charge for the purpose of an election petition.

Held further: That in the circumstances, the petition contained only three charges and therefore the security tendered was sufficient.

Per **G. P. A. Silva, J.** — "In considering preliminary objections of this nature it is essential to remember that the free exercise of the franchise and the purity of elections are assets of the greatest value to the State. In safeguarding those assets it is the duty of the courts to see that an election petition, which is the instrument for setting in motion the machinery to ensure the continued existence of those assets, should not be baulked or hampered at its very inception by objections of a technical flavour which are lacking in real substance. Not only is it of the utmost importance to the public that serious allegations in respect of an election should be fully inquired into, but it is also vitally necessary for an elected representative that he should be exonerated from such allegations if they happen to be unfounded."

Cheque

Civil Procedure Code

Section 402 — *Abatement of action — Case laid by for six months to enable plaintiff to take steps to apply for the issue of a commission to examine witnesses resident abroad — No further steps taken by plaintiff —Order of abatement made after inquiry on defendant's application.*

An action was laid by on an order dated 29th November, 1957. The defendant's proctor moved for an order of abatement on 15th December, 1958. After an inquiry the learned District Judge, purporting to act under section 402 of the Civil Procedure Code, ordered the action to abate.

Held: That the order abating the action should be set aside as the duty of restoring a case "laid by" rested on the Court and not on the parties.

Section 404 — *Death of plaintiff pending appeal — Substitution of successor — Action for declaration as Viharadhipathy to temple.*

Section 437 — *Presumption of regularity of official acts.*

Section 774(1) — *Judgment of Supreme Court not pronounced as contemplated by law—Effect.*

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In an action by way of summary procedure, the defendants, having obtained leave to file answer unconditionally, filed their answer and the case was fixed for trial. On the trial date, the defedants being absent and their counsel stating to Court that he was not appearing for them, the learned District Judge ordered that "judgment be entered for plaintiff as prayed for with costs" and a decree absolute was entered in consequence.

Held: That the learned District Judge erred in entering a decree absolute. The proper decree that should have been entered is a *decree nisi* under section 85 of the Civil Procedure Code.

Condictio Indebiti

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Co-operative Societies Ordinance

Co-operative Societies Ordinance, section 53 — *Award by arbitrator under provisions of such Ordinance — Refusal by District Court to enforce it on ground that affidavit supporting application defective and award erroneous — Civil Procedure Code, section* 437 — *Presumption of regularity of official acts —When can District Court refuse to enforce such award.*

Where a District Judge refused an application to enforce an award made by an Arbitrator under the provisions of the Co-operative Societies Ordinance on the ground: (*a*) that the affidavit which accompanied the application was defective in that it did not show that it was made before a Justice of the Peace within the local limits of whose jurisdiction the defendant was at the time residing; (*b*) that the award was illegal because it ordered the payment by way of interest of an amount greater than the principal debt—

Held: (1) That in the absence of a dispute regarding the place of residence of the deponent the presumption of regularity of official acts is sufficient to establish that a Justice of the Peace ordinarily acts in confor-

mity with the requirements of section 437 of the Civil Procedure Code.

(2) That the District Court has no power to refuse to enforce the award on the ground that the award itself is erroneous. It can do so only when it is shown that the person making the award had no jurisdiction.

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Court of Criminal Appeal — Non-direction amounting to misdirection — Burden of proof — No direction regarding defence version creating reasonable doubt on prosecution case — Misdirection of fact causing prejudice to defence.

Held: (1) Where an accused person is charged with attempted murder, by inflicting injuries with a knife on the injured person, and he gives evidence to the effect that the injuries were not inflicted by him, but were inflicted by a third person, D, in attempting to injure the accused person himself, there is no burden on the accused person to establish any fact. In such a case, the presiding Judge should direct the jury, not only on the position that would arise if the jury either believed or disbelieved the accused person, but should also direct the jury on the intermediate position, that he would be entitled to an acquittal, if his version raised in the minds of the jury a reasonable doubt as to the truth of the prosecution version. The failure to direct the jury on this point constitutes a misdirection of the jury.

(2) The appellant's case was that only one knife blow was delivered that day, and that by D. The prosecution case was that two blows were delivered, and both were by the appellant. Two medical witnesses were called. One of them, although half-heartedly, conceded in cross-examination that if the injured man's body was in a particular position, one knife blow could have resulted in the two injuries. The second medical witness stated categorically that both injuries could have resulted from one knife blow, and the Crown did not re-examine the witness on this point.

The learned Commissioner directed the Jury as follows:—

"Do you think if D brought this knife and stabbed that she would have stabbed wrongly twice? The suggestion is made that one blow could have caused those two injuries. Do you think it possible to get one blow at that angle when they are on the ground?"

Held: That this was a mis-statement on a question of fact and on a material point in the case and was capable of causing prejudice to the defence, since there was evidence and not merely a suggestion on that point.

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Court of Criminal Appeal — Burden of proof — Failure of trial judge to distinguish between burden on the Crown of proving a charge and that on an accused of establishing a special or general defence — Misdirection — Court of Criminal Appeal Ordinance, proviso to section 5(1).

In a trial for murder, certain circumstances in the evidence led by the prosecution made it necessary for the trial judge to leave it to the jury to consider whether what would *prima facie* have been a case of murder was reduced to one of culpable homicide not amounting to murder on one of more of three grounds —

(*a*) by reason of absence of murderous intention as a result of intoxication;

(*b*) by reason of grave and sudden provocation; and

(*c*) as a result of the killing taking place in a sudden fight.

The learned judge directed the jury that —

(*a*) if they thought that the appellant was so drunk as to be incapable of forming a murderous intention;

(*b*) if they thought that the appellant did, in fact, receive grave and sudden provocation; or

(*c*) if they thought that the incident took place in the course of a sudden fight;

it was open to them to reduce the offence from one of murder. The learned judge explained that the Crown was required to prove the elements of the charge of murder beyond a reasonable doubt, but did not direct the jury in regard to the extent of the burden that lay upon the accused to establish any one of the aforementioned defences.

Held: (1) That the failure to distinguish between the extents of the burden that lay respectively upon the Crown and the accused amounted to a misdirection.

(2) That this was not a case to which the proviso to section 5(1) of the Court of Criminal Appeal Ordinance could fairly be applied and that the conviction for murder must be set aside.

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Court of Criminal Appeal — Statement from the dock — Omission to refer to a matter therein — Effect of such omission.

Held: That when an accused person makes a statement from the dock, it would be quite unsafe to draw unfavourable inferences from such a statement, and particularly from the failure or omission of the accused to mention some matter.

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Misdirection — Matters favourable to defence not referred to in summing up —Misdirection of fact on material point — Explanations not founded on evidence — Unreasonable verdict in consequence — Suggestions based on conjecture — Inherent credibility of defence version, not put to Jury — Injuries on accused not put to Jury as supporting defence but explained away to support prosecution — Evidence not fairly presented to Jury — Miscarriage of Justice.

Held: (1) That even if it was permissible for a trial judge to suggest to the jury explanations not founded on evidence, it was also necessary for him to point also to matters which weaken or invalidate such explanations.

In this case the prosecution version as to how the incident in the course of which the deceased died commenced, came into sharp conflict with the defence version. The prosecution case was that the deceased man was forcibly seized by the four accused when he got down from a bus at 7.30 p.m. at a junction, and was removed by them to the Estate, in which the first accused was a watcher, three hundred yards away and had there been beaten to death. The defence version was that the deceased had come to the Estate about 8.30 p.m., on a marauding expedition to cut rubber trees and had there engaged in an encounter with the first and fourth accused, in the course of which the first accused had assaulted him several times with a battle-axe.

A Police Constable testified that at 9.30 p.m., he found the deceased lying fallen at the Estate, injured and groaning, but unable to speak. When taken to the hospital, he was found to be dead.

The Doctor was of opinion that at the outside, the deceased must have had a meal of rice within the two hours preceding his death (which must have taken place at or after 9.30 p.m.).

The medical evidence, read with the evidence of the Police Constable, belied the prosecution version of the alleged incident at the bus-stop and also supported the defence position that the deceased must have returned peacefully to his home after the bus journey, and had later come to the Estate of his own accord.

In dealing with this matter, the Commissioner recommended to the jury very favourably a suggestion of Crown Counsel that the deceased may have had a meal of rice at the bazaar before he got into the bus.

Held: (2) (*a*) That the place and time at which the deceased had his last meal were of the utmost materiality as a test of the truth of the principal witness for the prosecution, E, and it was unfair to support her credibility with an explanation which had no foundation in the evidence;

(*b*) That the explanation itself was in the teeth of the undisputed medical and police testimony; and

(*c*) That by this test alone, any verdict based on the acceptance of E's evidence would have been unreasonable and against the weight of evidence.

(3) That the summing up also contained the following further short-comings;—

(*a*) Material facts on which the defence justifiably relied in support of their version, were utilised in the summing up to the disadvantage of the defence in support of a conjecture that the four accused had decided to lie in wait for the deceased, because of his previous conduct.

(*b*) Favourable inferences arising from proved facts have been discounted by favouring prosecution suggestions, in no way supported by evidence.

(*c*) No reference was made to the inherent credibility of the version of the first accused who was the watcher on the Estate and to the evidence of the creeper on the Estate which supported him.

(*d*) The defence version was disparaged without heed to relevant considerations, including the injuries on the 4th accused, which supported the defence, but were used in the summing up to support the prosecution case.

(*e*) There were misdirections as to the indisputable evidence and of conjectural and unreasonable explanations of facts which favoured the defence.

(*f*) The evidence was not fairly presented to the jury in the summing up and a miscarriage of justice resulted in consequence.

Criminal Procedure Code

Section 330 — *Autrefois acquit — Principle of res judicata — Applicability in our criminal law.*

Section 418 — *Order for restoration of possession — Should show of criminal force to the complainant himself be shown.*

On a writ issued for delivery of possession of a house and land by the District Court in a *rei indicatio* action against the accused (the defendant in that case) the belongings of the accused and his family were thrown out by the Fiscal and possession was delivered to C, the husband of the plaintiff. Within a few hours of being ejected, the accused and his family reoccupied the house forcibly.

The accused was charged with criminal trespass in this case and on his pleading guilty to the charge he was given three months' time to leave the land. A further extension of time was given and on his failure to quit the land even by that time, he was sentenced to three months rigorous imprisonment for not fulfilling his undertaking to quit. The accused appealed and his family continued to occupy the house.

After the dismissal of the appeal, on an application by the complainant, the magistrate made order for the restoration of property under section 418 of the Criminal Procedure Code.

Held: (1) That the Magistrate was justified in making the order in this case under section 418 of the Criminal Procedure Code.

(2) That it is unnecessary that there should be any show of criminal force to the complainant himself. It is sufficient if threats were made to the complainant's servants or his agents, which caused them to leave the premises and seek refuge under the law.

CORNELIS SINGHO *v.* JAYATILLAKE... 101

Deed

Revocation for gross ingratitude.

LIYANAGE *v.* PERERA 7

Donation

Donation — Gift subject to donor's life interest — Action for revocation on ground of gross ingratitude with prayer for ejectment and damages — Sufficiency of evidence to support charge of ingratitude — "Other similar or more Serious reasons"—Grant of prayer for ejectment.

Plaintiff gifted to defendant, his adopted sister, house and premises in which they were living by a deed of 1959. He brought this action for its revocation on the ground of gross ingratitude, together with a prayer for ejectment and damages.

The plaintiff in evidence said:

(*a*) that he was convinced that the defendant was misconducting herself with a man servant when her husband was living apart from her;

(*b*) that she failed to send away the servant though requested by him, but when the husband returned, he was sent away only to be brought back later;

(*c*) that the defendant insulted him, ignored him and once instigated her husband to assault him. (The husband had not been on speaking terms with the plaintiff since his return).

Held: (1) That the plaintiff had failed to make out a case for the revocation of the deed of gift, on the five grounds stated by Voet or the other wider ground described by Voet as "other similar or more serious reasons."

LIYANAGE *v.* PERERA 37

Donation by father to children — Acceptance by one donee on behalf of minor donees — Is such acceptance valid.

KIRIGORIS & TWO OTHERS *v.* EDDINHAMY .. 99

Elections

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

LOCAL AUTHORITIES — *See under* — LOCAL AUTHORITIES (ELECTIONS) ORDINANCE ..

Election Petitions

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

Evidence Ordinance

Section 134 — *Perjury — Rule requiring corroboration—Perjury Act of* 1911 (*England*)—*Whether an accused should be convicted on the uncorroborated evidence of the virtual prosecutor.*

TENNEKOON *v.* THE QUEEN 28

Section 45 — *Handwriting Expert — Subject of "lifting of stamps" — Whether allied field.*

TENNEKOON *v.* THE QUEEN 28

Equity

Equitable remedy for restoration of property or for the recovery of its value.

See under — BILLS OF EXCHANGE .. 24

Gaming Ordinance

Search warrant under — Issued by Magistrate — Can same Magistrate hear the case.

SAPARAMADU *v.* JOSEPH 9

Industrial Courts

Powers of, in the settlement of industrial disputes

WALKER SONS & CO. LTD. *v.* FRY 65

Industrial Disputes Act

Industrial Disputes Act, No. 43 *of* 1950 — *Amending Act No.* 62 *of* 1957 — *Powers of Labour Tribunals, Arbitrators and Industrial Courts in the settlement of Industrial Disputes — Do they exercise judicial power — Whether validly constituted — Ceylon* (*Constitution*) *Order-in-Council,* 1946, *section* 55.

Of the above matters:—

(*a*) S.C. No. 9 of 1962 and S.C. Nos. 18 — 23 of 1962 were appeals from orders made by Labour Tribunals established under Part IV A of the Industrial Disputes Act No. 43 of 1950, as amended by Act No. 62 of 1957, on applications being made under section 31B of the Act.

(*b*) S.C. No. 319 of 1963 and S.C. No. 37 of 1965 were applications for Writs of Certiorari to quash

orders made by arbitrators to whom two industrial disputes had been referred under sections 4 (1) and 3 (3) (d) respectively of the Act.

(c) S.C. No. 144 of 1964 and S.C. No. 158 of 1964 were applications for Writs of Certiorari to quash the proceedings of the Industrial Court to which the Minister of Labour and Nationalised Services had referred the two disputes under Section 4(2) of the Act. *Viz.* — (*i*) whether the non-employment of a certain number of workers was justified and to what relief they were entitled to, and (*ii*) whether the notice of discontinuance of certain persons was insufficient and whether they were entitled to compensation.

These matters were referred by His Lordship, the Chief Justice under section 51 of the Courts Ordinance to a Bench of five judges. The only matter argued before them was whether the Tribunals concerned had been validly appointed. The arguments of Counsel in each case was directed to the question whether each Tribunal was a judicial officer as that term is used in the Ceylon (Constitution) Order-in-Council, 1946 (Cap. 37); and if so, whether it was validly constituted in that it had not been appointed by the Judicial Service Commission.

In respect of appeals, S.C. No. 9 of 1962 and S.C. Nos. 18 — 23 of 1962.

Held: by Sansoni, C.J., H. N. G. Fernando, S.P.J. and T. S. Fernando, J., (Tambiah J. and Sri Skanda Rajah, J. dissenting):—

(1) That on an examination of the features of the new Part IV A of the Industrial Disputes Act (introduced by Amending Act No. 62 of 1957) which distinguish the case of a workman's application to the Labour Tribunal under section 31B of the said Part IVA from the modes of settlement of disputes originally prescribed in the Act it is clear that disputes which had always fallen within the jusisdiction of ordinary Courts of Law have been assigned to Labour Tribunals for hearing and determination, thus establishing Courts of concurrent jurisdiction in regard to contracts of service, calling them Labour Tribunals.

(2) That the Labour Tribunals acting under Part IVA of the Act are holders of judicial office and fall clearly within the category of those required to be appointed by the Judicial Service Commission, under section 55 of the Ceylon (Constitution) Order-in-Council, 1946.

(3) That the judgment of the Privy Council in *The Bribery Commissioner* vs. *Ranasinghe* (1964) 66 N.L.R. 73, is decisive against any argument that the jurisdiction which the Courts possessed at the time of the enactment of our Constitution can validly be superseded by creating new tribunals which are not appointed by the Judicial Service Commission.

(4) That as the Labour Tribunals concerned have not been appointed by the Judicial Service Commission, they had no jurisdiction to hear and determine the matters placed before them for decision, and the orders made by them must be set aside.

(5) That a Labour Tribunal need not be appointed by the Judicial Service Commission, if it performs only arbitral functions referred to it under Section 3(1)(d) and Section 4(1) of the Act.

In respect of applications S.C. No. 319 of 1963 and S.C. No. 37 of 1965.

Held: (All judges agreeing) That the disputes concerned having been referred to Arbitrators under sections 4(1) and 3(1)(d) of the Act by the order of the Minister of Labour and Nationalised Services and by the consent of parties respectively, the arbitrators do not hold judicial office and need not have been appointed by the Judicial Service Commission.

In respect of Applications No. 144 of 1964 and No. 158 of 1964.

Held: (1) (All judges agreeing) That an Industrial Court under the Industrial Disputes Act is not a judicial officer, even though it holds a paid office. There is no requirement that it should be appointed by the Judicial Service Commission.

(2) (Sansoni, C.J., and T. S. Fernando J. dissenting) That the Courts concerned had jurisdiction to entertain and decide even the disputed questions of fact which arose for their decision.

In regard to the above mentioned four applications which were for Writs of Certiorari, their Lordships H. N. G. Fernando, S.P.J., Tambiah J., and Sri Skanda Rajah, J., while holding that the tribunals concerned were not exercising judicial power and therefore validly appointed, set them down for hearing on other points raised in the petitions.

However, Sansoni, C.J., with T. S. Fernando, J. agreeing, held that these Tribunals who had only arbitral powers had acted outside the ambit of those powers and exercised judicial power. As the nature of the remedy available to the petitioners had not been argued, their Lordships set them down for further argument before a Bench of two Judges.

WALKER SONS & CO. LTD. *vs.* FRY 65

Judicial Power

Labour Tribunals

Powers of, in the settlement of industrial disputes.

Landlord and Tenant

Local Authorities (Elections) Ordinance

Order by Minister under Urban Councils Ordinance removing Chairman from office — Effect of such order — Deposed chairman deprived of electoral rights — Is it a judicial or administrative order.

Magistrate

Gaming Ordinance, sections 2, 5, 7 *and* 8 — *Magistrate issuing search warrant under section* 5 — *Accused charged under section* 2 — *Preliminary objection that same Magistrate should not hear case — Objection overruled — Exercise of his discretion by Magistrate — When will it be reviewed by superior Court.*

Consequent on the issue of a search warrant by the Magistrate of Kandy, under the Gaming Ordinance, the petitioner was charged under section 2 of the Gaming Ordinance. At the trial a preliminary objection was taken by Counsel for the petitioner that the case should not be tried by the same Magistrate on the following grounds:—

(*a*) That the issue of the warrant was done by the Magistrate in an executive capacity, and it being necessary for the defence to challenge the validity of the warrant, the Magistrate should not judicially consider its validity or propriety.

(*b*) That it may be necessary for the defence to call this Magistrate as a witness to show the circumstances in which the warrant came to be issued.

It was expressly stated to the Magistrate that no suggestion was being made that he entertained any *personal bias* in the case.

After hearing argument, the learned Magistrate made order overruling the objection, whereupon the petitioner applied to the Supreme Court for the revision of the said order.

Held: (1) That where a Magistrate acts under section 5 of the Gaming Ordinance in issuing a search warrant, he acts in a judicial capacity, after satisfying himself that he has good reason to believe that a specified place is kept or used as a common gaming place.

(2) That it is open to that same Magistrate at the trial which follows action taken on the warrant, to go back upon the belief he had reached when the warrant was issued. The question is one of drawing inferences and, inferences could be drawn not only by the Magistrate at a trial, but also, even by the Supreme Court on appeal.

(3) That there cannot be any reason for an accused person to call as a witness at the trial, a Magistrate who issued the search warrant.

(4) That, therefore, the Magistrate who issued the search warrant is legally competent to hear the trial.

(5) That as the Magistrate, having a discretion as to whether the case should be heard by him or by another Magistrate, had decided that there is no good reason why it should not be heard by him, the Supreme Court will not interfere as it is not satisfied that the order complained of had been reached on any wrong principle.

Maintenance

Maintenance Ordinance, section 6 — *Nature of corroborative evidence required — Test to be applied by Court.*

Section 6 of the Ordinance states as follows:— "No order shall be made on any such application as aforesaid on the evidence of the mother of such child unless corroborated in some material particular by the evidence to the satisfaction of the Magistrate."

Held: That the test of corroboration is whether the facts given in evidence show a probability that the evidence of the mother is true.

Minors

Minors — Donation by father to children — Acceptance by one donee on behalf of minor donees — Is such acceptance valid

Held: That in the case of a donation made by a parent, acceptance of the donation by a brother of the minor donees is good, for the reason that the donor

has allowed such acceptance to be made on behalf of the minor children.

KIRIGORIS & TWO OTHERS *vs.* EDDINHAMY .. 99

Misdirection

See under — COURT OF CRIMINAL APPEAL

Non-Direction

See under — COURT OF CRIMINAL APPEAL

Partition Act

Partition Act of 1951 (*Cap.* 69), *sections* 48(1), 68 — *Interlocutory Decree entered in partition action — Does revision lie — Do the words "subject to the decision on any appeal" in section* 48(1) *exclude the power of the Supreme Court to make an Order in revision*

Death of party before decree — Effect of Partition decree which allots a share to a party deceased at the time when it was entered.

Held: by SANSONI, C.J., T. S. FERNANDO, J., SRI SKANDA RAJAH, J. and G. P. A. SILVA, J., (ABEYESUNDERE, J. dissenting) —

(1) That an application in revision lies from an interlocutory decree entered in a partition action.

(2) That the words "subject to the decision on any appeal", in section 48(1) of the Partition Act of 1951, do not exclude the power of the Supreme Court to make an order in revision. These words are entirely tautologus as section 68 of the Act provides for appeals against any order or decree entered in a partition action.

(3) That a partition decree which allotted a share to a party, but which was entered after the death of that party is a nullity, and it is open to another party to the action to apply to the Supreme Court to set aside that decree in revision (even though it may have been affirmed in appeal) and remit it to the lower Court to enable proper steps to be taken in the action.

Per **Sansoni, C.J.** — "The power of revision is an extraordinary power which is quite independent of and distinct from the appellate jurisdiction of this Court. Its object is the due administration of justice and the correction of errors, sometimes committed by this Court itself, in order to avoid miscarriages of justice. It is exercised in some cases by a Judge of his own motion, when an aggrieved person who may not be a party to the action brings to his notice the fact that, unless the power is exercised, injustice will result. The Partition Act has not, I conceive, made any change in this respect, and the power can still be exercised in respect of any order or decree of a lower Court."

MARIAN BEEBEE *vs.* SEYED MOHAMED & OTHERS 34

Partition action — Failure to register action duly as a lis pendens under Registration of Documents Ordinance — Effect on interlocutory decree — Partition Act, sections 13(1), 26, 36, 48, 49 *and* 70(1).

Held: By Sansoni, C.J., T. S. Fernando, J., Abeyesundere, J. (Sri Skanda Rajah, J. and G. P. A. Silva, J. dissenting)

(1) That the effect of the failure to register an action under the Partition Act duly as *lis pendens* under the Registration of Documents Ordinance is not to render an interlocutory decree invalid, but to deprive the decree of its final and conclusive effect as against a stranger to the action claiming an interest independently of the decree. He is not bound by it and is free to attack it as being incorrect when it defines the rights of the parties.

(2) That registration of an action as a *lis pendens* under the Registration of Documents Ordinance (as required by section 13(1) of the Partition Act) does not mean registration in accordance with all the provisions of that Ordinance, since due registration is not required by the said section 13(1).

Per **G. P. A. Silva, J.** — (dissenting) — "The only reasonable view, therefore, seems to me to interpret the section in a way that will not lead to such a situation. This situation will not arise if it is construed that an interlocutory decree which is entered without due registration of the *lis pendens* is not the interlocutory decree which is in the contemplation of section 70(1). Such a construction is, to my mind, not based on an argument of convenience but on the special provision contained in section 48(3). Obvious as it may seem, chronologically too, section 48 precedes section 70 and the latter has, therefore, to be read subject not only to the main provision but also to the exception contained in the former. To refrain from doing so will be to ignore the exceptional circumstances provided for in section 48(3) and to leave the person who is protected by this sub-section with only the feeling of satisfaction that the interlocutory decree does not have the conclusive effect so far as he is concerned but without any direction by the legislature as to what step he should or can take to retrieve his position after his lands have been apportioned in divided

lots among his original co-owners by a decree of court. It has to be borne in mind that the remedies available to him are not those specifically provided by law but only those which have been judicially interpreted as possible remedies. The judgment referred to earlier and the judgment in the case of *Odiris Appuhamy* vs. *Caroline Nona*, reported in 66 New Law Reports, page 241, which have decided that a person coming within the exceptions in section 48(3) can bring a separate action, does not base such a right on a specific provision of law. A person who comes within the exception to section 48(3) should, therefore, be allowed to intervene at any stage and the District Judge would have the power to set aside the interlocutory decree entered by him for this purpose because it ceases to be an interlocutory decree."

Penal Code

Section 190 — *Evidence Ordinance, section* 134 — *Perjury — Rule requiring corroboration — Perjury Act of* 1911 (*England*).

"*Autrefois Acquit*" — *Scope of the rule— Criminal Procedure Code, section* 330 — *Principle of res judicata — Applicability in our Criminal Law.*

Evidence Ordinance, section 45 — *Handwriting expert — Subject of "lifting of stamps" — Whether allied field.*

Held: (1) That an accused should not be convicted of perjury on the uncorroborated evidence of the virtual prosecutor.

(2) That our Code of Criminal Procedure recognises the pleas of *autrefois convict* and *autrefois acquit* only to the limited extent set out in section 330.

(3) That an expert on the subject of identity and genuineness of handwriting is not entitled to be treated as an expert on the subject of "lifting of stamps."

Quaere: Whether the principle of *res judicata* is applicable in our Criminal Law? The following dicta of the Privy Council in the case of *Sambasivam* v. *Public Prosecutor, Federation of Malaya,* (1950) A.C., at p. 479, was quoted (with approval) in the judgment of T. S. Fernando, J. :—

"The effect of a verdict of acquittal pronounced by a competent Court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication. The maxim *res judicata pro veritate accipitur* is no less applicable to criminal than to civil proceedings."

Criminal trespass.

See under—CRIMINAL PROCEDURE CODE

Possessory Action

Co-owners — When can a co-owner get a possessory decree agianst another co-owner.

Prescription

Prescription Ordinance, section 7.

See under—BILLS OF EXCHANGE 24

Privy Council

Appeals to

See under—APPEALS (PRIVY COUNCIL) ORDINANCE.

Registration of Documents Ordinance

Registration of lis pendens in a partition action— Failure to effect due registration—Effect.

Rent Restriction

Rent Restriction Act, No. 29 *of* 1948 *as amended by Act, No.* 10 *of* 1961, *sections* 6 *and* 13(1) (*a*)— *Defendant* (*tenant*) *in arrears of rent for more than three months — Landlord* (*plaintiff*) *giving notice to quit on* 25*th May* 1961 *to deliver possession on* 30*th June* 1961 *— Validity of such notice — Adequacy of notice in view of section* 13(1)(*a*) *as amended.*

The defendant was in arrears of rent from June, 1960. On the basis of a monthly tenancy the plaintiff gave notice to the defendant on 25th May, 1961, to quit and deliver possession of the premises on 30th June, 1961.

On two preliminary issues as to whether —

(*a*) the said notice to quit was bad in law; and

(*b*) three months' notice was necessary as required by section 13(1)(*a*) of the Rent Restriction Act as amended by section 6 of the Rent Restriction Act, No. 10 of 1961

the learned District Judge held in favour of the defendant and dismissed the plaintiff's action.

Held: (1) (Following the decision in *Edward* v. *Dharmasena*, 66 N.L.R. 525; 67 C.L.W. 4). That the month's notice given by the plaintiff was a valid notice.

(2) That three months' notice was not necessary because the said section 6 of the Amending Act would only apply where the ground for ejectment was that rent had been in arrears for one month and not three months.

Res Judicata

Is principle applicable in our criminal law.

Revision

An application in revision lies from an interlocutory decree entered in a partition action.

Roman-Dutch Law

Condictio Indebiti

Search Warrant

Issued by Magistrate under Gaming Ordinance — Can same Magistrate hear the case.

Unjust Enrichment

Urban Councils Ordinance

Order by Minister under section 184 *of the Urban Councils Ordinance removing chairman from office — Effect of such order.*

Words and Phrases

"Month's notice" — *Landlord and Tenant.*

"Judicial power"

" charge"—*in Rule* 12 *of Parliamentary Election Rules* .

ELECTION PETITION, No. 40 OF 1965.

Present : **Sirimane, J.**

MINNERIYA—ELECTORAL DISTRICT, No. 118.

K. M. D. PAMUNUWA *vs.* C. P. de SILVA

Argued on : 4th and 5thOctober, 1965.
Decided on : 14th October, 1965.

Election Petition—Election challenged on the ground that the respondent who was declared elected failed to deposit the necessary sum of money in terms of section 29 (1) *of the Ceylon (Parliamentary Elections) Order-in-Council,* 1946, (*Cap.* 381)—*Non-compliance with section* 77 (*b*) *of the Order-in-Council—Failure to take objection before the Returning Officer on Nomination Day—Can it be taken later in an election petition ?—Sections* 28 *F,* 29 (1), 31, 31 (1) *d,* 31 (2), 31 (3), 31 (4) *of Order-in-Council.*

Held : (1) That any objection relating to a non-compliance with the provisions of section 29 (1) of the Ceylon (Parliamentary Elections) Order-in-Council must be taken before the Returning Officer and if not so taken could not be permitted thereafter.

(2) That the omission to plead in the petition that " the alleged failure to make the necessary deposit affected the result of the election " is not a fatal defect.

Case referred to : *Mohamed Mihular* v. *Nalliah,* (1944) 45 N.L.R. P. 251 ; XXVII C.L.W. 63

E. R. S. R. Coomaraswamy with *Hannan Ismail, Harischandra Mendis, Nihal Jayawickrema, V. Nanayakkara* and *S. S. Sahabandu* for the petitioner.

C. Thiagalingam, Q.C., with *D. M. Weerasinghe, Neville Samarakoon, A. H. de Silva, T. Parathalingam, R. R. Nalliah* and *K. Jayasekera* for the respondent.

SIRIMANE, J.

The petitioner by his petition dated 19th April, 1965, challenged the election of the respondent as member for the Electoral District of Minneriya on the grounds of general intimidation, general treating and on an alleged failure to make a deposit as required by section 29 (1) of the Ceylon (Parliamentary Elections) Order-in-Council (Chapter 381). The charges of general intimidation and general treating were withdrawn before the date of hearing, and the sole ground on which the election was challenged was the alleged failure to make the required deposit.

The charge as stated in paragraph 3 of the petition is as follows :—

" Your petitioner says that the respondent failed duly to deposit or cause to be deposited the necessary sum of money in terms of section 29 (1) but was nevertheless treated as a candidate and declared elected and accordingly there was such non-compliance with the provisions of the Ceylon (Parliamentary Elections) Order-in-Council, 1946, relating to elections as conform to the requirements of section 77 (b) of the said Order-in-Council."

Counsel for the respondent has taken two preliminary objections, namely :—

(1) that the alleged failure to duly deposit the necessary sum of money in terms of section 29 (1) is not an allowable objection that may be taken by way of an election petition, as no objection to such failure had been made to the Returning Officer in terms of section 31 (1) (d).

(2) that para 3 of the election petition does not allege that the alleged failure to make the necessary deposit affected the result of the election.

It is necessary to set out the relevant portions of three sections in Chapter 381 :—

Section 29 (1) :

" A candidate at any election or some person in his behalf shall deposit or cause to be deposited with the Returning Officer or with some person authorised by the Returning Officer in that behalf, between the date of the publication of the Proclamation or notice referred to in section 27 and one o'clock in the afternoon of the day of nomination :

(*a*) Where such candidate is the official candidate of a recognised party for the purpose of elections, the sum of two hundred and fifty rupees in legal tender ; or

(*b*) Where such candidate is not the official candidate of any such party, the sum of one thousand rupees in legal tender and if he fails to do so he shall be deemed to have withdrawn his candidature under section 33 . . . "

Section 28 *E* 3 :

" In this Order the expression official candidate of a recognised party for the purpose of elections . . . means a candidate of that party . . . in respect of whom there is for the time being in force a valid certificate of official candidature for the purpose of sections 29 and 35 in relation to such election."

Section 28 *F* (1) :

" Where an election is due to be held in any electoral district an authorised agent of any recognised party may . . .

(*a*) " . . . validly issue under his hand to the Returning Officer for that district a certificate in respect of only one candidate of that party to such election to the effect that such candidate is the official candidate of that party at such election."

It can be seen from these sections that the official candidate of a recognised party need not be a member of the party.

Though it is not strictly relevant for the purposes of the legal argument, it was stated at the Bar and not denied, that the respondent had obtained a certificate (which was available in Court) issued by the authorised agent of a recognised party and made a deposit as required by section 29 (1) *a*.

In answer to me learned Counsel for the petitioner said that he proposed to lead evidence to show that the respondent had held himself out to be a member of some other party which was not a recognised party and hence the deposit was inadequate. These are not matters, in my opinion, with which a Court can concern itself. However that may be, I shall assume for the purposes of the argument that a deposit was not made as required by section 29. Section 31 sets out the objections that may be raised to a nomination paper. One such objection is :—

31 (1) (d) " that the provisions of section 29 have not been observed."

Section 31 (2) which, in my opinion, is very relevant to this argument reads as follows :—

" No objection to a nomination paper shall be allowed unless it is made to the Returning Officer between 12 noon and 1.30 o'clock in the afternoon on the day of the nomination."

It is admitted that no objection was, in fact, taken to the nomination before the Returning Officer.

I am attracted by the argument of Mr. Thiagalingam that although part 4 of Chapter 381 is headed " Elections " the scheme of the Order-in-Council is to deal with—

(*a*) Nominations ;

(*b*) Elections properly so called.

Any objection to the deposit relating to a nomination may be taken before the Returning Officer. If such an objection is taken (and one must always remember, that the inadequacy of the deposit is such an objection) two results may follow :—

(a) the objection may be disallowed ; in which case (in terms of section 31(4), the decision of the Returning Officer is final ; or

(b) it may be allowed, and a candidate thus prevented from going to the polls, in such a case section 31 (4) provides that the decision is subject to reversal by an election petition.

It seems to me that an objection which may have been taken before the Returning Officer can be made the subject-matter of an election petition only in the circumstances set out in section 31 (4). If no objection is taken the very salutary provisions of section 31 (2) (*supra*) would apply.

Mr. Coomaraswamy argued that because the opening words of section 31 are " Objections *may* be made to a nomination paper on all or any of the following grounds . . . " that it was not obligatory on anyone to raise objections before the Returning Officer. The word " may " is used in that section, in my view, because it is an " enabling " section. A person may or may not raise the objections set out therein. If he chooses not to do so, then, in my view, the provisions of sub-section (2) prevent him from exercising that right thereafter. I am unable to agree with Mr. Coomaraswamy's submission that section 31 (2) merely limits the time within which objection may be taken before the Returning Officer and is no bar to the same objection being taken elsewhere. If that submission is correct no objection need ever be taken to a nomination paper under section 31 ; but the same objections as set out therein may be taken against a successful candidate after his nomination paper has been accepted without protest, and after an Election has been fought and won.

Mr. Coomaraswamy also argued that the deposit is not a part of the nomination paper. The section itself (section 31) enumerates the failure to comply with the provisions of section 29 as an objection which may be taken to a "nomination paper". In these circumstances the words "nomination paper" should not be given a restricted meaning and the deposit must be considered to be part of the nomination paper.

Mr. Coomaraswamy next submitted that the petitioner could not have taken these objections before the Returning Officer as section 32 specifies the persons entitled to be present at nomination and these are the candidates, their respective proposers and seconders and one other person elected by each candidate. That may be unfortunate ; but it may very well be that the Legislature advisedly did not think it prudent or practical to permit every one of thousands of voters in an electorate to scrutinize nomination papers and to raise objections such as those set out in section 31. The Legislature appears to have left these technicalities to be dealt with by those most concerned with them. But if such objections are not raised by those who might have done so, there is an end to the matter.

At this point it may be observed that the Returning Officer himself would know whether a certificate of official candidature is in order and whether a deposit has been duly made.

Mr. Thiagalingam has pointed to the provision in Section 31 (3) that the Returning Officer may himself lodge an objection, which is in contrast to the provisions of the corresponding Section in the Local Authorities Elections Ordinance, Section 12 (3)—Chapter 262.

I am of the view that the first preliminary objection is entitled to succeed.

In regard to the second, the objection is that it has not been pleaded that the alleged non-compliance with section 29 "affected the result of the election". In the concluding part of para 3 the Petitioner has stated that there was "such non-compliance....as conformed to the requirements of Section 77 (b).....", so that it has been pleaded though indirectly perhaps, that the non compliance affected the result of the election. In the case of *Mohamed Mihular* vs, *Nalliah*, 45 N.L.R. page 251, Hearne J. said at page 253:—"The view was pressed in argument that the petition should have set out that such non compliance affected the result of the election. I do not think it was necessary to do so".

I am in respectful agreement with that view and the second objection fails.

As started earlier, I am of the view that any objection relating to a non compliance with the provisions of Section 26 (1) must be taken before the Returning Officer, and if not taken cannot be permitted thereafter.

The first preliminary objection is upheld and the petition is dismissed with costs.

Preliminary objection upheld.
Petition dismissed.

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

P. SAMSUDEEN *vs.* EAGLE STAR INSURANCE COMPANY, LTD.,

S.C. 185 *(F)*/1 59—*D.C. Colombo, Case No.* 27306/*M.*

Argued on : 22nd November, 1961 and 23rd November, 1961.
Decided on : 23rd January, 1962.

Abatement of action—Case laid by for six months to enable plaintiff to take steps to apply for the issue of a commission to examine witnesses resident abroad—No further steps taken by plaintiff—Order of abatement made after inquiry on defendant's application—Civil Procedure Code, section 402.

An action was laid by on an order dated 29th November, 1957. The defendant's proctor moved for an order of abatement on 15th December, 1958. After an inquiry the learned District Judge, purporting to act under section 402 of the Civil Procedure Code, ordered the action to abate.

Held : That the order abating the action should be set aside as the duty of restoring a case "laid by" rested on the Court and not on the parties.

Per TAMBIAH, J.—(*a*) " The long line of case decisions reviewed above favours the view that an order of abatement could be made under section 402 of the Civil Procedure Code only if the plaintiff has failed to take a step rendered necessary by the law."

(*b*) " The practice of " laying by " cases has been disapproved in certain judgments of this Court. and, in our opinion, this practice should ordinarily be avoided and the practice indicated by Bonser, C.J., in *Fernando* v. *Curera* (*supra*) observed."

Distinguished : *Marikar* v. *Bawa Lebbe*, (1892) 1 S.C.R. 240.
Suppramaniam v. *Symons*, (1915) 18 N.L.R. 229.
Wilson v. *Sinniah*, (1938) 18 Law Recorder 9.

Followed : *Fernando* v. *Curera*, (1896) 2 N.L.R. 29.
Lorensu Appuhamy v. *Paaris*, (1908) 11 N.L.R. 202.
Kuda Banda v. *Hendrick*, (1911) 6 S.C.D. 42.
Seyado Ibrahim v. *Naina Marikar*, (1912) 6 S.C.D. 79.
Suhuda v. *Sovena*, (1913) 1 Bal. Notes 87.
Sethuwa v. *Cassim Lebbe*, (1919) 7 C.W.R., 28.
Associated Newspapers, Limited v. *Kadiramar*, (1934) 36 N.L.R. 102.
Tillekeratne v. *Keerthiratne*, (1935) 14 C.L. Rec. 142.
Sellamma Achie v. *Palavasam*, (1939) 41 N.L.R. 186.
Chittambaram Chettiar v. *Fernando*, (1947) 49 N.L.R. 49.

C. Ranganathan with *K. Viknarajah* and *Miss S. Wickremasinghe*, for the plaintiff-appellant.

H. W. Jayawardene, Q.C., with *V. J. Martyn* and *D. S. Wijewardene*, for the defendant-respondent.

TAMBIAH, J.

The plaintiff-appellant sued the defendant-respondent, an insurance company, for the recovery of the sum of Rs. 30,046.49 alleged to be due on a policy of marine insurance, marked " A " and annexed to the plaint, and insuring a cargo of 80 tons of potatoes shipped by one Mohamed Taha Abou El Kheir from Port Said to Colombo in the s.s. " Malancha " but discharged at Aden.

The cause of action pleaded in the plaint is that the plaintiff, as the assignee of the bill of lading relating to the cargo and of the policy of insurance covering the same, had suffered damages in the sum claimed by reason of the discharge of the cargo at Aden and that the defendant-company had repudiated liability.

The defendant-company admitted the issue of the said policy but took up various defences disclaiming liability. Although no specific issue was raised on the question of assignment, the learned District Judge dismissed the plaintiff's action holding that assignment had not been proved. The plaintiff appealed to this Court from the order of the learned District Judge and this Court, by order dated 26th April, 1956, set aside the order of the learned District Judge and sent the case back for a trial *de novo*.

The record of the case, together with the judgment of the Supreme Court, was returned to the learned District Judge and the trial was fixed by him for the 25th of September, 1956. On the 20th of September, 1956, the plaintiff's proctor moved for a postponement of the trial fixed for the 25th of September, 1956, as certain material witnesses in the case could not be contacted. The case was then mentioned on the 21st of September, 1956, on which date both the plaintiff and the defendant were represented by counsel, and subject to the payment of costs, the Court made order that the case be taken off the trial roll. On the 25th of September, 1956, the case was called again and on this date, too, both parties were represented by counsel. The Court made order that the plaintiff should pay the defendant Rs. 315/- as costs and that the case should be laid by.

On the 29th of November, 1957, the plaintiff stated in his motion that, as he had not been able to obtain a definite reply from his correspondents in Egypt in order to make arrangements to take preliminary steps towards applying for a commission to that country to examine witnesses with a view of furnishing such evidence at the trial and as the case was due to be fixed for trial in terms of the order of the Supreme Court, the trial date should not be fixed and that the case should be laid by for a further six months to enable him to take steps to apply for the issue of a commission. The learned District Judge, by order dated 29th of November, 1957, allowed his application.

On the 15th of December, 1958, the defendant moved, under section 402 of the Civil Procedure Code (Cap. 101), that an order of abatement should be entered in respect of the plaintiff's action. Notice was issued by the Court to the plaintiff's proctor on the 20th December, 1958. On the 13th of March, 1959, an inquiry was held into this matter by the learned District Judge and he delivered order on the 17th of March, 1959, abating the action. The plaintiff has appealed from this order.

The learned District Judge purported to act under section 402 of the Civil Procedure Code which enacts as follows :

> " If a period exceeding twelve months in the case of a District Court, or six months in a Court of Requests, elapses subsequently to the date of the last entry of an order or proceeding in the record *without the plaintiff taking any step to prosecute the action where any such step is necessary*, the Court may pass an order that the action shall abate."

The counsel for the appellant contended that the order made by the learned District Judge, laying by the case, cast no duty on the plaintiff to restore it to the roll and, therefore, the order of abatement was wrongly made. The counsel for the respondent, however, submitted that there was a duty cast upon the plaintiff to restore the case to the trial roll and as the plaintiff has failed to perform his duty for a period of 12 months from the last order of the learned District Judge, the order of abatement was correctly made under section 402 of the Civil Procedure Code.

Section 402 of the Civil Procedure Code has been the subject of interpretation in a long series of cases and it is relevant at this stage to consider the more important case decisions on this matter in order to determine whether a duty is cast on the plaintiff to restore the case to the trial roll when a case was laid by.

In *Fernando* v. *Curera*, (1896) 2 N.L.R. 29, the District Court made order striking off the case from the trial roll until another connected case was decided in appeal. The District Judge, purporting to act under section 402 of the Civil Procedure Code, made an order of abatement on the ground that a period exceeding twelve months had elapsed subsequently to the date of the last order or proceeding on the record without the plaintiff taking any step in the case. The plaintiff appealed from the order of the District Judge and the Supreme Court set aside the order. Bonser, C.J., observed (at pages 29 and 30) : " The Court seems to have assumed that it was the duty of the plaintiff to make an application to fix a day for the hearing of the action ; but *it was the duty of the Court to fix a day for the hearing* ".

In *Lorensu Appuhamy* v. *Paaris*, (1908) 11 N.L.R., p. 202, the defendants had filed answer in a partition action but the Court did not fix any date of trial and the plaintiffs themselves did not take any further steps in the action for over a year. The District Judge ordered that the action should abate and, four years later, the plaintiffs moved that the order of abatement be vacated and this application was refused. The Supreme Court, on appeal, reversed the order of the District Judge and held that the order of abatement was wrongly made as the plaintiffs had not failed to take any necessary step in the action. Wood Renton, J., (with whom Hutchinson, C.J., agreed) stated (at page 204) : " The appellants had within the meaning of section 402 taken every step incumbent upon them with a view to the prosecution of the action. *I think that when that section uses the word " necessary ", it means " rendered necessary by some positive requirement of the law* ". We ought not to interpret it as if the section ran " without taking any steps to prosecute the action which a prudent man would take under the circumstances ". In the present case, the appellants had done all that the law required of them. *The duty of fixing the day of trial rested, under section 80 of the Civil Procedure Code, on the Court* ".

The ruling in the case of *Lorensu Appuhamy* v. *Paaris* (*supra*) has been followed in a series of cases. In *Kuda Banda* v. *Hendrick*, (1911) 6 S.C.D., p. 42, the plaintiff's proctor stated that his client was in jail and moved that the case might be postponed to the bottom of the roll, but the District Judge ordered that it be struck off the roll. Subsequently, the District Judge ordered the action to abate *ex mero motu* on the ground that no steps had been taken for more than a year. The Supreme Court held that the order of abatement was *ultra vires*, and that it should be vacated inasmuch as there was no step which was necessary for the plaintiff to take which he had not taken. It was held further that the duty of fixing the case for re-trial rested on the Court. Lascelles, C.J., (with whom Middleton, J., agreed), cited, with approval, the dictum of Wood Renton, C.J., in *Lorensu Appuhamy* v. *Paaris* (*supra*) quoted above.

In *Seyado Ibrahim* v. *Naina Marikar* (1912) 6 S.C.D., p. 79, an action was instituted against the defendant as the executor of the estate of the deceased. Later, an application was made for the case to stand over for a certain date till the defendant had obtained probate. On that date, the parties were absent and the defendant had not still obtained probate. The District Judge, purporting to act under section 402 of the Civil Procedure Code, made an order of abatement. On appeal, the Supreme Court, following *Lorensu Appuhamy* v. *Paaris* (*supra*), held that the order of abatement was wrongly made as the plaintiff had not failed to take any necessary step in the action and that the said order should be vacated.

In *Suhuda* v. *Sovena*, (1913) 1 Bal. Notes, p. 87, the case, which was instituted in 1906, had dragged its weary length along for many years and, although the record showed that the true cause of delay was the failure of the defendant to pay the fees of the Commissioner and that there was no fault on the part of the plaintiff, nevertheless the District Judge made an order of abatement under section 402 of the Civil Procedure Code. The plaintiff appealed and the Supreme Court followed the construction placed on section 402 of the Civil Procedure Code in *Lorensu Appuhamy* v. *Paaris* (*supra*) and held that the order of abatement could be made under section 402 only when the plaintiff has failed to take some step rendered necessary by some positive requirement of the law.

In *Sethuwa* v. *Cassim Lebbe*, (1919) 7 C.W.R., p. 28), the defendant, in a partition action, put the plaintiff's title to the share claimed by him in issue and the Court, of consent, struck the case off the trial roll till the plaintiff vindicated his title in a separate action. Later, the District Judge made order of abatement on the ground that the plaintiff had not taken any steps for six months from the last order of the Commissioner of Requests. On appeal, it was held that the plaintiff's failure to bring a separate action to vindicate his title could not be said to be failure to take steps for the purpose of prosecuting the action within the meaning of section 402 of the Civil Procedure Code. De Sampayo, J., observed (at page 29) : " In such circumstances, it seems to me that *it is for the Court if it thought fit, to restore the case to the trial roll*, and if it be found that the question of title could not be gone into in this partition action, but that a separate action was necessary, it might be within the power of the Court to dispose of this matter on that ground".

In *Associated Newspapers, Limited* v. *Kadiramur*, (1934) 36 N.L.R., p. 102), in an action instituted in the Court of Requests, the Fiscal reported on the returnable date of summons that the defendant was not to be found at the address given in the summons and the Court made the minute " No Order ". Six months having elapsed thereafter, the Court made order for the abatement of the action under section 402 of the Civil Procedure Code. The plaintiff appealed and Akbar, J., quoted with approval the dictum of Wood Renton, J., in *Lorensu Appuhamy* v. *Paaris* (*supra*) quoted above, and held that there was no failure on the part of the plaintiff to take any steps obligatory in law and that the order of abatement was irregular.

In *Tillekeratne* v. *Keerthiratne*, (1935) 14 C.L. Rec., p. 142, an order was made by the Court of Requests suspending further proceedings till a decision in a pending appeal was reached. The Court failed to fix a date for further hearing, and, purporting to act under section 402 of the Civil Procedure Code, the Court later made an order of abatement on the ground that the plaintiff had not taken any steps for a period of six months from the last order of the Commissioner of Requests. On appeal, it was held that, in the absence of any failure on the part of the plaintiff or the defendant to take a step required by law, an order of abatement could not have been made. Garvin, J., followed the ruling in *Fernando* v. *Curera* (*supra*).

In *Sellamma Achie* v. *Palavasam*, (1939) 41 N.L.R., p. 186, a Bench of two Judges held that the Court had no power to enter an order of abatement under section 402 of the Civil Procedure Code where the failure to prosecute the action for twelve months, after the last order, was due to the death of the plaintiff within the period.

In *Chittambaram Chettiar* v. *Fernando*, (1947) 49 N.L.R., p. 49, one *P.*, the administrator of the estate of a Chettiar, filed an action for the recovery of a sum of money due on a promissory note. After the action was fixed for trial, letters of administration issued to *P.* were recalled and fresh letters were issued to *S.* The case was taken off the trial roll for substitution of the new administrator. *P.* took no further interest in the action and *S.* took no steps to get himself substituted. The judge made order abating the action. Thereafter, the appellant, one of the heirs of the deceased Chettiar, moved in the testamentary case to have letters issued to *S.*

recalled and to have himself appointed administrator, and his application was allowed. He then moved to have the order of abatement set aside. His application was disallowed on the ground of delay. On appeal, it was held, *inter alia*, that *P.* was under no legal duty to get *S.* substituted as plaintiff in his place and that this step, which he undertook, was not one necessary for him to take in order to prosecute the action under section 402 of the Civil Procedure Code ; consequently, the order of abatement was void and of no effect. Jayetilleke, J., after citing some of the cases reviewed above, quoted with approval the dictum of Wood Renton, C.J., in *Lorensu Appuhamy* v. *Paaris* (*supra*) cited above.

The long line of case decisions reviewed above favours the view that an order of abatement could be made under section 402 of the Civil Procedure Code only if the plaintiff has failed to take a step rendered necessary by the law.

The counsel for the respondent contended that section 80 of the Civil Procedure Code has no application to this case as the case was sent back for a trial *de novo*. But, in view of sections 82 and 83 of the Civil Procedure Code, after the Court has fixed the date for trial, it was the duty of the Court to postpone it for another date (*vide* sections 82 and 83 of the Civil Procedure Code), and it cannot be said that there is a duty cast on the plaintiff to restore the case to the trial roll.

The counsel for the respondent also contended that in view of certain ruling of this Court, a duty was cast on the plaintiff to restore the case to the trial roll. The cases which he cited may now be examined. In *Marikar* v. *Bawa Lebbe*, (1892) 1 S.C.R., p. 240). the case was struck on the roll on the 17th of July, 1890, as no steps had been taken in the case for twelve months. On the 19th of January, 1892, the plaintiff filed petition and affidavit praying that he be allowed *to continue the action*. Order *Nisi* was allowed and a copy of the said order was served on the respondent. On the returnable date, the respondents were absent but the Court disallowed the petition on the ground that the cause alleged for not continuing the action was unsatisfactory. On appeal, Withers, J., stated (at page 241) : " The order of the 17th July, 1890, was, no doubt, irregular for it was not in accordance with the provisions of section 402 of the Civil Procedure Code, *still the order operates, in fact, till the case was restored to the roll. No doubt, on a proper application, the District Judge would direct the case to be restored to the roll*, but then and there it would be within his discretion to pass an order that this action shall abate and, no doubt, he made such an order on the present materials ". The *ratio decidendi* in this case, as we understand it, is that an order of abatement was operative till it was set aside and the plaintiff could not ask to continue an action, which has already abated, without his taking proper steps to set aside the order of abatement. This case, therefore, is no authority for the proposition that if a case has been laid by, then a duty is cast on the plaintiff to restore the case to the trial roll.

However, in *Suppramaniam* v. *Symons*, (1915) 18 N.L.R., p. 229, a different interpretation was given to the rule laid down in *Marikar* v. *Bawa Lebbe* (*supra*). An action was filed in 1889 and, on the 14th of August, 1893, an order was made, with the knowledge and consent of all parties striking off the case from the roll with a view of settlement. An order of abatement was made on the 5th of November, 1896. After this order, nothing was done till 13th March, 1911, when an application was made to have the order of abatement set aside. The District Judge held that although the order of abatement ought not to have been made, nevertheless as the plaintiffs had not complied with the conditions prescribed in section 403 of the Civil Procedure Code under which an order of abatement could be set aside, and as they had not made their application within reasonable time, the order of abatement should not be interferred with. On appeal, Wood Renton, C.J., (with whom Ennis, J., agreed) dismissed the appeal, but rested his decision on different grounds. He stated (at page 230) : " In the case of, at least, one of the previous postponements, the plaintiff's proctor himself moved the Court that the action, which had been struck off the roll in the hope of settlement being reached, should be restored to it, and the case of *Marikar* v. *Bawa Lebbe* (*supra*) which is a decision of two judges, shows that in such circumstances it is the duty of the plaintiff to move that the action should be restored to the roll and that on such a motion it is within the discretion of the District Judge to make an order for its abatement. If such a motion had been made in the present case, the District Judge would, in my opinion, have been amply justified on the materials disclosed by the record in making such an order ". On a careful analysis, however, of the *ratio decidendi* in *Marikar* v. *Bawa Lebbe* (*supra*), we are inclined to think

that it has been assumed that this case has a wider application than its actual decision warrants.

In *Wilson* v. *Sinniah*, (1938) 18 C.L. Rec., p. 9, the action was instituted on the 28th of January, 1931, and the case was taken off the trial roll on the 17th of July, 1934. On the 25th of April, 1936, the Court ordered that the action should abate. On appeal, Poyser, J., following the ruling in *Suppramanium* v. *Symons* (*supra*), held that the order of abatement was correctly made. He said (at page 10) : " It has been held in the case of *Suppramaniam* v. *Symons* (*supra*) that the action should be struck off the trial roll in the hope of settlement being reached, it was his duty to move that the action should be restored to the roll ". A relevant case, *Tillekeratne* v. *Keerthiratne* (*supra*) was referred to by Poyser, J., but does not appear to have received consideration.

It seems to us that the decision in *Suppramanium* v. *Symons* (*supra*) and *Wilson* v. *Sinniah* (*supra*) are based on the view that *Marikar* v. *Bawa Lebbe* (*supra*) has a wider application than the actual decision warrants. We, therefore, prefer to follow the ruling in *Lorensu Appuhamy* v. *Paaris* (*supra*) which has been consistently followed in a number of weighty decisions. Where an interpretation has been placed by a long line of authorities on a rule of procedure, this Court would be reluctant to depart from such an interpretation. Both on principle and on authority it seems to us that unless the plaintiff has failed to take a step rendered necessary by the law to prosecute his action, an order of abatement should not be made under section 402 of the Civil Procedure Code. In the instant case, in our opinion, it cannot be said that the plaintiff has failed to take a step rendered necessary by the law.

For these reasons, we hold that the order of the learned District Judge abating the action should be set aside. The practice of " laying by " cases has been disapproved in certain judgments of this Court and, in our opinion, this practice should ordinarily be avoided and the practice indicated by Bonser, C.J., in *Fernando* v. *Curera* (*supra*) observed. Where, however, an order " laying by " a case has been made by a Court, the duty of restoring the case to the trial roll rests, in our opinion, on the Court and not on the parties. We set aside the order of abatement and restore the case to the trial roll. The plaintiff is entitled to costs in both Courts.

T. S. FERNANDO, J.
I agree.

Set aside.

Present: **H.N.G. Fernando, A.C.J. & Abeyesundere, J.**

PANNANANDA THERO *vs.* SUMANGALA THERO*

S.C. 196/'64 (*Inty*) *D.C. Kurunegala* 152/*L*

Argued and decided on: 27th August, 1965.

Buddhist Ecclesiastical Law—Action for declaration as Viharadhipathy of temple and its temporalities—Appeal from dismissal of action—Death of plaintiff pending appeal—Substitution of successor—Buddhist Temporalities Ordinance—Civil Procedure Code, section 404.

Where an unsuccessful plaintiff in an action for a declaration that he is the lawful Viharadhipathi of a temple and entitled to its temporalities appealed, and died pending the appeal, a person who claims to be his successor is entitled to be substituted in the former's place under Section 404 of the Civil Procedure Code if the latter established that he is the lawful successor to the deceased under the Buddhist Ecclesiastical Law.

H. W. Jayawardena, Q.C., with *N. R. M. Daluwatte* for the petitioner-appellant.

N.E. Weerasooriya, Q.C., with *W.D. Gunasekera* for the defendant-respondent.

FERNANDO, A.C.J.

In this section the plaintiff has sued for a declaration that he is the lawful Viharadhipathi of a Vihare, and entitled to the temporalities thereof, and also for possession of a number of properties stated to be temporalities of the Vihare.

* For Sinhala translation, see Sinhala section, Vol. 11 part 1, p. 1.

It is very clear from the pleadings that the dispute between the plaintiff and the defendant chiefly concerned the question the right to possess the temple properties.

After trial the learned District Judge dismissed the plaintiff's action and an appeal against that dismissal was taken to this Court. During the pendency of this appeal the plaintiff died, and an application was made to this Court for substitution of the present petitioner in place of the plaintiff, in order to enable the petitioner to prosecute the pending appeal. That application was referred to the District Court for determination. There the petitioner sought to prove that he has succeeded the plaintiff as Viharadhipathi of the temple, and to have himself substituted on that basis. The learned District Judge, however, refused the application for substitution holding that there was no legal provision which enabled the petitioner to have himself substituted by way of summary procedure.

In my opinion the difficulty is met by section 404 of the Civil Procedure Code. The title to temple property is vested by law in the controlling Viharadhipathi for the time being (subject of course to certain exceptional cases). Therefore, on the assumption that the deceased-plaintiff was the incumbent of the Vihare, then, on his death, the title to the temple property is vested by law in his successor. If, therefore, the present petitioner is the lawful successor of the plaintiff, the title to the property which is the subject of this action, has now vested in him. The position taken up by the petitioner, therefore, is that there has been by operation of law a creation or a devolution in his favour of interests in the lands which are the subject of this action; and if he can establish to the satisfaction of the District Court that he would be the successor in title to the incumbency upon the assumption that the deceased-plaintiff himself had been the incumbent, then the petitioner will be entitled to substitution under section 404. The correctness of that assumption will of course have to be decided in the substantive appeal.

The order appealed from is set aside and the case is remitted to the District Court for a determination of the question whether the petitioner will be, under the Buddhist Ecclesiastical Law, the successor to the incumbency, if any, held by the deceased-plaintiff. If that question is determined in favour of the petitioner, he will be substituted, subject to any appeal to this Court. The costs of the former proceedings in the District Court, and the costs of this appeal will abide the determination of the District Judge.

The substantive appeal (No. 55/'61F) can be listed for argument only after this order has been complied with.

ABEYESUNDERE, J.

I agree.

Set aside and sent back.

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

P. D. M. SAPARAMADU *vs.* T. C. JOSEPH

In the matter of an application for Revision in terms of section 356 *of the Criminal Procedure Code in M.C. Kandy Case No.* 37414.

S.C. Application No. 39 *of* 1965

Argued on : March 11, 1965.
Decided on : April 4, 1965.

Gaming Ordinance, sections 2, 5, 7 *and* 8—*Magistrate issuing search warrant under section* 5—*Accused charged under section* 2—*Preliminary objection that same Magistrate should not hear case—Objection overruled—Exercise of his discretion by Magistrate—When will it be reviewed by superior Court.*

Consequent on the issue of a search warrant by the Magistrate of Kandy, under the Gaming Ordinance, the Petitioner was charged under section 2 of the Gaming Ordinance. At the trial a preliminary objection was taken by Counsel for the petitioner that the case should not be tried by the same Magistrate on the following grounds :—

(*a*) That the issue of the warrant was done by the Magistrate in an executive capacity, and it being necessary for the defence to challenge the validity of the warrant, the Magistrate should not judicially consider its validity or propriety,

(*b*) That it may be necessary for the defence to call this Magistrate as a witness to show the circumstances in which the warrant came to be issued.

It was expressly stated to the Magistrate that no suggestion was being made that he entertained any *personal bias* in the case.

After hearing argument, the learned Magistrate made order overuling the objection, whereupon the petitioner applied to the Supreme Court for the revision of the said order.

Held : (1) That where a Magistrate acts under section 5 of the Gaming Ordinance in issuing a search warrant, he acts in a judicial capacity, after satisfying himself that he has good reason to believe that a specified place is kept or used as a common gaming place.

(2) That it is open to that same Magistrate at the trial which follows action taken on the warrant, to go back upon the belief he had reached when the warrant was issued. The question is one of drawing inferences and, inferences could be drawn not only by the Magistrate at a trial, but also, even by the Supreme Court on appeal.

(3) That, there cannot be any reason for an accused person to call as a witness at the trial a Magistrate who issued the search warrant.

(4) That, therefore, the Magistrate who issued the search warrant is legally competent to hear the trial.

(5) That as the Magistrate, having a discretion as to whether the case should be heard by him or by another Magistrate, has decided that there is no good reason why it should not be heard by him, the Supreme Court will not interfere as it is not satisfied that the order complained of has been reached on any wrong principle.

Per T. S. Fernando, J.—"I find difficulty in agreeing with the observations of Gratiaen, J. in *Williams* v. *Weerakoon* (1951) 53 N.L.R. 141, that before a Court can decide that the presumption created by section 7 applied the preliminary proceedings leading up to the issue of the warrant should also have been produced and scrutinised or that there was any obligation on the prosecution to lead such evidence as was sufficient to bring the presumption, if relied on, into operation. I am inclined to adopt the reasoning on this point of Beaumont, C.J., in the Indian case of *Vallibhai* v. *Emperor*, (1933) A.I.R. (Bom.) 79, who stated that ' there is a presumption under section 114, Illustration (*e*) of the Evidence Act which enables us to presume that the officer issuing the warrant has performed his duty correctly, and until that presumption is displaced, it is not, in my opinion, necessary for the officer to give any evidence on the matter'."

"The principles upon which a court will act in reviewing a discretion exercised by a lower court were recently referred to by Their Lordships of the Privy Council in the case of *Ratnam* v. *Cumarasamy*, (1965) 1 W.L.R. at p. 11, as being well settled. Said Lord Guest, 'there is a presumption that the Judge has rightly exercised his discretion. The Court will not interfere unless it is clearly satisfied that the discretion has been exercised on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice.' "

Cases referred to : *Emperor* v. *Valli Mohammad Sheikh Mohammad*, A.I.R. (1948) Bomb. 72.
Manukulasuriya v. *Merasha* (1922) 24 N.L.R. 33; 4 C.L. Rec. 5
Williams v. *Weerakoon*, (1951) 53 N.L.R. 141.
Vallibhai v. *Emperor*, (1933) A.I.R. (Bom.) 79.
Regina v. *Camborne Justices*, (1955) 1 Q.B. 41.
Regina v. *Rand*, (1866) L.R.1. Q.B. 230; 7 B & S. 297; 35 L.J.M.C. 157
Morgan v. *Bowker*, (1963) 2 W.L.R. 860; (1963) 1 A.E.R. 691
Ratnam v. *Cumarasamy*, (1965) 1 W.L.R. at p. 11.

H. V. Perera, Q.C., with *A. C. M. Uvais* and *Nimal Senanayake*, for the accused-petitioner.

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

T. S. Fernando, J.

This is an application invoking the power of this Court under Section 356 of the Criminal Procedure Code to reverse an order made in a criminal case awaiting trial by the Magistrate of Kandy.

On the 18th April, 1964, the Magistrate acting in terms of section 5(1) of the Gaming Ordinance of 1889 (Cap. 46), issued a warrant authorizing entry into premises No. 34, Sangaraja Mawata, Kandy, the search therof and the exercise by the warrant-holder of all the powers conferred on the latter by the said section of the Ordinance. An entry into the aforementioned premises was accordingly made by a party of police officers led by an Inspector of Police, and it would appear that the accused petitioner and several others were

detained and taken before the Magistrate to be dealt with according to law. Case No. 37441 of the Kandy Magistrate's Court was thereafter instituted charging the accused-petitioner with committing the offence of unlawful gaming punishable under section 2 of the Ordinance.

Before the case could be tried, counsel for the accused took the preliminary objection that it should not be tried before the Magistrate for the reasons stated hereunder :-

(1) The Magistrate had issued the search warrant in question, and that it would be necessary for the defence to challenge the validity of that warrant. The issuing of the warrant was an executive act and was done by the Magistrate in an executive capacity, and therefore the same Magistrate should not judicially consider its validity or propriety.

(2) It may be necessary for the defence to call this Magistrate as a witness to show the circumstances in which the warrant came to be issued. On behalf of the accused, it was expressly stated in the Magistrate's Court that no suggestion was being made that the Magistrate entertains any personal bias in the case.

These two objections appear to be an anticipatory echo of the reasons stated by Chagla, J. in the case of *Emperor* v. *Valli Mohammad Sheikh Mohammad*, A.I.R. (1948) Bomb. 72, where the Bombay High Court considered a similar question arising in respect of a search warrant issued in terms of the Bombay Prevention of Gambling Act 4 (iv) of 1887, sections 5 and 6. Said Chagla, J. :—

> "It seems to us wrong in principle that the Magistrate who issues the warrant under section 6 should try the accused who has the right to challenge the propriety of that very warrant. . . . .We agree that section 556 (of the Criminal Procedure Code of India) which disqualifies a Magistrate who is personally interested trying a case has no application, because the fact of issuing the warrant does not give any personal interest to the Magistrate in the case which he is trying. But a more important and a more fundamental legal principle is involved. It is always open to the accused to challenge the validity or the propriety of the warrant issued by the Magistrate in a case tried under the Bombay Prevention of Gambling Act, and it is entirely wrong that the same person who in his executive capacity issues the warrant should judicially consider its validity or propriety. It has also got to be remembered that the accused has the right to call the Magistrate who issues the warrant as a witness on his behalf, and therefore it is not right that the accused should be put to the difficulty of applying for a transfer of the case to some other Court in the event of his deciding to call the Magistrate as a witness."

The learned Magistrate did not consider that this decision of the Bombay High Court was applicable here, and I think that he was right in that view. I cannot see what reason there is for an accused person to call as a witness at the trial the Magistrate who issued the search warrant. As Bertram, C.J., observed in *Manukulasuriya* v. *Merasha*, (1922) 24 N.L.R. at p. 34, the proceedings for the issue of the warrant ought to be before the defence at the trial so that they may be able to raise any necessary points against its validity. The record of the proceedings speaks for itself, there is nothing that the Magistrate can say to supplement it or interpret anything stated therein. If at any stage that record requires to be produced at the trial such production does not necessitate the calling of the Magistrate himself as a witness. Mr. Perera himself could not advance any reason or indicate any circumstance in which it would become imperative for the Magistrate who issued the search warrant being called as a witness at the trial.

In regard to the other reason indicated in the judgment of the Bombay case, whatever might be the position under the Bombay Prevention of Gambling Act where even a Superintendent of Police has been empowered to issue a search warrant under the Act, on a correct interpretation of the power of a Magistrate under section 5 of the Gaming Ordinance, I am satisfied that our Magistrates act not in any executive capacity but in their judicial capacity. Mr. Perera did not appear to me to press seriously the contention that a Magistrate in issuing a search warrant under our Ordinance acts in an executive capacity; Therefore, it seems to me, with due respect to the judges who decided the Bombay case upon which the accused relied, that the reasons given therein for the order eventually made are untenable.

Mr. Perera, however, in the course of his argument before me in supporting the objection to the case being tried by the very Magistrate who has issued the search warrant, formulated a ground of objection on the following lines : While conceding that the concluding words of Section 5(1) of the Gaming Ordinance made it plain that a trial before the Magistrate who had himself issued the search warrant in a particular case is not illegal, he contended that, where it is competent to invite a person to draw inferences from certain facts, it was contrary to principle that the person who can be so invited is the very person who has already reached an inference from those same facts. It is undoubtedly correct to say that,

notwithstanding that a search warrant under section 5 has issued after a Magistrate has had good reason to believe that a specified place is kept or used as a common gaming place, it is open to that same Magistrate at the trial which follows action taken on the search warrant to go back upon the belief he had reached at the stage of the issue of the warrant. The question is one of drawing inferences from facts, and therefore inferences could be drawn not only by a Magistrate at a trial but also, as our law reports show, even by this Court on appeal. Bertram, C.J., did state in the case of *Manukulasuriya* v. *Merasha*, (*supra*) that in all cases under the Gaming Ordinance, the first step to ascertain is, whether the search warrant which initiated the proceedings has been validly issued. If it has been validly issued, then section 7 creates a very strong presumption, and it is for the defence, if it can, to rebut that presumptiom. If it transpires that the warrant was not validly issued, then the case must be examined on the facts apart from the presumption. I agree, however, with the argument of learned Crown Counsel that section 7 of the Ordinance which creates the presumption does not alter the burden of proving the charge which still remains on the prosecution, but that in discharging that burden the prosecution is entitled to invoke the statutory presumption.

I find difficulty in agreeing with the observations of Gratiaen J. in Williams v. Weerakoon. (1951) 53 N.L.R.141 that before a Court can decide that the presumption created by section 7 applied, the preliminary proceedings leading up to the issue of the warrant should also have been produced and scrutinised or that there was any obligation on the prosecution to lead such evidence as was sufficient to bring the presumption, if relied on, into operation. I am inclined to adopt the reasoning on this point of Beaumont C. J. in the Indian case of *Vallibhai v. Emperor*, (1933) A.I.R. Bom. 79 who stated that "there is a presumption under section 114, Illustration (e) of the Evidence Act which enables us to presume that the officer issuing the warrant performed his duty correctly, and until that presumption is displaced, it is not, in my opinion, necessary for the officer to give any evidence on the matter". Again, with much respect, I experience no little difficulty in following Gratiaen, J., when he observed in the case already referred to above that he did not regard it as legitimate for a Court to assume that the search warrant has been regularly issued upon proper material, and to proceed from a presumption of regularity to apply the further statutory presumptions which the Ordinance creates under sections 7 and 8.

The point pursued by Mr. Perera was that, where the Magistrate, who issued the warrant and the Magistrate who hears the trial are one and the same person, the effect is to invite the person who has made inferences from certain facts to review his own inferences with the object of making contrary inferences. We are all far from intending to say that any judge or Magistrate is not capable of reaching a decision different to that reached by him earlier after he has had an opportunity of reconsidering his inferences and upon a review of the relevant facts. I do not therefore agree with the observation of learned Crown Counsel at the argument that to say that the Magistrate who hears the trial should not be the same Magistrate who has issued the search warrant amounts almost to slander of the Magistrate. As Mr. Perera observed, such a Magistrate is legally competent and in certain cases an accused person may well say that he has no objection to a trial before the very Magistrate who issued the warrant. Where, however, an accused person has objected to such a trial, is there any principle of justice that requires the Magistrate to permit the trial to take place before another Magistrate?

I was referred by Crown Counsel to the fairly recent case of *Regina* v. *Camborne Justices*, (1955) 1 Q.B. 41, where a Divisional Court of the Queen's Bench Division in England reviewed the authorities on the question of judicial bias. Answering the question what interest in a judicial or quasi-judicial proceeding does the law regard as sufficient to incapacitate a person from adjudicating or assisting in adjudicating on it upon the ground of bias or appearance of bias, Slade, J., stated that "in the judgment of this Court the right test is that prescribed by Blackburn, J., in *Regina* v. *Rand*, (1866) L.R. 1. Q.B. at p. 233—namely, that to disqualify a person from acting in a judicial or quasi judicial capacity upon the ground of interest (other than pecuniary or proprietary) in the subject-matter of the proceeding, a real likelihood of bias must be shown." I do not think that the principle which was examined in the *Camborne Justices* case (*supra*) is that invoked by the petitioner on the present application. Indeed, he expressly stated to the learned Magistrate, that no question of any personal interest is suggested. Mr. Perera emphasized that a fair and impartial trial carries with it the implication that the person accused should

not be made to labour under the belief that he has to carry here an additional burden, the burden of convincing a person who has already reached a certain belief that he was wrong in entertaining that belief.

Very great reliance was placed by Crown Counsel on the recent decision of the Queen's Bench Division of England in *Morgan* v. *Bowker*, (1963) 2 W.L.R. 860, where Lord Parker, C. J., in a case arising under the Obscene Publications Act, 1959 (7 and 8 Eliz. 2, Ch. 66), dealing with the procedural point that it was wrong and *vitiates* proceedings for justices who have issued a summons to determine the summons when it comes on for hearing, stated :—

> "Justices must come to a *prima facie* view when articles are brought before them, as these justices did. They are not determining the matter; they are merely deciding whether a summons should issue. It seems to me quite wrong to suggest that because they have taken a *prima facie* view, they are in some way biased or incapable of approaching with an open mind the hearing of the summons. I feel that there is nothing whatsoever in that objection."

Before attempting to apply that decision to the present question arising upon our Gaming Ordinance, it is necessary to see whether there are one or more important differences between the relevant provisions of the two statutes. Under Section 3(1) of the Obscene Publications Act, a warrant to enter and search premises is issued by a justice of the peace when he is satisfied that there is *reasonable ground for suspecting that.....* obscene articles are kept for publications for gain in the premises concerned. Under the Gaming Ordinance (section 5) a search warrant is issued when the Magistrate is satisfied that there is good reason to belive that any place is kept or used as a Common Gaming place. Moreover, there is no place in the English Act in question for a statutory presumption such as that contained in section 7 of our Gaming Ordinance. A Justice of the peace under the English Act is merely deciding whether a summons should issue. When he has decided that, he is in respect of that matter, so to say, *functus officio*. The matters to be proved on a charge under the English Act remain unaffected by the earlier proceeding in respect of the issue of the summons. Under our Ordinance, the presumptive proof of unlawful gaming arising upon the issue of a search warrant operates on the incidence of the burden of proof. The English authority cited is therefore distinguishable, and, in my opinion, is not applicable to the case before me.

The position, therefore, that we have here is that the Magistrate who issued the search warrant is legally competent to hear the trial. That such is the position is conceded even by Mr. Perera. The accused himself has expressly stated that no suggestion is being made that the Magistrate entertains any personal bias in the case. We are therefore confronted here at this stage with the simple point that the Magistrate, having a discretion as to whether the case should be heard by him or by another Magistrate, has decided that there is no good reason why it should not be heard by him. The principles upon which a court will act in reviewing a discretion exercised by a lower court were recently referred to by Their Lordships of the Privy Council in the case of *Ratnam* v. *Cumarasamy* (1965) 1 W.L.R. at p. 11 as being well settled. Said Lord Guest, " there is a presumption that the Judge has rightly exercised his discretion. The Court will not interfere unless it is clearly satisfied that the discretion has been exercised on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice." I have not been satisfied that the order complained of has been reached on any wrong principle, indeed, to grant the accused's prayer in this case would be tantamount to concluding that where an accused person objects to his trial taking place before the Magistrate who has issued a warrant in terms of section 5 of the Gaming Ordinance the Magistrate has no alternative to the upholding of the objection.

The application for an order from this Court that the trial do take place before another Magistrate is refused.

Application refused.

Present: G. P. A. Silva, J. & Alles, J

T. P. SELLATHURAI *vs.* Mrs W. A. FERNANDO*

S.C. Case No, 180/1963 *F—D.C. Colombo Case No.* 53974

Argued on : 23rd June, 1965.
Decided on: 9th July, 1965

Rent Restriction Act, No. 29 of 1948 as amended by Act, No. 10 of 1961, section 6 and 13 (1) (a)— Defendant (tenant) in arrears of rent for more than three months—Landlord (plaintiff) giving notice to quit on 25th May 1961 to deliver possession on 30th June 1961—Validity of such notice—Adequacy of notice in view of section 13 (1) (a) as amended.

The defendant was in arrears of rent from June, 1960. On the basis of a monthly tenancy the plaintiff gave notice to the defendant on 25th May, 1961, to quit and deliver possession of the premises on 30th June, 1961.

On two preliminary issues as to whether—

(*a*) the said notice to quit was bad in law ; and

(*b*) three months' notice was necessary as required by section 13 (1) (*a*) of the Rent Restriction Act as amended by section 6 of the Rent Restriction Act, No. 10 of 1961,

the learned District Judge held in favour of the defendant and dismissed the plaintiff's action.

Held : (1) (Following the decision in *Edward* v. *Dharmasena*, 66 N.L.R. 525 ; 67 C.L.W. 44). That the month's notice given by the plaintiff was a valid notice.

(2) That three months' notice was not necessary because the said section 6 of the Amending Act would only apply where the ground for ejectment was that rent had been in arrear for one month and not three months.

Not Followed : *Abeywickrema* v. *Karunaratne*, (1962) LXIII C.L.W. 23.

Cases referred to : *Edward* v. *Dharmasena*, (1964) 66 N.L.R. 525 ; LXVII C.L.W. 64.
Abdul Rahaman v. *Abdul Cader*, (1963) 67 N.L.R. 86.

S. Sharvananda, for the plaintiff-appellant.

Mark Fernando, for the defendant-respondent.

ALLES, J.

In this action, the plaintiff sued the defendant for ejectment from premises No. 33, Wolfendhal Street, Colombo on the ground that the rent had been in arrears for more than three months, in breach of the provisions of section 13 of the Rent Restriction (Amendment) Act No. 10 of 1961 and for the recovery of arrears of rent and damages.

On the trial date, it was agreed between the parties that the trial should proceed on Issues 10 and 11, as these Issues would finally dispose of the case. These Issues are in the following terms:—

(10) Is the notice to quit pleaded in para 4 of plaint bad in law.

(11) Has the plaintiff failed to give the defendant three months notice as required by section 13 (1) (a) of the Rent Restriction Act No. 29 of 1948 as amended by section 6 of the Rent Restriction Act No. 10 of 1961?

The learned District Judge has answered both these issues in the affirmative and dismissed the plaintiff's action.

According to the plaintiff, the defendant had paid all rents up to the end of May, 1960. On 25th May, 1961 the plaintiff gave notice to the defendant to quit and deliver possesion of the premises on the 30th day of June 1961. The plaintiff's position is that this was a monthly tenancy and hence the notice that had to be given was a month's notice.

In dismissing the Plaintiff's action on the preliminary issue, the learned District Judge, following the decision of Sri Skanda Rajah, J. in *Abeywickrema* vs. *Karunaratne*, 63 C.L.W. 23, held that the

* For Sinhala translation, see Sinhala section, Vol. 11 part 1, p. 2.

notice given by the plaintiff on the 25th day of May, 1961 to quit and deliver possession on the 30th June, 1961 was bad. When the learned District Judge followed the judgment of Sri Skanda Rajah, J. in the above case he did not have the advantage of Justice Sri Skanda Rajah's view in the subsequent case of *Edward* vs. *Dharmasena*, 66 N.L.R. 525, where he revised his earlier decision. We are in agreement with the view taken by this Court in *Edward* vs. *Dharmasena*, and hold that the month's notice given by the plaintiff was a valid notice.

The other ground on which the learned District Judge has dismissed the plaintiff's action is that the plaintiff has failed to give the defendant *three months notice* as required by section 13 (1) (a) and amended by section 6 of the Amending Act. Counsel for the plaintiff-appellant submits that the learned District Judge has misdirected himself in law in applying section 6 of the Amending Act to the facts of this case. In his submission it is only section 13 of the Amending Act that is applicable. Admittedly, the action was instituted during a period when the Amending Act was in operation. Plaint was filed on the 23rd September, 1961 and at that time the defendant had been in arrears of rent for over three months. The question however arises as to whether the notice as required by section 13 (1A) of the Amending Act has any relevancy to the institution of proceedings for over three months. We agree with the observations of H.N.G. Fernando, J. in *Abdul Rahuman* v. *Abdul Cader*, 67 N.L.R. 86, at p. 88, that the new section 13 (1 A)does not apply in the case of an action governed by section 13 of the Amending Act of 1961. Admittedly in this case, three months notice of the termination of the tenancy had not been given by the plaintiff, but in our view, such notice was not necessary because this was not a case to which section 6 of the Amending Act applied. That section would only apply where the ground for ejectment was that the rent had been in arrear for one month and not three months as in this case.

Counsel for the defendant-respondent however urged before us that in any case the notice that had been issued on his client in this case is bad in law and that therefore the learned District Judge was not in error when he answered Issue 10 against the plaintiff. In Issue 10, reference is made to para 4 of the plaint in which the plaintiff has referred to the notice given by him which has already been mentioned in the earlier part of this judgment. Counsel's submission is that the notice requiring the defendant to deliver possession on the 30th June, 1961 was bad since it did not comply with the requirement of the law that a calendar month's notice from the date of commencement of the tenancy had to be given.

Counsel for the plaintiff-appellant however, while conceding that there may be substance in the submission made by Counsel for the defendant-respondent before us, stated that he had been taken by surprise on this point because this was not the basis on which the notice was held to be bad by the learned District Judge. We think that there is some substance in this contention. Since, however, we propose to remit the case back to the District Court for trial in due course, it will be open to the defendant to raise this issue at the trial.

We are therefore of the view that the learned District Judge has misdirected himself in law in answering the two issues against the plaintiff-appellant and we would answer both issues in the negative and remit the case for trial in due course. The plaintiff-appellant will be entitled to the costs of this appeal.

SILVA, J.
I agree.

Appeal allowed.

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

M. A. C. M. SALIM *vs.* P. SANTHIYA AND OTHERS

S.C. Application, No. 251/64—*Application for Conditional Leave to Appeal to the Privy Council in S.C. No.* 39 (*Inty.*) *of* 1960—*D.C. Kurunegala, Case* 6772/*P.*

Argued on : 9th June, 1965.
Decided on : 14th June, 1965.

Civil Procedure Code, section 774 (1)—*Appeals* (*Privy Council*) *Ordinance, Rule* 2.—*Application for Conditional Leave to the Privy Council—Failure to give notice to opposite party within specified time—Judgment of Supreme Court not pronounced as contemplated by law—Effect thereof—Suitor not to be prejudiced by wrongful act of Court.*

Where the judgment of the Supreme Court in appeal was pronounced in contravention of section 774 (1) of the Civil Procedure Code in that the said judgment was not pronounced at the conclusion of the hearing, nor on an appointed day, nor on a day of which notice had been given to the parties or their counsel—

Held : That this non-compliance with section 774 (1) of the Civil Procedure Code would excuse the failure of the Petitioner to comply with Rule 2 of the Rules in the Schedule to the Appeals (Privy Council) Ordinance which requires that notice of intention to appeal to the Privy Council shall be given to the opposite party within 14 days of the pronouncing of judgment.

Per T. S. FERNANDO, J.—" It is a rule that a Court of Justice will not permit a suitor to suffer by reason of its own wrongful act and that it is under a duty to use its inherent powers to repair the injury done to a party by its act. "

Case referred to : *Sirinivasa Thero* v. *Sudassi Thero*, (1960) 63 N.L.R. 34

Hanan Ismail, for the petitioner.

S. Sharvananda, for the plaintiffs-respondents.

Clarence de Silva, for the 11th (A-E) and 12th defendants-respondents.

T. S. FERNANDO, J.

Judgment on appeal against which it is now sought to appeal to the Privy Council was pronounced by this Court on the 30th June, 1964. This application for conditional leave to appeal was presented to this Court on the 30th July, 1964. Notice of the intention of the petitioner to make this application was given to the respondents only by letter dated 29th July, 1964, and reached them only on the 30th July, 1964. It is, therefore, quite apparent that the petitioner has failed to comply with rule 2 of the Rules in the Schedule to the Appeals (Privy Council) Ordinance, (Cap. 100) which requires that notice of intention to appeal shall be given to the opposite parties within fourteen days of the pronouncing of the judgment.

As an explanation for his omission to comply with the said rule 2, the petitioner contends that the judgment in question was not pronounced by this Court in the manner contemplated by section 774 (1) of the Civil Procedure Code. That sub-section requires the Court, on the termination of the hearing of an appeal, to pronounce judgment in open Court either at the conclusion of such hearing or, on some future day which shall either be appointed at the conclusion of the hearing or of which notice shall subsequently be given to the parties or their counsel. It is admitted that judgment on this appeal was not pronounced at the conclusion of the hearing and also that it was pronounced neither on an appointed day nor on a day of which notice had been given to the parties or their counsel as contemplated by the Code.

The petitioner states that the first intimation he had of the pronouncing of the judgment was on the 27th June, 1964. We do not doubt this statement. Counsel appearing for him has brought to our notice an unreported judgment of this Court (Sansoni, J., and G. P. A. Silva, J.) of the 6th July, 1962, in S.C. Application, No. 161/62—Application for Conditional Leave to Appeal in S.C. 2 of 1961/Income Tax Case Stated BRA 285—by which conditional leave was granted, where the Court was doubtful whether there had been a compliance with section 774 (1) of the Civil Procedure Code. In the instant application the petitioner has succeeded in establishing that there has been no compliance with the requirement of the aforesaid section in respect of notice to parties of the pronouncing of the judgment.

The petitioner has shown himself quite diligent from the moment he became aware of the pronouncing of the judgment. This Court pointed out in *Sirinivasa Thero* v. *Sudassi Thero*, (1960) 63 N.L.R., at p. 34, that it is a rule that a Court of Justice will not permit a suitor to suffer by reason of its own wrongful act and that it is under a duty to use its inherent powers to repair the injury done to a party by its act. In these circumstances it is plain that our duty is to grant conditional leave to appeal, and that leave is hereby granted on the usual terms.

SRI SKANDA RAJAH, J.
I agree.

Application allowed.

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

THAIYALANAYAKI AND ANOTHER *vs.* KULANTHAIVELU

S.C. No. 494/64 *(F)—D.C. Jaffna, No.* 2001/*MS.*

Argued on : October 1, 1965.
Decided on : October 7, 1965.

Civil Procedure Code, Chapter LIII, sections 703, 704, 706, 710—*Action under Summary Procedure—Leave to appear and defend granted unconditionally—Answer filed—Default of appearance of defendants on trial date—Can decree absolute be entered ?—Civil Procedure Code, sections* 85, 144.

In an action by way of summary procedure, the defendants, having obtained leave to file answer unconditionally, filed their answer and the case was fixed for trial. On the trial date, the defendants being absent and their counsel stating to Court that he was not appearing for them, the learned District Judge ordered that " judgment be entered for plaintiff as prayed for with costs " and a decree absolute was entered in consequence.

Held : That the learned District Judge erred in entering a decree absolute. The proper decree that should have been entered is a *decree nisi* under section 85 of the Civil Procedure Code.

Per SANSONI, C.J.—"The Court in granting leave to appear and defend may require the defendant either to pay into Court the sum mentioned in the summons, or to give security therefor, or it may allow the defendant to file answer unconditionally, as it did in this case. But whether it allows the defendant to defend the action on terms, or unconditionally, the Court by granting leave does nothing more than remove a bar which stands in the way of the defendant. "

Cases referred to : *Ramanathan*, v. *Fernando*, (1930) 31 N.L.R. 495
Noorbhoy v. *Mohideen, Pitche*, (1929) 31 N.L.R. 3; 7 Times of Ceylon L.R. 153
Johanis Appuhamy v. *Carlincho*, (1963) 67 N.L.R. 144

S. Sharvananda, for the defendant-appellant.

H. W. Jayewardene, Q.C., with *V. Thiagalingam* and *S. S. Basnayake*, for the plaintiff-respondent.

SANSONI, C.J.

This action was filed, by way of summary procedure under Chapter LIII of the Code, to recover a sum of money alleged to be due on a promissory note.

In answer to the summons, the two defendants applied by affidavit to be allowed to file answer unconditionally, and the District Judge allowed their application. An answer was filed and the case was fixed for trial.

The defendants were absent on the trial date, and their Counsel stated that he was not appearing for them. Counsel for the plaintiff then moved that judgment be entered for the plaintiff, and the Judge made the order " Enter judgment for plaintiff as prayed for with costs ". A decree absolute was entered.

The defendants subsequently applied to have the decree vacated and to be allowed to defend the action. After inquiry, the District Judge refused their application and they have appealed.

Mr. Sharvananda submitted that the Court should not have entered the decree it did in favour of the plaintiff, but should have entered a *decree nisi* under section 85 of the Code. That section provides that if the defendant fails to appear on the day fixed for the hearing of the action, the Court shall proceed to hear the case *ex-parte*, and to pass a *decree nisi* in favour of the plaintiff. Mr. Sharvananda's submission must be accepted if section 710 applies to this case. That section reads :—" Except as provided in this Chapter, the procedure in actions under this Chapter shall be the same as the procedure in actions instituted under Chapter VII " (which is the Chapter dealing with the institution of actions of regular procedure).

Mr. Jayewardene relied on section 704 (1) which states that in an action on summary procedure " the defendant shall not appear or defend the action unless he obtains leave from the Court as hereinafter mentioned so to appear and defend ; and in default of his obtaining such leave *or of appearance and defence in pursuance thereof*, (I

stress the words relied on in the argument) the plaintiff shall be entitled to a decree . . . ". His contention was that any default made by the defendant, at any time after grant of leave, entitled the plaintiff to a decree absolute under this section.

The decision of this question seems to me to turn on what the Court does when a defendant is allowed leave to appear and defend. The Court in granting leave to appear and defend may require the defendant either to pay into Court the sum mentioned in the summons, or to give security therefor, or it may allow the defendant to file answer unconditionally, as it did in this case. But whether it allows the defendant to defend the action on terms, or unconditionally, the Court by granting leave does nothing more than remove a bar which stands in the way of the defendant.

Garvin, A.C.J., in *Ramanathan* v. *Fernando*, (1930) 31 N.L.R. 495, said : " It is the right of every person against whom an action is instituted to appear and, unless he admits the claim, to file his answer. For the purpose of expediting the recovery of claims of the nature specified in section 703 by discouraging frivolous, vexatious, and purely dilatory defences, the Legislature has in such cases curtailed this right by the requirement that a defendant shall not be admitted to defend the action until he has first obtained leave ". Coming nearer the point in dispute on this appeal, the learned Judge said at p. 500, " The Legislature in Ceylon has evidently thought it sufficient for its object, which I assume is to facilitate the recovery of the claims specified in Chapter LIII, to curtail the ordinary right of a defendant to answer by the requirement that he shall first obtain leave to do so and by vesting in the Court a discretion to grant leave upon terms or upon payment of the sum claimed into Court, except in cases in which the application should be granted without condition. "

To uphold Mr. Jayewardene's argument would mean that a defendant in such an action has not only to obtain leave to appear and defend in the sense of filing answer, and to comply with any terms imposed by the Court at that stage, but also to face the continual threat of having judgment entered against him in case of any subsequent default of appearance. Suffice it to say that no such condition was imposed by the Court in this case, and if it had been imposed, I consider that it would have been indefensible. Section 706 specifies all the conditions a Court may impose in granting leave, and there is nothing in Chapter LIII which authorises a Court to place a plaintiff in a more advantageous position.

Mr. Jayewardene argued that the word " defence " in section 704 meant the whole process of defending the action up to the point of judgment. In some contexts the word may bear that meaning, but in section 704 it means nothing more than filing answer. That is the meaning Garvin, A.C.J., gave it, and that is the meaning that I would give it.

I concur, with respect, in the opinion of Akbar, J., expressed in *Noorbhoy* v. *Mohideen Pitche*, (1929) 31 N.L.R. 3, that once leave to defend has been given, an action instituted under Chapter LIII is in no way different from any other action.

Another section of the Code relied on to support the entering of the decree absolute was section 144 which reads : " If on any day to which the hearing of the action is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the action in one of the modes directed in that behalf by Chapter XII, or make such other order as it thinks fit ". It was urged that " such other order " would include a decree absolute. I do not agree. I have rejected such an argument in my judgment in *Johanis Appuhamy* v. *Carlincho*, (1963) 67 N.L.R. 144, and I am still of the same opinion.

A *decree nisi* should have been entered when the defendants failed to appear at the trial. The decree entered was wrong, and must be set aside. I would allow the appeal with costs in both Courts and direct the District Judge to enter a *decree nisi* in this case in terms of section 85 of the Code.

SIRIMANE, J.

I agree.

Appeal allowed.

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

THE PUTTUR NORTH CO-OPERATIVE CREDIT SOCIETY

vs.

CHELLAPPAH THAMBIMUTTU & ANOTHER

S.C. No. 151/64 (*Inty.*)—*D.C. Jaffna, No.* 161.

Argued on : 27th August, 1965.
Decided on : 3rd September, 1965.

Co-operative Societies Ordinance, section 53—*Award by arbitrator under provisions of such Ordinance—Refusal by District Court to enforce it on ground that affidavit supporting application defective and award erroneous—Civil Procedure Code, section* 437—*Presumption of regularity of official acts—When can District Court refuse to enforce such award.*

Where a District Judge refused an application to enforce an award made by an Arbitrator under the provisions of the Co-operative Societies Ordinance on the ground: (*a*) that the affidavit which accompanied the application was defective in that it did not show that it was made before a Justice of the Peace within the local limits of whose jurisdiction the defendant was at the time residing; (*b*) that the award was illegal because it ordered the payment by way of interest of an amount greater than the principal debt—

Held : (1) That in the absence of a dispute regarding the place of residence of the deponent the presumption of regularity of official acts is sufficient to establish that a Justice of the Peace ordinarily acts in conformity with the requirements of section 437 of the Civil Procedure Code.

(2) That the District Court has no power to refuse to enforce the award on the ground that the award itself is erroneous. It can do so only when it is shown that the person making the award had no jurisdiction.

Cases referred to : *Kanagasabai* v. *Kirupamoorthy*, (1959) 62 N.L.R. 54.
Bandahamy v. *Senanayake*, (1960) 62 N.L.R. 313.
Jayasinghe v. *Boragodawatte Co-operative Stores*, (1955) 56 N.L.R. 462.
Barnes de Silva v. *Galkissa Wattarappola Co-operative Stores Society*, (1953) 54 N.L.R. 326 ; XLVIII C.L.W. 102.

Per H. N. G. Fernando, A.C.J.—"Such defects, substantially, may be described as matters which establish a lack of jurisdiction in the person making the award. An error of law or of fact on the part of the arbitrator in reaching his determination within jurisdiction is not such a defect. Such an error can be corrected on an appeal, provision for which is found in section 53 (formerly section 45) of the Ordinance; but if no appeal is taken, then in terms of that section the award becomes final and cannot be questioned in a civil Court. A District Court, which in this context is a Court of execution and not a Court of appeal, has no power to refuse to enforce an award on the ground that the award itself is erroneous."

H. W. Jayawardene, Q.C., with *K. S. Rajah* and *D. S. Wijewardene*, for the petitioner-appellant.

No appearance for the respondents.

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

This appeal was preferred from an order of the learned District Judge refusing to enforce an award made by an arbitrator to whom a dispute had been referred under the relevant provisions of the Co-operative Societies Ordinance.

One ground upon which the learned District Judge acted was that the Affidavit which accompanied the application to enforce the award was defective. In *Kanagasabai* v. *Kirupamoorthy*, 62 N.L.R. 54, at 59, Basnayake, C.J., made the following comment :—

> " The affidavit does not show that it was made before a Justice of the Peace within the local limits of whose jurisdiction the deponent was at the time residing. (Section 437 of the Civil Procedure Code)."

I do not disagree with the view that it may be desirable for a person before whom an affidavit is made to certify on the document itself that the

deponent resides within the area for which the person is appointed. But section 437 does not require that such a certificate must appear on the affidavit itself, and unless some such dispute actually arises as to the place of residence of the deponent, the presumption of the regularity of official acts should, in my opinion, suffice to establish that a Justice of the Peace ordinarily acts in conformity with the requirements of section 437. Moreover, in the present case, the question whether the affidavit was defective is purely academic, since all the matters deposed to in the affidavit were also testified to in oral evidence given in Court. The order of the District Judge cannot, therefore, be supported on this ground.

The learned Judge also held that the award ordered the payment by way of interest of an amount greater than the principal debt, and that accordingly the award was illegal on its face. I will assume for present purposes the correctness of the opinion that an arbitrator acting under the Co-operative Societies Ordinance is bound by the principle of the common law as to the amount of interest which may be decreed against a debtor. Nevertheless, the District Judge had no power to refuse to enforce the award on the ground that this principle had not been observed. He relied on the statement in *Bandahamy* v. *Senanayake*, 62 N.L.R. 313, that " the party against whom the award is sought to be enforced should be given an opportunity of showing the existence of defects, even though the award does not bear any fatal flaws on its face. "

That statement must be understood in the light of the observations in the judgments as to the character of the defects which may vitiate an award at the stage when enforcement is sought. The majority judgments approved the decision in *Jayasinghe's case*, 56 N.L.R. 462, which in turn adopted the views expressed by Gratiaen, J., in *Barnes de Silva's case*, 54 N.L.R. 326 :—

> " This rule, the validity of which may be assumed for the purposes of the present appeal, does not lay down the procedure for making such applications, but it is the clear duty of a Court of law whose machinery as a Court of execution is invoked to satisfy itself, before allowing Writ to issue, that the purported decision or award is *prima facie* a valid decision or award made by a person duly authorised under the Ordinance to determine a dispute which has properly arisen for the decision of an extra-judicial tribunal under the Ordinance. In that event alone would the Court be justified in holding that the decision or award is entitled to recognition and capable, under the appropriate rule, of enforcement as if it were a decree of Court. "

This view was approved and adopted by Basnayake, C.J., in *Bandahamy* v. *Senanayake*. It is explained also in the judgment of Sansoni, J. :—

> " What section 45 provides for is the enforcement of an award which :—
>
> (*a*) is made upon a dispute duly referred under the Ordinance ; and
>
> (*b*) is made by a person duly empowered by or under the Ordinance to make it."

The defects, the existence of which may thus be shown, are defects which fall within the observations of Gratiaen, J., which are cited above. Such defects, substantially, may be described as matters which establish a lack of jurisdiction in the person making the award. An error of law or of fact on the part of the arbitrator in reaching his determination within jurisdiction is not such a defect. Such an error can be corrected on an appeal, provision for which is found in section 53 (formerly section 45) of the Ordinance ; but if no appeal is taken, then in terms of that section the award becomes final and cannot be questioned in a civil Court. A District Court, which in this context is a Court of execution and not a Court of appeal, has no power to refuse to enforce an award on the ground that the award itself is erroneous.

I would allow this appeal with costs in both Courts. The order appealed from is set aside, and the order *nisi* for the enforcement of the award is made absolute.

ABEYESUNDERE, J.

I agree.

Appeal allowed.

IN THE COURT OF CRIMINAL APPEAL

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

K. V. MARTIN SINGHO *vs.* THE QUEEN

C.C.A. Appeal, No. 81 *of* 1965 (*with Application* 9 *of* 1965).
S.C. No. 256—*M.C. Horana,* 33468.

Argued and decided on : 3rd November, 1965.
Reasons delivered on : 15th November, 1965.

Court of Criminal Appeal—Non-direction amounting to misdirection—Burden of proof—No direction regarding defence version creating reasonable doubt on prosecution case—Misdirection of fact causing prejudice to defence.

Held : (1) Where an accused person is charged with attempted murder, by inflicting injuries with a knife on the injured person, and he gives evidence to the effect that the injuries were not inflicted by him, but were inflicted by a third person, D, in attempting to injure the accused person himself, there is no burden on the accused person to establish any fact. In such a case, the presiding Judge should direct the Jury, not only on the position that would arise if the Jury either believed or disbelieved the accused person, but should also direct the jury on the intermediate position, that he would be entitled to an acquittal, if his version raised in the minds of the Jury a reasonable doubt as to the truth of the prosecution version. The failure to direct the jury on this point constitutes a misdirection of the Jury.

(2) The appellant's case was that only one knife blow was delivered that day, and that by D. The prosecution case was that two blows were delivered, and both were by the appellant. Two medical witnesses were called. One of them, although half-heartedly, conceded in cross-examination that if the injured man's body was in a particular position, one knife blow could have resulted in the two injuries. The second medical witness stated categorically that both injuries could have resulted from one knife blow, and the Crown did not re-examine the witness on this point.

The learned Commissioner directed the Jury as follows :—

" Do you think if D. brought this knife and stabbed that she would have stabbed wrongly twice ? The suggestion is made that one blow could have caused those two injuries. Do you think it possible to get one blow at that angle when they are on the ground ? "

Held : That this was a mis-statement on a question of fact and on a material point in the case and was capable of causing prejudice to the defence, since there was evidence and not merely a suggestion on that point.

Per T. S. FERNANDO, J.—" Medical evidence, no doubt, is opinion evidence ; but it is nevertheless evidence, and the jury is required to consider its value and its acceptance. "

E. R. S. R. Coomaraswamy with *Anil Obeyesekere, Nihal Jayawickrama, Kumar Amarasekere* and *S. Gunasekera,* for the accused-appellant.

N. Tittawela, Crown Counsel, for the Crown.

T. S. FERNANDO, J.

The appellant stood his trial at the Assize Court at Kalutara on a charge of attempt to commit the offence of murder by stabbing a man named Jeemon, and was convicted by a unanimous verdict of the jury of the offence of attempt to commit culpable homicide not amounting to murder. A sentence of five years' rigorous imprisonment was imposed on him by the learned Commissioner of Assize who presided at the trial.

On behalf of the appellant two grounds were urged as militating against the maintenance of the conviction. The first was that there was non-direction of the jury in regard to one aspect of the burden of proof in the case, and that such non-direction amounted here to a misdirection. The second was that the directions in regard to certain facts bearing on the defence of the accused were misleading and caused such prejudice thereto as to amount to a miscarriage of justice.

The validity of these two grounds is best considered in the background of the respective cases for the prosecution and the defence. According to the case for the prosecution, the stabbing took place on the day following that on which Jeemon's father had died. There was to be a cremation ; and for the purpose of making a pyre firewood was necessary and Jeemon decided to cut down certain old rubber trees which stood on a land called Kaluhendeniya. He attempted to maintain in his examination-in-chief that this land belonged to his family, but had to concede during his cross-examination that ownership of the land had passed from his father through several persons finally to the wife of the appellant. When Jeemon had cut down about five trees, the appellant appeared on the land and inquired, obviously by way of a sarcastic question, " Have you cut a sufficient number of trees ? " meaning " our trees ". Jeemon, in reply, enquired what business it was of the appellant if trees planted by his (Jeemon's) father were cut for a funeral pyre for his father. The appellant, it was alleged, then abused Jeemon and challenged him. Jeemon, in response to that challenge, moved towards the appellant whereupon the latter stabbed him on the abdomen and held him in an embrace and thereafter struck a second blow with a knife which alighted this time on the rear of his upper arm.

The appellant's version of the incident was given by him in the witness-box. He stated that when he saw rubber trees standing on the land purchased by his wife being cut down by Jeemon he went up and asked him whether he had cut down a sufficient number of trees. To this inquiry, Jeemon replied with abuse, and came running up and hit him a blow on his forehead whereupon he embraced Jeemon and both fell on the ground together. Jeemon's sister, Darawathie, then came up with another woman. Darawathie appeared to be armed with some weapon like a knife. Jeemon was on top of him on the ground at this time. Darawathie stabbed at him (the appellant), but the blow was received on the body of Jeemon as he (the appellant) managed to wriggle away from the weapon as it descended. He saw only one blow so delivered or alighting.

On the evidence as given at the trial, the defence therefore was one denying that the appellant caused any injury to Jeemon. In the circumstances the burden of proof rested throughout on the prosecution. The relevant directions given by the learned trial judge which have been the subject of complaint by the appellant are set down below :—

(1) " In this case the evidence of the accused is that it was Darawathie who stabbed the injured man . . . If you believe the accused's story on that matter, then you will straight away acquit the accused because it was not the accused who inflicted the injuries on the injured man. If you can't believe the accused on that point, well then, his story goes out—that version goes out."

(2) " As I told you, if you believe the accused's story, then the accused is out. If you do not, still the prosecution case remains and remember it is for the prosecution to prove its case."

As this Court has pointed out on many occasions in the past, where an accused person is not relying on a general or special exception contained in the Penal Code, there is no burden on him to establish any fact. In this case the appellant was not relying on any such exception. Even if the jury declined to believe the appellant's version, he was yet entitled to be acquitted on the charge if his version raised in the mind of the jury a reasonable doubt as to the truth of the prosecution version. In our opinion, the jury should have been so directed, and the omission so to direct them, being on an important aspect of the case relating to the burden of proof, constituted a misdirection of the jury.

This is not the only criticism made of the learned judge's charge. The appellant's case was that only one knife blow was delivered this day, and that was by Darawathie. The prosecution case was that two blows were delivered, and both these were by the appellant. The medical witnesses (two of them) were the first witnesses called at the trial. Of these, the first witness was at the outset doubtful whether the two injuries found on Jeemon could have been the result of one blow, but conceded, albeit half-heartedly, in cross-examination that, on the supposition that Jeemon's body was in that particular position which counsel demonstrated, one blow with a knife could have resulted in the two injuries. The second medical witness, however, stated categorically that both injuries could have resulted from one knife blow, and counsel for the Crown made no attempt to re-examine this witness on the point.

Complaint was made of the learned judge's observations to the jury in the course of the summing-up. He stated :—

"Do you think if Darawathie brought this knife and stabbed that she would have stabbed wrongly twice ? The suggestion is made that one blow could have caused those two injuries. Do you think it possible to get one blow at that angle when they are on the ground ?"

Medical evidence, no doubt, is opinion evidence ; but it is nevertheless evidence, and the jury is required to consider its value and its acceptance. The defence did not rest its case on a mere suggestion. The appellant gave evidence that there was only one blow delivered, and the medical evidence referred to earlier showed that the defence version on this point was not improbable. We think there was here a mis-statement on a question of fact when the case was summarised to the jury as if it was a case devoid of evidence that one blow could have caused both injuries. The mis-statement was on a material point in the case and was capable of causing prejudice to the defence.

In view of the misdirection on law and the mis-statement of fact on a material point, we made order at the conclusion of the argument allowing the appeal and quashing the conviction.

Conviction quashed.

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

ELARIS *vs.* KURUPPU*

S.C. No. 472/63 (*F*)—*D.C. Panadura, Case No.* 7790.

Argued on : 13th October, 1965.
Decided on : 20th October, 1965.

Co-owners—Possessory decree—When can a co-owner get a possessory decree against another co-owner ?

Held : That apart from a co-owner who has made a plantation or erected a building on a portion of the common land and, therefore, is entitled to a *jus retentionis*, a co-owner has no right to a possessory decree against another co-owner as his possession is not *ut dominus*.

H. W. Jayawardena, Q.C., with *L. C. Seneviratne* and *D. S. Wijewardena*, for the defendant-appellant.

D. Y. A. Joseph, for the plaintiff-respondent.

SANSONI, C.J.

This is a possessory action brought in respect of a portion in extent 3 roods of the land called Nidanmulawatte in extent 1 acre, 1 rood, 13 1/2 perches. The plaintiff claimed that when he was in undisturbed possession of that portion for over a year and a day, the defendant forcibly encroached on a part of it. The defendant in his answer claimed that he was entitled to and was in possession of an undivided extent of 34 perches of the entire land, in the legitimate exercise of his rights as a co-owner.

It transpired in evidence that the plaintiff inherited his interest from his father, and the plaintiff's brother inherited an equal share with the plaintiff. The plaintiff admitted that he was possessing the land on behalf of his deceased brother's heirs. There are still other co-owners such as the plaintiff's two daughters, and one D. F. G. Perera. Thus there are several co-owners of the land of 1 acre, 1 rood, 13 1/2 perches, and what the plaintiff has sought to do in this action is to prevent one of the admitted co-owners possessing any part of the portion of 3 roods which he claims to have been possessing.

It is settled law that every co-owner has a right to possess and enjoy the whole property and every part of it, and it is not open to a co-owner, which the plaintiff is, to prevent another co-owner such as the defendant possessing and enjoying a part of that property.

This is not one of those cases where a co-owner who has made a plantation or erected a building on a portion of the common land seeks a posses-

* For Sinhala translation, see Sinhala section, Vol. 11 part 2, p. 5

sory decree in respect of that plantation or building against another co-owner who has dispossessed him of his improvements. There are decisions of this Court which hold that the improving co-owner is entitled to the *jus retentionis* of his improvements and can get a possessory decree in respect of such improvements. Apart from such cases, a co-owner cannot get a possessory decree against another co-owner, since his possession is not *ut dominus*.

The defendant as a co-owner was entitled to possess a portion of the 3 roods extent. Whether he will ultimately be allotted the house he has built or get compensation in lieu of it, is a matter that can only be gone into in a properly constituted partition action.

If the plaintiff wants to have a divided portion for himself, his only remedy is to bring such an action. As long as he is a co-owner, he cannot claim to possess exclusively a divided portion of the common land.

For these reasons the possessory decree which he has obtained in the lower Court must be set aside, and his action dismissed with costs in both Courts.

SIRIMANE, J.

I agree.

Set aside and action dismissed.

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

DON CORNELIS & ANOTHER *vs.* DE SOYSA & CO., LTD.

S.C. No. 341/62 *(F)—D.C. Colombo, Case No.* 50907/*M.*

Argued on : 1st and 2nd December, 1965.
Decided on : 16th December, 1965.

Cheque—Crossed " Not Negotiable "—Stolen from the drawer—Forgery of payee's indorsement—Subsequent acquisition of the cheque by the defendant " bona fide " and for value—Money on cheque collected by the defendant through bank—Section 24, *Bills of Exchange Ordinance,* (*Cap.* 82).

Action for money had and received—English common law action—Equitable remedy for restoration of property or for recovery of its value—Availability of such remedy in the law of Ceylon—Section 7 *of Prescription Ordinance* (*Cap.* 68)*—Relation of such remedy to the " condictio indebiti " of the Roman-Dutch Law and the doctrine of unjust enrichment.*

The plaintiff, a limited liability company, drew twenty cheques crossed "Not Negotiable" in favour of twenty different payees. All the cheques were stolen before they reached the payees, and the indorsements of the payee on each of the twenty cheques forged. The defendants, partners in a business, thereafter took the cheques *bona fide* from one Francis, who used to be a servant of the plaintiff. In exchange the defendants gave Francis cash or goods. The defendants then collected the monies on the cheques through their Bank. Francis was subsequently sent to jail in connection with cheque frauds. The plaintiff-Company, as owner of the cheques, sued the defendant for the recovery of the monies paid on the cheques as money had and received by the defendant to the use of the plaintiff. The defendant, among other defences, pleaded that the plaint disclosed no cause of action.

Held : (1) That the action for money had and received of the English Common Law has been followed in Ceylon and section 7 of the Prescription Ordinance has provided for such an action ; that the principle of the action may be treated as identical with the law of Ceylon.

(2) That the action for money had and received is founded on the same principle of equity as the *condictio indebiti* of the Roman-Dutch Law, namely, that a person who takes the property of another without legal justification is under an equitable obligation to restore it or pay its value to the owner.

(3) That the equities favoured the plaintiff since he was innocent, and weighed against the defendants who had cashed many cheques, some for large sums, without taking reasonable precautions to ascertain whether Francis had a right to the cheques.

(4) That on the facts proved in this case, the defendants were under a duty to restore to the plaintiff the monies on the cheques.

Per SANSONI, C.J.—" It was urged for the defendants that in the absence of proof of *dolus* or *culpa* they would not be liable. This is to confuse their delictual liability with their liability to make restitution. ' Restitution ' as Lord Wright has said at page 36 of his Legal Essays and Addresses, ' is not concerned with damages, or compensation for breach of contract or for torts, but with remedies for what, if not remedied, would constitute an unjust benefit or advantage to the defendant at the expense of the plaintiff '. "

Distinguished : *Daniel Silva* v. *Appuhamy*, (1965) 67 N.L.R. 457 D.B. ; (1965) LXVIII C.L.W. 26

Cases referred to : *Dodwell & Co., Ltd.* v. *John*, (1918) 20 N.L.R. 206; 1918 A.C. 563
Saibo v. *The Attorney-General*, (1923) 25 N.L.R. 321.
Sinclair v. *Brougham*, (1914) A.C. 398 ; 111 L.T.1; 30 T.L.R. 315; 98 L.J. Ch. 465
Kiriri Cotton Co., Ltd. v. *Dewani*, (1960) A.C. 192; (1960) 1 A.E.R. 177; (1960) 2 W.L.R 127
Peiris v. *The Municipal Council of Galle*, (1963) 65 N.L.R. 555.
The Imperial Bank of India, Ltd. v. *Abeyasinghe*, (1927) 29 N.L.R. 357.
Larner v. *London County Council*, (1949) 2 K.B. 683; (1949) 1 A.E.R. 964; 65 T.L.R. 316

Disapproved : Dictum of Tambiah, J., in *Daniel Silva* v. *Appuhamy*, 67 N.L.R. 457, at 472 ; 68 C.L.W. 26, at 35-36, that the action for money had and received is unknown to the law of Ceylon.

[Editorial Note.—In *Daniel Silva* v. *Appuhamy*, 67 N.L.R. 457; 68 C.L.W. 26 (D.B.), the facts were similar to the facts in this case. In that case the cause of action pleaded was that the defendant had converted the plaintiff's cheque to his use. A Divisional Bench decided in that case that the cause of action pleaded was conversion, a tort of the English law which did not find a place in the Roman-Dutch law of delict in Ceylon. In the result it decided that the plaint did not disclose a cause of action. This Court was bound by that decision, but decided that it did not apply here because the plaintiff in this case did not claim damages for conversion, but claimed for the restitution of the monies on the cheques as money had and received by the defendant to its use, a cause of action which was held to be available in the law of Ceylon.]

N. E. Weerasooriya, Q.C., with *W. D. Gunasekera* and *N. R. M. Daluwatte*, for the defendants-appellants.

C. Ranganathan, Q.C., with *J. C. M. Fernando*, for the plaintiff-respondent.

SANSONI, C.J.

The plaintiff-company sued the defendants, who were carrying on business in partnership, to recover a sum of Rs. 7,962/12 on twenty-two causes of action. In respect of each cause of action the plaintiff pleaded that it had drawn a cheque crossed and marked " Not Negotiable ". Instead of being delivered to the payee, the cheque was stolen and the payee's indorsement forged. The defendants thereafter, though they had no title to the cheque, sent it for collection to their Bank, which credited their account with the amount of the cheque, while the plaintiff's Bank correspondingly debited their account.

Evidence was led in respect of all but two of the cheques (in the case of those two cheques the payees were not called), and it was proved that the alleged indorsements were not made by the payees of twenty of the cheques. The plaintiff's case was that the twenty cheques were at all times their property, because they were never issued to the respective payees. Consequently, the plaintiff claimed, the money credited to the defendants' account in respect of each cheque was money had and received by the defendants to the use of the plaintiff, which the plaintiff was entitled to recover. The defendants pleaded that :—

(1) they had the authority of the plaintiff to cash these cheques ;
(2) the plaintiff was estopped from denying that the defendants had authority to cash these cheques ;
(3) all the cheques were cashed by them in the ordinary course of business ;
(4) they were holders in due course ;
(5) the plaintiff or its agent had been guilty of negligence ;
(6) the plaint disclosed no cause of action ; and
(7) the claims were prescribed.

The only evidence led to establish these defences was that of the 1st defendant, and it fell far short of proving the alleged authority, or negligence, or estoppel. The 1st defendant merely said that he had cashed these cheques at the request of one Francis who used to be a clerk in the plaintiff's estate department. Francis used to bring the cheques, but the payee did not accompany him. Once or twice he questioned Francis as to why he brought cheques drawn in favour of other people. Sometimes Francis used to take cash, and sometimes the cheques were credited to his account with the defendants. He never asked Francis how he got cheques drawn in favour of third parties.

It is obvious that Francis who, according to the evidence, had been sent to jail in connection with cheque frauds, was responsible for the forgery of the payee's signature on each of these cheques. The cheques were never the property of Francis, who probably stole them from the plaintiff. He could not, in any case, give the defendants any title to them, and the forged indorsements were wholly inoperative under section 24 of the Bills of Exchange Ordinance, Cap. 82. Although the defendants obtained the amounts of the cheques from their Bank, which collected the amounts from the plaintiff's Bank, the defendants had no right to these monies. In the result, the defendants obtained monies belonging to the plaintiff, without the plaintiff's consent or even knowledge.

The question is whether the plaintiff has any remedy against the defendants under these circumstances. The District Judge gave judgment for the plaintiff, and the defendants have appealed. Their Counsel relied on the recent case of *Daniel Silva* v. *Johanis Appuhamy*, (1965) 67 N.L.R. 457, in which the facts were very similar. The three Judges who heard that appeal unanimously decided that as the cause of action pleaded there was conversion, the plaint did not disclose a cause of action, inasmuch as the English doctrine of conversion is not applicable in Ceylon. That decision is binding on us. But I do not think it applies to this case, because the plaintiff here has not claimed damages on the ground of conversion. The plaint is framed, instead, on the ground that the amounts recovered by the defendants were money had and received by them to the use of the plaintiff. It is well-established in England that a plaintiff is, under these circumstances, entitled to waive the tort of conversion and sue instead for the amount of the cheques as money had and received to its use. In the case cited, Tambiah, J., alone expressed the view that the action for money had and received is unknown to our law. I regret that I am unable to accept this dictum, which was not necessary for the decision of that case.

The action for money had and received in its common law form no longer exists even in England, since the Judicature Act, 1873, abolished the forms of action altogether. But the principle of the action has been often followed in Ceylon, as it still is in England and other countries which have the common law. I need only refer to the case of *Dodwell & Co., Ltd.* v. *John*, (1918) 20 N.L.R. 206, decided in the Privy Council. There is also the case of *Saibo* v. *The Attorney-General*, (1923) 25 N.L.R. 321, in which Bertram, C.J., referred to the action for money had and received, and said that the English law on the subject may be treated as identical with the law of Ceylon. The Prescription Ordinance of 1871, Cap. 68, provides in section 7 for claims for the action for money received by defendant for the use of the plaintiff.

The principle underlying the action is that money which in justice and equity belonged to the plaintiff has been received by the defendant under circumstances which rendered its receipt a receipt by the defendant for the use of the plaintiff. Lord Summer in *Sinclair* v. *Brougham*, (1914) A.C. 398, said that it was grounded upon a notional or imputed promise to repay, but in the same case Lord Dunedin said, "An action founded on a *jus in re*, such as an action to get back a specific chattel, and an action for money had and received are just different forms of working out the higher equity that no one has a right to keep either property or the proceeds of property which does not belong to him". And again, "It is clear that all ideas of natural justice are against allowing A to keep the property of B which has somehow got into A's possession without any intention on the part of B to make a gift to A". More recently, Lord Denning in *Kiriri Cotton Co., Ltd.* v. *Dewani*, (1960) A.C. 192, referring to the action for money had and received said that it is not an action on contract or even imputed contract "It is simply an action for restitution of money which the defendant has received but which the law says he ought to return to the plaintiff. This was explained by Lord Wright in the Fibrosa case, (1943) A.C. 32. All the particular heads of money had and received; such as money paid under a mistake of fact, paid under a consideration that has wholly failed, money paid by one who is not in *pari delicto* with the defendant, are only instances where the law says the money ought to be returned."

The rules applicable to claims to money had and received and for restitution are closely connected with the doctrine of unjust enrichment, which proceeds on the basis that the defendant has received some property of the plaintiff, or some benefit from the plaintiff, for which it is just that he should make restitution.

I concur, with respect, in the view of Tambiah, J., expressed in *Peiris* v. *The Municipal Council of Galle*, (1963) 65 N.L.R. 555, that this doctrine of unjust enrichment is part of our law. It follows

that there is no inconsistency in applying the principle of the action for money had and received, which is founded on the same principle of equity as the Roman-Dutch Law action of *condictio indebiti*, and is " a liberal action, founded upon large principles of equity, where the defendant cannot conscientiously hold the money "—see the judgment of Schneider, J., in *The Imperial Bank of India* v. *Abeyesinghe*, (1927) 29 N.L.R. 357. " There is no principle of equity which appears more frequently in Roman Law, and in more diverse connexions, than the prohibition of unjust enrichment at the expense of another. He who has come into possession of property not his own, even though the acquisition might have been made accidentally or by mistake and without deliberate fraud, is under a strict obligation to return it or its value to the true owner. This was the foundation of the important action of *condicto indebiti* and in the main of the praetors' wide discretionary remedy of *in integrum restitutio*. Among innumerable statements of the principle in the *Corpus Iuris*, the most succinct and characteristic is that of Pomponius : " *Iure naturae aequum est neminem cum alterius detrimento et iniuria fieri locupletiorem* " (D. 50.17.206)—C. K. Allen, Law in the Making (6th Edition), p. 379. Lee and Honore in The South African Law of Obligations, sections 681 and 695 refer to the same principle of restitution. When one person's property comes into the hands of another without lawful justification, the latter must, if he cannot restore the property, pay the former the value of any benefit derived from it.

On the facts proved in this case I would hold that the defendants are under a duty to make restitution of the proceeds of the twenty cheques which bore forged indorsements. They were always the property of the plaintiff, and " a holder under a forged indorsement, if paid, must make restitution either to the payer or to the true owner . . . Liability does not depend in these cases on the innocence of the defendant, who may be a purchaser in good faith but has dealt with the goods without title and without the owner's authority "—*see* Legal Essays and Addresses by Lord Wright, pages 42 and 54, where the author reviews the American Restatement of the Law of Restitution.

It was urged for the defendants that in the absence of proof of *dolus* or *culpa* they would not be liable. This is to confuse their delictual liability with their liability to make restitution. " Restitution ", as Lord Wright has said at page 36 of the same work, " is not concerned with damages, or compensation for breach of contract or for torts, but with remedies for what, if not remedied, would constitute an unjust benefit or advantage to the defendant at the expense of the plaintiff. "

In my view the plaintiff has shown that the defendants had no lawful justification for receiving the proceeds of the twenty cheques which bore forged indorsements.

But it is argued that the defendants gave Francis cash or goods in exchange for those cheques, and it would be unjust to require them to pay the plaintiff, for they would then be paying twice over. I do not consider this a valid argument. The 1st defendant has in his evidence demonstrated that the defendants were at fault when they cashed so many cheques, some of them for large amounts, without taking the slightest precaution to ascertain what right Francis had to them. Any reasonable man, particularly one engaged in trade, would have enquired how these cheques came into the hands of Francis, who brought them unaccompanied by the payees. On the other hand, the plaintiff's conduct has been entirely innocent. It made no representation which could have misled the defendants, and was obviously unaware of the defendants' unauthorised handling of its property. It received no benefit whatever from these transactions. It cannot be argued that as between the plaintiff and the defendants the equities are equal. This is the test adopted by Denning, L.J. (as he then was) in *Larner* v. *London County Council*, (1949) 2 K.B. 683, dealing with the analogous claim to money paid under a mistake of fact.

I would dismiss the appeal with costs.

SIRIMANE, J.
I agree.

Appeal dismissed.

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

In S.C. No. 81.
P. M. K. TENNEKOON *vs.* THE QUEEN

S.C. No. 81-82 *of* 1964—*D.C.* (*Cr.*) *Anuradhapura,* 1139—*M.C. Anuradhapura,* 19435.

In S.C. No. 82.
THE QUEEN *vs.* B. DE S. GOONEWARDENE

Argued on : 9th and 14th July, 1965.
Decided on : 24th September, 1965.

Penal Code, section 190—*Evidence Ordinance, section* 134—*Perjury—Rule requiring corroboration —Perjury Act of* 1911 (*England*).

" Autrefois Acquit "—Scope of the rule—Criminal Procedure Code, section 330—*Principle of Res judicata—Applicability in our Criminal Law.*

Evidence Ordinance, section 45—*Handwriting expert—Subject of " lifting of stamps "—Whether allied field.*

Held : (1) That an accused should not be convicted of perjury on the uncorroborated evidence of the virtual prosecutor.

(2) That our Code of Criminal Procedure recognises the pleas of *autrefois convict* and *autrefois acquit* only to the limited extent set out in section 330.

(3) That an expert on the subject of identity and genuineness of handwriting is not entitled to be treated as an expert on the subject of " lifting of stamps. "

Quaere : Whether the principle of *res judicata* is applicable in our Criminal Law? The following dicta of the Privy Council in the case of *Sambasivam* v. *Public Prosecutor, Federation of Malaya,* (1950) A.C., at p. 479, was quoted (with approval) in the judgment of T. S. Fernando, J. :—

> " The effect of a verdict of acquittal pronounced by a competent Court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication. The maxim *res judicata pro veritate accipitur* is no less applicable to criminal than to civil proceedings."

[**Editorial Note:** As regards the applicability of the principle of *res judicata* in criminal proceedings in our law, it might be noted that in the case of *The Queen v. E. H. Ariyawantha,* (1957) 59 N. L. R. 241, the Court of Criminal Appeal (Basnayake, C. J., H. N. G. Fernando, J. and L. W. de Silva, A. J.) took the view that the principle did apply. In that case the Court applied the principle to the facts of the case before them and also referred to the judgment of the Privy Council in *Sambasivam* v. *Public Prosecutor, Federation of Malaya,* (1950) A. C. 458.]

Cases referred to : *Sambasivam* v. *Public Prosecutor, Federation of Malaya,* (1950) A.C. 458.
Connelly v. *Director of Public Prosecutions,* (1964) 2 A.E.R. 401.
King v. *Sirimana,* (1925) 7 Cey. Law Rec. 7; 3 Times of Ceylon L.R. 132.
King v. *Dharmasiriwardene,* (1931) 1 C.L.W. 101.
Emperor v. *Bal Gangadhar Tilak,* (1904) I.L.R. 28, Bom. 479.
Thevar v. *State of Madras,* (1957) A.I.R., S.C. 614.
R. v. *Threlfall,* 10 Cr. A.R. 112; 111 L.T. 168.

Not followed : *Arjun Singh* v. *Emperor,* (1931) A.I.R. All. 362.

Texts cited : *Cross on Evidence,* (2nd ed.), at p. 168.
Wigmore on Evidence, (3rd ed.), at p. 275, 277.
Best on Evidence.

G. E. Chitty, Q.C., with *Nihal Jayawickrama*, for the 1st accused-appellant, in Appeal No. 81 ; and with *D. R. P. Goonetilleke* and *Nimal Wikramanayake*, for the 2nd accused-respondent, on Appeal No. 82.

V. S. A. Pullenayegam, Crown Counsel, with *R. Abeysuriya, Crown Counsel*, for the Crown in both Appeals.

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

I agree with the orders proposed by my brother in these appeals, on the ground that an accused should not be convicted of perjury on the uncorroborated evidence of the virtual prosecutor.

At the first trial of the two accused, the verdict of acquittal resulted from the conclusion of the District Judge that the evidence which they had given in the earlier civil action had not been proved to be false. The conviction of the first accused at the second trial resulted from the opposite conclusion of another District Judge that the same evidence was false beyond a reasonable doubt. As Lord Devlin observed in *Connelly's Case*, " no system of justice can guarantee that every judgment is right, but it can and must do its best to secure that there are not conflicting judgments in the same matter ". Because of the acquittal at the first trial, " inevitably doubts would be felt about the soundness of the conviction " on the same evidence at the second trial, and the respect and confidence which the proceedings of the Courts should command would be prejudiced in consequence.

True it is under our law, separate indictments were necessary, because the two accused could not be jointly indicted on charges of perjury. But I doubt whether it was a commendable exercise of discretion to join surplus charges of abetment to the substantive charges of perjury, and thus to cause each of the accused to face two trials on identical facts. The charge of perjury, and the charge of abetment of perjury, could have been established against either accused only by proof of the one fact that his evidence in the civil action had been false ; and proof of that one fact would have established both the charges. Moreover, after the acquittals at the first trial, it was open to the Crown to secure that the finality of the judgment at the trial was preserved. If there had been convictions at the first trial, it is probable that the Crown would not have proceeded with the second indictment, and, in my opinion, the same result should have ensued from the acquittals.

Had there not been other grounds in favour of the accused in these appeals, I would have wished to hear arguments on two interesting and important questions both of which are suggested in the illuminating judgments in *Connelly's Case*, and which merit consideration by our Courts :—

(1) The question whether the principle of *res judicata* is applicable in our Criminal Law ;

(2) The question whether the holding of the second trial of the two accused amounted to an abuse of process, and if so whether our Courts do not have inherent power to prevent or remedy such abuse.

T. S. Fernando, J.

On the 18th February, 1952, the 2nd accused in the present case instituted in the District Court of Anuradhapura civil action numbered 3479 against one Henry Silva seeking to recover from the latter a sum of Rs. 2,000/- which was claimed as due on promissory note P 1 said to have been executed on the 4th November, 1950. Silva in his answer denied the genuineness of P 1. The trial of action No. 3479 commenced in the District Court of Anuradhapura on the 31st July, 1952, on which day the evidence of both the 1st and the 2nd accused was taken on affirmation. The 1st and 2nd accused both testified that Silva signed this note on 4th November, 1950, and that the 1st accused and another signed as witnesses. On the 7th October, 1952, the action was dismissed with costs, the District Judge holding that P 1 was a fabricated document. An appeal preferred by the 2nd accused against this dismissal was itself dismissed by the Supreme Court on the 27th January, 1955.

At the conclusion of the trial in action No. 3479, on an application made on behalf of Silva, P 1 was impounded by the District Court. It was sent to the Criminal Investigation Department after the appeal had been dismissed. Presumably

as a result of the investigations made by the Police, two cases, (Nos. 19434 and 19435), was filed in the Magistrate's Court of Anuradhapura, the 1st and 2nd accused being accused in both cases. In M.C. Anuradhapura, Case No. 19434, the 2nd accused was charged with intentionally giving false evidence at the trial of action No. 3479 and with using as genuine a fabricated document P 1 knowing it to be fabricated. The 1st accused was charged with abetting 2nd accused in the commission of both offences. In M.C. Anuradhapura, Case No. 19435, the 1st accused was charged with intentionally giving false evidence at the trial of action No. 3479 and the 2nd accused was charged with abetting the 1st accused in the commission of that offence. It is important to bear in mind that the prosecution had to resort to the filing of two cases as our law appears to take the view that when two people have given false evidence, although that be in one and the same proceeding, they cannot be said to have done so in the same transaction within the meaning of the sections relating to joinder of charges contained in our Criminal Procedure Code. Of application to the point is illustration (*e*) to section 184 :

> (*e*) *A.* and *B.* are accused of giving false evidence in the same proceeding. They should be indicted and tried separately.

At the conclusion of the non-summary proceedings in the two cases above-mentioned, the 1st accused and the 2nd accused were committed to the District Court for trial. Indictments were thereafter forwarded by the Attorney-General, and M.C. Anuradhapura, Cases Nos. 19434 and 19435, came to be numbered 1138 and 1139, respectively, in the District Court.

Case No. 1138 was first taken up for trial in the District Court, and at the conclusion thereof both the 1st and the 2nd accused were acquitted, the learned District Judge holding that he was not satisfied beyond reasonable doubt that P 1 was a fabricated document. It is instructive to reflect at this stage on the difference as to the extent of proof in respect of the same issue—whether P 1 was a fabricated document—in criminal as opposed to civil proceedings. The Crown preferred no appeal against the acquittal of these two accused in Case No. 1138.

In spite of the facts : (i) that no appeal was preferred against the acquittals ; (ii) that the District Court had reached a finding that P 1 was not proved, beyond reasonable doubt, to be a fabricated document ; and (iii) that the several parties in both cases (Nos. 1138 and 1139) were the same, the Crown decided to go on with the trial in the case No. 1139 now under appeal. The trial came on before a judge other than the judge who heard case No. 1138.

At the commencement of the trial, counsel for the accused raised in respect of each of them pleas of *autrefois acquit*. The pleas were rejected by the learned trial judge. The correctness of such rejection was questioned before us by counsel on behalf of the accused, but we are unable to say that the trial judge was wrong. Our Code of Criminal Procedure appears to recognise the pleas of *autrefois convict* and *autrefois acquit* only to the limited extent set out in section 330. Sub-section (1) of that section enacts as follows :—

> (1) A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall while such conviction or acquittal remains in force not be liable to be tried again for the same offence *nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section* 181 *or for which he might have been convicted under section* 182.

Sub-sections (2), (3) and (4) of section 330 have no application to the instant case. As the charges in cases Nos. 1138 and 1139 were not in respect of the same offence or offences, and as section 181 is applicable only where it is doubtful what offence has been committed, and section 182 is a section permitting a conviction of an offence for which the person accused might have been charged under section 181, it became apparent that no valid plea of *autrefois acquit* was available to the accused. Learned counsel for the accused himself felt obliged to concede the limited nature of the plea that is recognised by our criminal procedure.

In view of the ground (set out below) upon which we are deciding these two appeals, it becomes unnecessary to consider on these appeals whether it was open to the Crown to seek afresh in case No. 1139 a decision on the same issue that had been decided against it in case No. 1138, a case between the very same parties, that P 1 had not been proved to be a fabricated document. We have in mind the observations of the Judicial

Committee in *Sambasivam* v. *Public Prosecutor, Federation of Malaya*, (1950) A.C., at p. 479, where Lord MacDermott stated :—

> "The effect of a verdict of acquittal pronounced by a competent Court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication. The maxim *res judicata pro veritate accipitur* is no less applicable to criminal than to civil proceedings."

Sambasivam's case was adverted to in the recent decision of the House of Lords in *Connelly* v. *Director of Public Prosecutions*, (1964) 2 A.E.R. 401, in connection with the doctrine of issue estoppel in a criminal case, but the learned judges who constituted the Bench on that occasion were not all agreed as to the application of the principle of *res judicata* to the criminal law. We do not, therefore, wish to explore this question here for the reason already stated, viz., that we are deciding these appeals on another ground which makes it unnecessary to consider this, and for the additional reason that we did not have the advantage of sufficient argument addressed to us thereon.

The main contention upon which we were addressed was that this being a charge of perjury, the evidence of a single witness was insufficient in law to form the entire basis of the conviction. The learned trial judge, in the course of a carefully considered judgment, has held that Silva (the sole prosecution witness as to the falsity of the alleged incident of the execution of the note P 1 in a hotel in Anuradhapura) impressed him as being a truthful witness. The 1st accused gave evidence on his own behalf at the trial and said that the note was, in fact, signed by Silva on the date appearing thereon and that he himself signed at the same time as a witness to the execution. The trial judge rejected his evidence. The trial judge states that Silva's evidence was corroborated by certain documents referred to by him, by the evidence of Mr. Samaranayake (a handwriting expert), by the relationship in which the parties had stood towards each other at the relevant time and by the surrounding circumstances. We have had much argument addressed to us on this aspect of the corroboration of Silva's evidence and, subject to our consideration of Mr. Samaranayake's evidence, it might here be stated that the other circumstances mentioned by the trial judge and reproduced above are not in reality corroboration at all.

Mr. Samaranayake is an Assistant Government Examiner of Questioned Documents. He has had about 17 years' experience as a handwriting expert and has given evidence in about 3,000 cases as a handwriting expert. On the evidence before him, the learned trial judge would have been quite entitled to treat him as a recognised expert on the subject of identity or genuineness of handwriting. But, with respect, the question before the trial Court was not one of handwriting at all. Indeed, the prosecution conceded that the genuine signature of Silva appeared on the stamp affixed to the note P 1. Silva admitted as much in evidence. What he denied was that he was at any time a party to the execution of P 1 ; he alleged that the stamp affixed thereto had been removed or lifted from some other document which he had signed, probably from a rent receipt. The question, therefore, for the Court was not one relating to handwriting but one concerned with lifting from one document of a stamp which had already been signed on and affixing it to another. Now, on this subject of lifting of stamps, there was no evidence upon which the trial judge could reasonably have held Mr. Samaranayake to be an expert. Mr. Samaranayake himself claimed that, when he was being trained in Great Britain, he might have dealt with about six or seven cases of lifting of stamps. He went on to say that after his return to Ceylon he probably dealt with half a dozen such cases here. It was elicited in cross-examination of Mr. Samaranayake, however, that at the trial in case No. 1138 he had not claimed to be an expert on the subject of lifting of stamps from documents. He also conceded that he could not remember a single instance in the course of his British training of a signed stamp having been removed after signature had been made thereon. In regard to his experience in Ceylon he conceded that he could remember only a single instance of a signed stamp being lifted from one document and pasted to another. When his evidence is analysed, it becomes quite apparent that his main reason for saying that the stamp on P 1 had been lifted from some other document at a time when it had already been signed on was that the underline of the signature ends at the very extremity of the serrated edge of the stamp. As he put it, "the stopping of the pen at the serrated edge is a chance in a hundred thousand and, secondly,

if he did stop there there would be running of ink." We think Mr. Samaranayake's evidence in the case was, to say the least, inconclusive on the point he was trying to make. Moreover, as section 45 of the Evidence Ordinance permits the reception of expert evidence only when the Court has to form an opinion as to foreign law, or of science, or art, or as to identity or genuineness of handwriting or finger impressions, palm impressions or foot impressions, it is doubtful whether Mr. Samaranayake's evidence was at all relevant in this case. We do not think his evidence provides the necessary corroboration of the evidence of Silva.

Approaching the case as one where the evidence of the sole witness for the prosecution had not received corroboration, Crown Counsel contended that there is no rule under our law requiring more than one witness in a trial on a charge of perjury. There is, however, direct local authority on the point. In *The King* v. *Sirimana*, (1925) 7 Law Rec. 7, Maartensz, J., relying on an Indian authority, allowed an appeal and quashed a conviction on a charge of perjury. This case had been relied on by the accused at the trial as well, and the trial judge, summarised the effect of the judgment as follows :—" It is open to a judge of first instance (or jury being judges of fact) to convict, in a case of perjury, on the evidence of the prosecutor alone." With due respect to the learned judge, I think he has misdirected himself as to the effect of the judgment in *Sirimana's case* which was the very opposite of that summarised by him. *Sirimana's case* was followed in *The King* v. *Dharmasiriwardene*, (1931) 1 C.L.W. 101, where Akbar, J., stated that it was held by the Supreme Court in the case of *The King* v. *Sirimana* that an accused should not be convicted of perjury on the uncorroborated evidence of a prosecutor.

The Indian authority relied on by Maartensz, J., was that of *Emperor* v. *Bal Gangadhar Tilak*, (1904) I.L.R. 28 Bomb. 479, a decision of a Bench of two judges of the High Court of Bombay, in the course of which Jenkins, C.J., stated—*see* p. 499—

> " Having dealt with the evidence on which the prosecution relies, it will be instructive now to observe the standard of caution in relation to charges of perjury observed by the highest authorities.
>
> According to the Criminal Law of England, from which our system is so largely drawn, the assignment of perjury must be proved by two witnesses or by one witness and the proof of other material and relevant facts confirming his testimony. And we have it on high authority that this ' is not a mere technical rule but a rule founded on substantive justice ', The Indian Evidence Act, it is true, does not provide that there must be corroboration to support a conviction, but in ordinary cases, and where the provisions peculiar to Indian law do not apply, a rule which is founded on substantial justice may well serve as a safe guide to those who have to administer the criminal law in India."

We were referred by Crown Counsel to an Indian decision to a different effect, *Arjun Singh* v. *Emperor*, (1931) A.I.R. All. 362, a decision of a judge (Kendall, J.) sitting alone where, after reciting section 134 of the Indian Evidence Act (which is in terms identical with those of section 134 of our Evidence Ordinance), it is stated that it seems to be clear, therefore, that this rule of the English common law is not a safe guide for the Indian Courts which are bound by the statute law. The earlier authority of *Emperor* v. *Bal Gangadhar Tilak* has not been referred to by Kendall, J., and it must be remembered that Jenkins, C.J.'s judgment indicates that he had not overlooked the existence of the statutory provision in the Evidence Act. It is correct that in *Thevar* v. *State of Madras*, (1957) A.I.R., S.C. 614, the Supreme Court of India observed that section 134 of the Evidence Act has enshrined the well-recognised maxim that " evidence has to be weighed and not counted." The Supreme Court was, however, there not dealing with a case of perjury ; but in that very case, Sinha, J., (who delivered the judgment of the Court) stated that " unless corroboration is insisted upon by statute, Courts should not insist on corroboration *except in cases where the nature of the testimony of the single witness itself requires, as a rule of prudence, that corroboration should be insisted upon, for example, in the case of a child witness, or of a witness whose evidence is that of an accomplice or of an analogous character.*"

We were earnestly pressed by learned Crown Counsel to consider whether this rule of the English common law which he described as a lingering relic of an earlier era should now be treated as obsolete in this Country. He referred us to the criticism of the rule by Dr. Rupert Cross

in his treatise on Evidence, (2nd ed.), at p. 168, where the learned author states that the reason for the rule—" else there is only oath against oath "—is open to question because it would justify a requirement of corroboration in any number of situations in which it is not necessary as a matter of law or practice. But it is interesting to find the same author observing in the same connection—(p. 168)—that the requirement of corroboration in the case of perjury and kindred offences may also be justified on the ground that nothing must be allowed to discourage witnesses from testifying, and the fact that a conviction for perjury might be secured on the oath of one witness could have this effect.

It was pointed out to us that this rule has been adversely commented upon in Wigmore's standard treatise on the Law of Evidence. After dealing extensively with the history of the rule, it is there stated—(*see* Third edition, p. 275)—that " the rule is in its nature now incongruous in our system. The quantitative theory of testimony, if consistently applied, should enforce a similar rule for every criminal charge, now that the accused is competent to testify. " Oath against oath ", as a reason for the rule, is indefensible. But there may be reasons of policy, founded on experience, sufficient to justify its maintenance ". Then there follows this important observation—*see* p. 277.—

> " A feature of the rule is now to be noticed which vitally distinguishes this and most of the following rules from the treason rule, namely, the feature that *a single witness suffices if corroborated* . . . This rule, then, while requiring a specific quantity of evidence does not rest exclusively on the antiquated numerical or quantitative conception of testimony. It proceeds in part on the modern rational theory that an oath assertion varies infinitely in its quality and significance, and that a single person's assertion, if made under specified conditions of credibility, may suffice to produce complete persuasion."

Of undoubted interest in this connection is a reason for the rule stated in *Best* on Evidence (and reproduced in *Wigmore* on Evidence, 3rd ed., Vol. VII, at p. 275) :—

> " The foundations of this rule, we apprehend, lie much deeper. The legislator dealing with the offence of perjury has to determine the relative weight of conflicting duties. Measured merely by its religious or moral enormity, perjury, always a grievous, would in many cases be the greatest of crimes, and as such be deserving of the severest punishment which the law could inflict. But when we consider the very peculiar nature of this offence, and that every person who appears as a witness in a Court of justice is liable to be accused of it by those against whom his evidence tells, who are frequently the basest and most unprincipled of mankind ; and when we remember how powerless are the best rules of municipal law without the co-operation of society to enforce them,—we shall see that the obligation of protecting witnesses from oppression, or annoyance, by charges, or threats of charges of having borne false testimony, is far more paramount to that of giving even perjury its deserts."

A Court of law has of necessity to be concerned more with the state of the law as it is rather than with its philosophic content, which latter is an exercise more profitably undertaken in academic circles, indeed, even in a legislative assembly. Under the English law from which so much of our criminal law has been borrowed, the position until the passing of the Perjury Act of 1911 was that, on a prosecution for perjury, proof of perjury required more than one witness. While the matter could well have been left to be guided by the common law, it is not without some significance that the legislature decided not to leave the common law untouched but rather to ensure the observance of the common law by the enactment of statutory provision specifically dealing with the point that had been covered by the common law—*vide* section 13. This section has been held to mean that one or more of the assignments of perjury must be proved either by two witnesses, or by one witness with proof of other material and relevant facts substantially confirming his testimony.—*see R.* v. *Threlfall*, 10 Cr. A.R. 112, at 114.

Where it has been shown that our Court has in 1925, and again in 1931, acted on the basis that the English common law rule applied in Ceylon, and where no instance has been brought to our notice where that rule has been disregarded, we consider it our duty to apply the law as hitherto understood. More especially is it our duty to do so in the present case where the single witness for the prosecution was a person as interested in ensuring a conviction as the accused themselves were in securing their acquittal.

In the result we reach the conclusion that the trial judge should have held that the commission of the offence of perjury by the 1st accused was not established beyond a reasonable doubt. We therefore allow Appeal No. 81, the appeal of the 1st accused, quash his conviction and acquit him.

It follows that the 2nd accused who had been charged with the offence of abetment of perjury by the 1st accused should also have been acquitted. We, therefore, dismiss Appeal No. 82, the appeal of the Attorney-General.

Appeal No. 81 *allowed.*

Appeal No. 82 *dismissed.*

Present : **Sansoni, C.J., T. S. Fernando, J., Abeyesundere, J., Sri Skanda Rajah, J., and G. P. A. Silva, J.**

MARIAN BEEBEE *vs.* SEYED MOHAMED AND OTHERS

Revision in D.C. Kandy Case No. P. 5014
S.C. Application No. 94/63

Argued on : October 25, 1965.
Decided on : November 17, 1965.

Partition Act of 1951 (*Cap.* 69), *sections* 48 (1), 68—*Interlocutory Decree entered in partition action—Does revision lie—Do the words "subject to the decision of any appeal" in section* 48 (1) *exclude the power of the Supreme Court to make an Order in revision?*

Death of party before decree—Effect of Partition decree which allots a share to a party deceased at the time when it was entered.

Held : by SANSONI, C.J., T.S. FERNANDO, J., SRI SKANDA RAJAH, J. and G.P.A. SILVA, J., (ABEYESUNDERE, J. dissenting)—

(1) That an application in revision lies from an interlocutory decree entered in a partition action.

(2) That the words "subject to the decision on any appeal", in section 48(1) of the Partition Act of 1951, do not exclude the power of the Supreme Court to make an order in revision. These words are entirely tautologus as section 68 of the Act provides for appeals against any order or decree entered in a partition action.

(3) That a partition decree which allotted a share to a party, but which was entered after the death of that party is a nullity, and it is open to another party to the action to apply to the Supreme Court to set aside that decree in revision (even though it may have been affirmed in appeal) and remit it to the lower Court to enable proper steps to be taken in the action.

Per SANSONI, C.J.—" The power of revision is an extraordinary power which is quite independent of and distinct from the appellate jurisdiction of this Court. Its object is the due administration of justice and the correction of errors, sometimes committed by this Court itself, in order to avoid miscarriages of justice. It is exercised in some cases by a Judge of his own motion, when an aggrieved person who may not be a party to the action brings to his notice the fact that, unless the power is exercised, injustice will result. The Partition Act has not, I conceive, made any change in this respect, and the power can still be exercised in respect of any order or decree of a lower Court. "

Cases referred to : *Hill* v. *William Hill (Park Lane) Ltd.*, (1949) A.C. 530; (1949) 2 A.E.R. 452; 65 T.L.R. 471.
Letang v. *Cooper*, (1965) 1 Q.B. 232
Chelliah v. *Tamber*, (1904) 5 Tamb. Rep. 52.
Menchinahamy v. *Muniweera*, (1950) 52 N.L.R. 409.
Somapala v. *Sirimanne* (1954) LI C.L.W. 31.
Lucihamy v. *Hamidu*, (1923) 26 N.L.R. 41.
Ramanathan Chettiar v. *Veerappa Chettiar*, (1955) 68 L.W. 832.

T. B. Dissanayake with *K. Charavanamuttu*, for the 8th defendant-petitioner.

M. S. M. Nazeem with *M. T. M. Sivardeen*, for the plaintiff-respondent.

N. E. Weerasooria (Jr.) with *R. D. C. de Silva*, for the 11th-17th defendants-respondents.

SANSONI, C.J.

This application for revision arises in the following circumstances.

Among the defendants to this partition action filed under the Partition Act, Cap. 69, were the 7th defendant and the 8th defendant-petitioner. The trial was held on 23rd November, 1961, but the 7th defendant had died on 28th November, 1960. None of the parties seem to have been aware of his death; if they were, they did not disclose that fact to the Court. Consequently no steps were taken under section 82 to substitute any person to represent his estate. An interlocutory decree was entered, and a share was allotted to the 7th defendant. An appeal was filed against that decree by the 8th defendant. Pending that appeal, the 8th defendant seems to have become aware of the 7th defendant's death and she thereupon filed papers to have all the proceedings held in this action after the death of the 7th defendant set aside. The appeal abated because of failure to comply with certain essential provisions of the law. We are left with the application in revision.

Two questions arise for decision on the arguments that we have heard. The first is whether an application in revision lies from an interlocutory decree entered in a partition action. The second is whether, if such application lies, this is a fit case for the exercise of the power.

On the first question, there are numerous decisions which have held that this Court can revise a decree entered in a partition action. They are well known and it is not necessary to mention them. But the objection has been taken that, in view of the terms of section 48(1) of the Act, no such application in revision lies in respect of an interlocutory or final decree. Section 48(1) reads:-

> "Save as provided in subsection (3) of this section, the interlocutory decree entered under section 26 and the final decree of partition entered under section 36 shall, subject to the decision on any appeal which may be preferred therefrom, be good and sufficient evidence of the title of any person as to any right, share or interest awarded therein to him and be final and conclusive for all purposes against all persons whomsoever, whatever right, title or interest they have, or claim to have, to or in the land to which such decrees relate and notwithstanding any omission or defect of procedure or in the proof of title adduced before the court or the fact that all persons concerned are not parties to the partition action; and the right, share or interest awarded by any such decree shall be free from all encumbrances whatsoever other than those specified in that decree.
>
> In this subsection "encumbrance" means any mortgage, lease, usufruct, servitude, fideicommissum, life interest, trust, or any interest whatsoever howsoever arising except a constructive or charitable trust, a lease at will or for a period not exceeding one month, and the rights of a proprietor of a nindagama."

This view is based on the argument that the presence of the words "subject to the decision on any appeal" excludes the power of this Court to make an order in revision.

Another possible view is that those words merely draw attention to the well-known principle that all orders of lower Courts which are appealable are subject to the order of the appeal Court where an appeal has been taken: and when the appeal Court by its decision deals judicially with the matter, that decision displaces the order of the lower Court, which is deemed to have merged in the decree on appeal.

I prefer the latter view which seems to me to be entirely in accordance with the practice that has hitherto prevailed. It cannot be doubted that this Court has always exercised its power of revision in partition cases, even at a time when section 9 of the Partition Ordinance No. 10 of 1863, provided that the decree for partition or sale "shall be good and conclusive against all persons whomsoever," and section 19 of that Ordinance provided that "all decisons and orders of any Court made under the authority of this Ordinance shall be subject to an appeal to the Supreme Court." Although there was no clause in section 9 such as that which is said to make the exercise of the power of revision inapplicable, it was never doubted that any decree of a lower Court was always "subject to the decision on any appeal."

The power of revision is an extraordinary power which is quite independent of and distinct from the appellate jurisdiction of this Court. Its object is the due administration of justice and the correction of errors, sometimes committed by this Court itself, in order to avoid miscarriages of justice. It is exercised in some cases by a Judge of his own motion, when an aggrieved person who may not be a party to the action brings to his notice the fact that, unless the power is exercised, injustice will result. The Partition Act has not, I conceive, made any change in this respect, and the power can still be exercised in respect of any order or decree of a lower Court.

I do not think that the insertion of the words I have quoted from section 48(1) made any difference. The phrase is entirely tautologous. Section 68, which provides for appeals against any order or decree entered in any partition action, must necessarily be given effect to, and would naturally affect the finality of any interlocutory or final decree. It was not necessary, in order to give efficacy to this section, to insert the words in question. This seems to be an illustration of the observation that "a Parliamentary enactment (like Parliamentary eloquence) is capable of saying the same thing twice over"—per Viscount Simon in *Hill* v. *William Hill* (Park Lane) Ltd., (1949) A.C. at 546. Recently Diplock, L.J., commented on the same subject when he said that "economy of language is not invariably the badge of parliamentary draftsmanship," see *Letang* v. *Cooper*, (1965) 1 Q.B. at p. 247.

On the second question, it is clear that a partition decree which allotted a share to a party but which was entered after the death of that party is a nullity. It is open to another party to the action to ask this Court in revision to set aside that decree (even though it may have been affirmed in appeal) and to remit the case to the lower Court in order that proper steps may be taken in the action—see *Chelliah* v. *Tamber*, (1904) 5 Tamb. Rep. 52; *Menchinahamy* v. *Muniweera*, (1950) 52 N.L.R. 409; *Somapala* v. *Sirimanne*, (1954) 51 C.L.W. 31. One reason is, I think, that a partition action has always been recognised as having a special character, in that every party has the double capacity of plaintiff and defendant. Though in theory it is merely a proceeding, by one or more admitted co-owners against the remaining co-owners, to obtain relief from the inconvenience of undivided possession, in practice it often involves a contest as to title—see *Lucihamy* v. *Hamidu*, (1923) 26 N.L.R. 41.

Another reason, I think, is that a decree which gives one co-owner a share of the common property takes away the right of the other co-owners to that share. Thus it is a decree which is both in favour of and against each co-owner. That is why all the co-owners should be made parties. It is on this principle also that it has been said that in a partition action each party is as much a plaintiff as he is a defendant—see *Ramanathan Chettiar* v. *Veerappa Chettiar*, (1955) 68 L.W. 832. But if a party to the action was dead, and his estate was not represented at the time the adjudication as to title was made, his estate will not be bound by any decree entered thereafter. Hence it is essential that such a decree should be set aside.

I would therefore set aside all the proceedings had in this action since the death of the 7th defendant, and remit the case to the District Court for proper proceedings to be taken.

The 8th defendant-petitioner is entitled to the costs of this application against the plaintiff and 11th-17th defendants who opposed this application.

T. S. Fernando, J.
I agree.

Sri Skanda Rajah, J.
I agree.

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

Abeyesundere, J.

Under section 68 of the Partition Act an appeal lies to the Supreme Court against a decree entered under that Act. In view of the said section 68, it would be unnecessary to provide in any other section referring to a decree that such decree is subject to the decision on any appeal that may be preferred therefrom, but if it is so provided in such other section, it would be in order that the subjection of such decree to the decision of the Supreme Court may be expressly limited to the decision made on an appeal from such decree. The effect of such limitation would be that the revisional powers of the Supreme Court under the Courts Ordinance and the Civil Procedure Code cannot be exercised in respect of such decree.

The subjection of an interlocutory decree under the said Act to the decision of the Supreme Court is expressly limited by section 48(1) of the said Act to the decision made on an appeal. The limitation expressly provided in the said section 48(1) by the legislature would be rendered nugatory if, by invoking the provisions in the Courts Ordinance and the Civil Procedure Code in regard to the revisional powers of the Supreme Court, an interlocutory decree under the said Act is also made subject to the decision of the Supreme Court on revision. The occurrence of the words "subject to the decision on any appeal which may be preferred therefrom" in the said section 48(1) should not be held to be due to tautology if those

words can be reasonably interpreted to serve a particular purpose. I have indicated such purpose above.

It was possible for the Supreme Court to exercise the powers of revision in respect of a decree under the repealed Partition Ordinance as in section 9 of that Ordinance there was no provision by which the subjection of the decree to the decision of the Supreme Court was expressly limited to the decision made on an appeal from the decree. The said section 9 did not contain the words "subject to the decision on any appeal which may be preferred therefrom."

For the aforesaid reasons I am of the view that the revisional powers of the Supreme Court cannot be exercised in respect of an interlocutory decree under the Partition Act. I there ore reject the petition for revision in the present case.

Application allowed.

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

LIYANAGE *vs.* PERERA*

S.C. No. 58/63 *(F)—D.C. Colombo, No.* 9602/*L.*

Argued on : October 15, 1965.
Decided on : October 22, 1965.

Donation—Gift subject to donor's life interest—Action for revocation on ground of gross ingratitude with prayer for ejectment and damages—Sufficiency of evidence to support charge of ingratitude—"Other similar or more serious reasons"—Grant of prayer for ejectment.

Plaintiff gifted to defendant, his adopted sister, house and premises in which they were living by a deed of 1959. He brought this action for its revocation on the ground of gross ingratitude, together with a prayer for ejectment and damages.

The plaintiff in evidence said :

(*a*) that he was convinced that the defendant was misconducting herself with a man servant when her husband was living apart from her;

(*b*) that she failed to send away the servant though requested by him, but when the husband returned, he was sent away only to be brought back later;

(*c*) that the defendant insulted him, ignored him and once instigated her husband to assault him. (The husband had not been on speaking terms with the plaintiff since his return).

Held : (1) That the plaintiff had failed to make out a case for the revocation of the deed of gift, on the five grounds stated by Voet or the other wider ground described by Voet as "other similar or more serious reasons." (*Vide* Voet 39-5-22, Gane's Translation).

(2) That, however, the plaintiff was entitled to an order of ejectment as he had reserved his life-interest.

H. W. Jayawardena, Q.C., with *H. W. Senanayake*, for the defendant-appellant.

N. E. Weerasooriya, Q.C., with *W. D. Gunasekera*, for the plaintiff-respondent.

SANSONI, C.J.

This is an unfortunate dispute between a donor and a donee who after living happily in the same house all their lives, have quarrelled over a very trivial matter.

The plaintiff (the donor) is a bachelor who gifted to the defendant, his adopted sister, the house and premises in which they are still living, by a deed of gift dated 29th November, 1959. He reserved to himself, however, a life-interest.

He brought this action for a revocation of the deed of gift on the ground of gross ingratitude. He has also asked in his plaint for the ejectment of the defendant and for damages for wrongful possession. In his evidence he said that he

* For Sinhala translation, see Sinhala section, Vol. 11 part 1, p. 6.

returned home one night in January 1961, and saw a light burning in the house; the defendant and a man servant were seated on two chairs in the dining room, talking to each other, the servant's sarong was tucked up to his knee, and he had a beedi in his mouth. While he was watching them he saw the defendant walking up to the servant, whispering something to him, and then leaving the dining room.

The next morning the plaintiff spoke to the defendant about this incident and she told him that she has only been speaking to the servant, He asked her to send the servant away, but she did not do so. At this time the defendant's husband was living apart from her. Her husband later returned to live in that house, the servant was sent away, but was brought back, and was still working in that house at the time of the trial.

The plaintiff also complained that the defendant insulted him, ignored him, and once instigated her husband to assault him. These are the grounds upon which he seeks to have the deed revoked.

As the plaintiff himself said in evidence, the quarrel between him and the defendant was over the servant. He seems to have convinced himself that the defendant was misconducting herself with the servant. He made a complaint to the Police in those terms on the 20th May, 1961. The, defendant, perhaps to meet one false charge with another, stated in evidence that before her husband returned to live with her, the plaintiff made improper advances towards her.

On the evidence it is clear that neither the charge made by the plaintiff nor the counter-charge made by the defendant has any foundation. Feelings between the parties seem to have become increasingly bitter, and perhaps the defendant's husband did strike the plaintiff on the 2nd June, 1961—a matter about which he complained to the Police. But it is to be noted that the plaintiff and the defendant's husband had not been on speaking terms from the time the latter returned to live in that house late in January, 1961.

In this state of the evidence, the question arises whether the plaintiff has made out a case for the revocation of the deed of gift. I have no wish to add one more to the number of judgments in which the revocation of donation has been discussed. The basis of all the discussions on this subject is *Voet*, 39-5-22, where are mentioned five causes of ingratitude for which a donation can be revoked. He says "These causes are when the donee has laid wicked hands upon the donor, or has contrived a gross and actionable wrong, or some huge volume of sacrifice, or a plot against his life, or finally has not obeyed conditions attached to the donation." He says a little later "There seems also to be no doubt that a withdrawal of gifts can also take place for other similar or more serious reasons...." (*Gane's* translation).

There is nothing in the evidence in this case to bring the plaintiff's complaint within any of the five causes mentioned by *Voet*, or other similar or more serious causes. This seems to me nothing more than a family quarrel arising out of a difference of opinion as to whether a particular servant should be employed or not. If this deed were to be revoked under these circumstances, "All Courts and Benches would not be enough for the starting of actions against ungrateful persons," to quote *Voet's* prophecy in the section I have referred to.

But the plaintiff must succeed on his claim for the ejectment of the defendant. She admitted that she and her family had been asked to quit this house as far back as January, 1961. The plaintiff was entitled to make that request, since he is entitled to the life-interest. The District Judge has rejected the defendant's claim in reconvention based on the payment of rates and taxes and the making of improvements.

In the result I would set aside the judgment and decree under appeal and direct that a fresh decree be entered ordering that the defendant be ejected from the land and premises described in the plaint, and dismissing the other claims of the plaintiff and the claims in reconvention of the defendant.

I would make no order as to damages or costs in either Court.

SIRIMANE, J.

I agree.

Set aside.

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

DISSANAYAKE MUDIYANSELAGE APPUHAMY

vs.

THE QUEEN

C.C.A. No. 30 *of* 1965 (*with Application, No.* 35 *of* 1965)
S.C. No. 187—*M.C. Badulla, No.* 8445.

Argued on : 7th June, 1965.
Decided on : 21st June, 1965.

Court of Criminal Appeal—Burden of proof—Failure of trial judge to distinguish between burden on the Crown of proving a charge and that on an accused of establishing a special or general defence—Misdirection—Court of Criminal Appeal Ordinance, proviso to section 5 (1).

In a trial for murder, certain circumstances in the evidence led by the prosecution made it necessary for the trial judge to leave it to the jury to consider whether what would *prima facie* have been a case of murder was reduced to one of culpable homicide not amounting to murder on one or more of three grounds—

(*a*) by reason of absence of murderous intention as a result of intoxication ;
(*b*) by reason of grave and sudden provocation ; and
(*c*) as a result of the killing taking place in a sudden fight.

The learned judge directed the jury that—

(*a*) if they thought that the appellant was so drunk as to be incapable of forming a murderous intention ;
(*b*) if they thought that the appellant did, in fact, receive grave and sudden provocation ; or
(*c*) if they thought that the incident took place in the course of a sudden fight ;

it was open to them to reduce the offence from one of murder. The learned judge explained that the Crown was required to prove the elements of the charge of murder beyond a reasonable doubt, but did not direct the jury in regard to the extent of the burden that lay upon the accused to establish any one of the aforementioned defences.

Held : (1) That the failure to distinguish between the extents of the burden that lay respectively upon the Crown and the accused amounted to a misdirection.

(2) That this was not a case to which the proviso to section 5 (1) of the Court of Criminal Appeal Ordinance could fairly be applied and that the conviction for murder must be set aside.

D. V. A. Joseph, for the appellant.

R. Abeysuriya, Crown Counsel, for the Crown.

T. S. FERNANDO, J.

Upon a unanimous verdict of a jury the appellant was convicted of the offence of murder of a man named Senanayake and sentence of death has been pronounced as a consequence of that verdict.

Although the appellant himself offered no evidence, certain circumstances deposed to by the witnesses called for the Crown made it necessary for the Judge who presided at the trial to leave it to the jury to consider whether what would *prima facie* have been a case of murder was reduced to one of culpable homicide not amounting to murder on one or more of three grounds : (*a*) by reason of absence of murderous intention as a result of intoxication ; (*b*) by reason of grave and sudden provocation ; and (*c*) as a result of the killing taking place in a sudden fight.

The learned trial judge correctly left to the jury the question of finding whether one or more of

the above mitigatory defences to the charge of murder were established, but he has inadvertently overlooked the necessity of directing the jury in regard to the extent of the burden that lay upon the appellant to establish any one of these defences. What the learned trial judge told the jury was that (*a*) if they thought that the appellant was so drunk as to be incapable of forming a murderous intention ; (*b*) if they thought that the appellant did, in fact, receive grave and sudden provocation ; or (*c*) if they thought that the incident took place in the course of a sudden fight, it was open to them to reduce the offence from one of murder.

In regard to the burden that lay on the Crown to establish the elements of the charge of murder the learned judge correctly explained that the extent of that burden was such that the Crown was required to prove those elements beyond a reasonable doubt. The failure to distinguish between the extents of the burden that lay respectively upon the Crown and the appellant amounted in the instant case, in our opinion, to a misdirection. The nearest approach to a direction in respect of the burden that lay on the defence was that which we have set out above. It is not possible for us now to say whether the jury did or did not consider that there was really no difference between the extents of the burden on the respective sides.

It was not suggested that there was any prior ill-feeling between the deceased and the appellant. The evidence called for the Crown itself established that these two persons were in the habit of drinking together, that at about 3 p.m. on the day in question the deceased came in the company of the appellant to the house of the witness, Sudu Banda, that along with Sudu Banda they went in the direction of certain kitul trees which were being tapped by or at the instance of both the appellant and the deceased, that they were then joined by two others, and all five persons thereupon drank toddy. After they had drunk some toddy a dispute arose between the deceased and the appellant over an allegation by the former that the appellant was not giving him his due share of the proceeds of the sale of toddy ; the deceased then abused the appellant calling him a son of a whore and the appellant thereupon struck the deceased on his face causing the latter to fall on the ground. When the deceased so fell the appellant took out a knife from his waist and stabbed him on his neck, abdomen and other parts of the body. If the direction that we think was necessary in respect of the extent of the burden of proof that lay on the appellant to establish the defences that fairly arose on the evidence had been given to the jury, it is not possible to say that a reasonable jury might not have reduced the offence.

We are unable to accede to the argument of learned Crown Counsel that this is a case where the proviso to section 5 (1) of the Court of Criminal Appeal Ordinance could fairly be applied. We set aside the conviction for murder and the sentence pronounced on the appellant and, acting under section 6 (2) of the said Ordinance, we substitute a verdict of guilty of culpable homicide not amounting to murder and pass on the appellant a sentence of ten years' rigorous imprisonment.

Conviction for murder set aside.

Verdict of culpable homicide substituted.

Present : **Alles, J.**

RICHARD SAMUEL RAMANAYAKE

vs.

HERATH MUDIYANSELAGE TIKIRIBANDA *alias* TIKIRI BANDA MUDIYANSELAGE HERATH AND TWO OTHERS

Election Petition No. 29 of 1965—Electoral District No. 47 (Walapane)

Argued on : 28th & 29th October, 1965.
Order delivered on : 9th November, 1965.

Election Petition—Averments in petition alleging non-compliance with sections 48(9), 48 (9 A) (a), (b), (c) of the Order in Council and miscount of votes—Do these amount to one charge under section 77(b) of the Ceylon (Parliamentary Elections) Order in Council 1946?—Another paragraph alleging such general abuse and corrupt use of public office, funds, utilities and amenities, corrupt patronage and influence as to render election void under section 77(a) of the said Order in Council—Whether one charge—Adequacy of security required under Rules 12(2) and 12(3) of the Parliamentary Election Petition Rules.

The Petitioner challenged the election of the 1st respondent by averring—

(*a*) in paragraph 4 of the petition that the election was not conducted by the 2nd respondent in accordance with the principles laid down in sections 48(9), 48 (9A) (*a*), (*b*) and (*c*) of the Ceylon (Parliamentary Elections) Order in Council, 1946.

(*b*) in paragraph 5 that there has been a miscount of the votes by the 2nd respondent, and that the return of the 1st respondent was undue,

(*c*) in paragraph 6, "that such general abuse and corrupt use of public office and of public funds, utilities and amenities corrupt patronage and influence prevailed before and during the said election, that by reason thereof the majority of electors have or may have been prevented from electing the candidate whom they preferred; and that the said election of the 1st respondent was rendered void by virtue of the provisions of section 77(*a*) of the Ceylon (Parliamentary Elections) Order in Council, 1946."

The petitioner deposited Rs. 5000/- as security being the minimum required by Rule 12(2) of the Parliamentary Election Petition Rules, 1946 and which sum would be sufficient to cover only three charges.

A preliminary objection to the hearing of the Election Petition was raised by the 1st respondent alleging that the security furnished was inadequate and praying for an order dismissing the petition.

It was submitted for the 1st respondent (1) that paragraphs 4 and 5 aforesaid contained two distinct charges; (2) that paragraph 6 referred to above contained more than one charge; (3) that particulars in paragraph 6 are vague and may give rise to a variety of charges.

Counsel for the petitioner contended that paragraphs 4 and 5 constituted one ground and relying on the dictum of Drieberg J., in *Tillekewardene* v. *Obeyesekera*, 33 N.L.R. 65, that the word "charges" in Rule 12(2) meant the "various forms of misconduct coming under the description of corrupt and illegal practices", that there were no charges in respect of which he need furnish security, since the matters he has raised in his petition are only grounds for the avoidance of an election.

Held : (1) That under Rule 12(1) the furnishing of security is a *sine qua non* for the filing of an election petition. It matters not whether the averments in an election petition are termed charges, complaints, accusations or grounds. It is unreasonable to assume that Drieberg, J., in *Tillekewardene* v. *Obeyesekera* formulated a definition of the word 'charges', which was to apply in every case.

(2) That in considering whether paragraph 6 above contains one charge or several charges a relevant consideration to be taken into account is that paragraphs (*a*) and (*b*) of section 77 appear to give statutory recognition to the well-known concept of freedom of election, an infringement of which was a ground for the avoidance of an election in common law. It is a concept well recognised both in England and in Ceylon.

(3) That the one 'charge' which is implicit in section 77(*a*) is that there has been no free and fair election and the averments in a petition which substantiate such an allegation together constitute one charge whatever be the number of instances, acts, facts or circumstances which are relied upon in support,

(4) That for the purpose of deciding the nature of the charges based on the particulars set out in paragraph 6 it is unnecessary to ascertain the particular category or head of the enumerated acts so long as they come under one or other of them.

(5) That on the same principles applicable to section 77(*a*), the averments in paragraphs 4 and 5 constitute one charge—the charge of non-compliance with section 77(*b*).

(6) That, therefore, the security furnished is adequate.

Per ALLES, J.—". . . .The words 'other misconduct, or other circumstances, whether similar to those before enumerated or not' were obviously intended to encompass practically every situation which would affect the freedom of election."

". . . .I am aware that Sirimane, J., in Election Petition No. 37 of 1965 (Attanagalla) and T. S. Fernando, J., in Election Petition No. 6 of 1965 (Kolonnawa) have taken a contrary view, but I regret that for the reasons I have stated earlier, I am unable to accept that view as being a correct interpretation of section 77(*a*). I am therefore of the opinion, that however inelegantly drafted or inartistically worded paragraph 6 may have been, it contains only one charge, and therefore the security furnished is adequate."

"Since the question has been raised, whether paragraphs 4 and 5 contain two charges or one, I have considered this matter and I am of the view that applying the same principles which I have done in respect of section 77(*a*), they only constitute one charge—the charge of non-compliance with the provisions of section 77(*b*)."

Not followed: *Perera* v. *Samarasinghe*, (1965) LXVIII C.L.W. 75
Perera v. *Bandaranaike*, (1965) LXVIII C.L.W. 73

Cases referred to: *Tillekewardene* v. *Obeyesekere*, (1931) 33 N.L.R. 65; 1 C.L.W. 12
Perera v. *Jayawardene*, (1947) 49 N.L.R. 1; XXXV C.L.W. 105
Piyasena v. *Ratwatte*, (1965) LXVIII C.L.W. 41 ; 67 N.L.R. 473
Mohamed Mihular v. *Nalliah*, (1944) 45 N.L.R. 251; XXVII C.L.W. 63
Ilangaratne v. *G. E. de Silva*, (1948) 49 N.L.R. 169; XXXVI C.L.W. 97
Jeelin Silva v. *Kularatne*, (1942) 44 N.L.R. 21; XXIV C.L.W. 1
Woodward v. *Sarsons*, (1875) L.R. 10 C.P. 733; 32 L.T. 867; 44 L. J.C. P. 293
South Meath case, 4 O'Malley and Hardcastle Reps. 139.
The Drogheda (Borough) Case, 1 O'Malley and Hardcastle Reps. 252; 21 L.T. 402
Kaleel v. *Themis*, (1956) 58 N.L.R. 396
Silva v. *Karalliadde*, (1931) 33 N.L.R. 85; 1 C.L.W. 19
Wijesekere & Another v. *Perera*, (1965) LXVIII C.L.W. 80

P. Navaratnarajah, Q.C., with *T. Suntheralingam, R. D. C. de Silva*, and *W. Weerasooriya*, for the petitioner.

Colvin R. de Silva, with *E. R. S. R. Coomaraswamy, Prins Gunasekera, Rajah Bandaranaike, Nihal Jayawickrema, Jayatissa Herat, V. Nanayakkara*, and *S. S. Sahabandu*, for the 1st respondent.

H. L. de Silva, Crown Counsel, as amicus curiae.

ALLES, J.

A preliminary objection to the hearing of Election Petition No. 29 of 1965 has been raised by the 1st respondent to this petition by his motion dated 9th September, 1965 in which he prays for its dismissal in terms of Rule 12(3) of the Parliamentary Election Petition Rules 1946, contained in the Third Schedule to the Ceylon (Parliamentary Election) Order in Council 1946. The 1st respondent alleges in his petition and affidavit that security as required by Rule 12(2) has not been furnished by the petitioner.

Rule 12(2) requires that the security furnished by the petitioner shall be not less than Rs. 5,000/-. The Rule further requires the petitioner, if the number of charges in a petition shall exceed three, to give additional security to an amount of Rs. 2,000/- in respect of each charge in excess of the first three. Under Rule 12(3), if the security as required under Rule 12(2) is not furnished, the respondent may apply to the Judge for an order directing the dismissal of the petition and for the payment of the respondent's costs.

The petitioner deposited a sum of Rs. 5,000/- as security but it is the submission of Counsel

for the 1st respondent that this sum is inadequate since the petition discloses more than three charges.

Paragraph 4 of the petition avers that there was a non-compliance with sections 48(9*a*)(*b*) and (*c*) of the Order in Council by the 2nd respondent and further alleges that the election was not conducted in accordance with the principles in 48(9), 48(9*a*), (*b*) and (*c*) of the said Order in Council—this appears to be an error for 48(9), 48(9A), (*a*), (*b*) and (*c*). The 1st respondent submits that this non-compliance affected the result of the election.

Paragraph 5 avers that the petitioner who was a candidate at the said election had a majority of valid and lawful votes at the said election and that there has been a miscount of the votes by the 2nd respondent and that the return of the 1st respondent was undue.

Paragraph 6 is in the following terms :

> "And your petitioner further says that such general abuse and corrupt use of public office and of public funds, utilities and amenities, corrupt patronage and influence prevailed before and during the said election, that by reason thereof the majority of electors have or may have been prevented from electing the candidate whom they preferred; and that the said election of the 1st respondent was rendered void by virtue of the provisions of section 77(*a*) of the Ceylon (Parliamentary Elections) Order in Council, 1946."

Counsel for the 1st respondent submits that Paragraphs 4 and 5 contain two distinct charges but that Paragraph 6 contains more than one charge. Counsel for the petitioner on the other hand contends that Paragraphs 4 and 5 constitute one ground for the avoidance of the election and that Paragraph 6 constitutes another. In view of the dictum of Drieberg, J. in *Tillekewardene* v. *Obeyesekere*, 33 N.L.R. 65, that the word 'charges' in Rule 12(2) meant the "various forms of misconduct coming under the description of corrupt and illegal practices", a dictum which was adopted later in the Divisional Bench case of *Perera* v. *Jayawardene*, 49 N.L.R. 1, it was submitted by Counsel for the petitioner that there are no charges in respect of which he need furnish security, since the matters he has raised in his petition are only grounds for the avoidance of an election. This distinction between 'charges' and 'grounds' has been considered by Abeyesundere, J. in Election Petition No. 1 of 1965,* and the learned Judge in the course of his order in that petition, following the decisions in *Tillekewardene* v. *Obeyesekere* and *Perera* v. *Jayawardene*, was of the view that "the charges within the meaning of Rule 12(2) are only those of the grounds set out in the said section 77 (of the Order in Council) which fall within the category of the corrupt or illegal practices specified or included in that section." I am unable to agree that the decision in *Tillekewardene* v. *Obeyesekere*, has the far-reaching consequences which Counsel for the petitioner invites me to draw. There is no warrant for such an arbitrary limitation to the word 'charges' as suggested by Drieberg, J. Under Rule 12(1), the furnishing of security is a *sine qua non* for the filing of an election petition. The rule is designed to provide for security for costs, charges and expenses that may become payable by the petitioner, regardless of the fact whether the petition involves charges for the commission of corrupt or illegal practices or grounds for the avoidance of an election. If the submission of Counsel for the petitioner is correct, the necessity for furnishing security in this case should never have arisen since the matters raised in the petition are only grounds for the avoidance of the election. From an examination of the decision in *Tillekewardene* v. *Obeyesekere*, it would appear that Drieberg, J. was only concerned there with the question whether, in a case where the commission of corrupt and illegal practices are alleged, several instances of such a practice constitute only one charge or as many charges as there are instances of such corrupt or illegal practices. He came to the view that in such a case, it was the forms of the misconduct and not the particular instances which constitute the charges. It is unreasonable to assume that Drieberg, J. was here formulating a judicial definition which was to apply in every case. Nor does its adoption by a Divisional Bench in *Perera* v. *Jayawardene*, alter the true *ratio decedendi* of the decision in that case because there too, the question involved the commission of corrupt practices and the ruling of Justice Drieberg was applied to the grounds relied on in that case. (*Vide* the concluding paragraph of Justice Soertsz' judgment at page 9 of 49 N.L.R.) In *Piyasena* v. *Ratwatte*, (1965) 68 C.L.W. 41, my brother Sri Skanda Rajah, J. has demonstrated that decisions of this Court subsequent to the decisions in *Tillekewardene* v. *Obeyesekere* and *Perera* v. *Jayawardene*, have not adopted the ruling of Drieberg, J.—*vide Mohamed Mihular* v. *Nalliah*, (1944) 45 N.L.R. 251, *Ilangaratne* v. *G. E. de Silva*, (1948) 49 N.L.R. 169, and *Jeelin Silva* v. *Kularatne*, (1942) 44 N.L.R. 21. Quite recently, my brother Judges T. S. Fernando, J. Sri Skanda Rajah, J. and

* 68 C.L.W. 80

Sirimanne, J. in Election Petitions 6 of 1965 (Kolonnawa),* 21 of 1965 (Balangoda) and 37 of 1965 (Attanagalla)** respectively have accepted the view that the definition of the word 'charges' given by Justice Drieberg in *Tillekewardene* v. *Obeyesekere*, is not exhaustive .I would respectfully agree with the views of my brother Judges on this point. As T. S. Fernando, J. stated in the Kolonnawa Petition (6 of 1965), any other view is "contrary to the practice that has hitherto obtained." I am therefore unable to agree with the submission of Counsel for the petitioner that the present petition is not one in respect of which security need be tendered by the petitioner. In my view, it matters not whether the averments in an election petition may be termed charges, complaints, accusations or grounds. Every petition which contains averments seeking to set aside an election for any reason whatsoever must comply with the requirements of Rule 12 regarding security. The contention of Counsel for the petitioner, therefore, that this petition does not attract security fails.

I shall now proceed to deal with the substantial question that was argued before us, namely, whether Paragraph 6 of the petition contains one charge or several charges. If it does contain only one charge, it matters not, as far as the petitioner is concerned, whether he satisfies me that Paragraphs 4 and 5 together constitute one charge or whether they constitute two charges as conceded by Counsel for the 1st respondent. In either case the security would be sufficient.

It is not disputed that the relevant section of the Order in Council which applies to the particulars referred to in Paragraph 6 is section 77(*a*). An analysis of section 77 must be considered in order to appreciate the question that has been raised.

Section 77 is in the following terms :

"The election of a candidate as a Member shall be declared to be void on an election petition on any of the following grounds which may be proved to the satisfaction of the Election Judge, namely :-

(*a*) that by reason of general bribery, general treating, or general intimidation, or other misconduct, or other circumstances, whether similar to those before enumerated or not, the majority of electors were or may have been prevented from electing the candidate whom they preferred;

(*b*) non-compliance with the provisions of this Order relating to elections, if it appears that the election was not conducted in accordance with the principles laid down in such provisions and that such non-compliance affected the result of the election;

(*c*) that a corrupt practice or illegal practice was committed in connexion with the election by the candidate or with his knowledge or consent or by any agent of the candidate;

(*d*) that the candidate personally engaged a person as his election agent, or as a canvasser or agent, knowing that such person had within seven years previous to such engagement been found guilty of a corrupt practice by a District Court or by the report of an Election Judge;

(*e*) that the candidate was at the time of his election a person disqualified for election as a Member."

There is significant difference between Paragraphs (*a*) and (*b*) of section 77 on the one hand and Paragraphs (*c*), (*d*) and (*e*) on the other. Section 77(*a*) and (*b*) relate to the purity of the election, and section 77(*c*), (*d*) and (*e*) refer to the purity of the candidate. In the case of section 77(*c*) and (*d*), the mere proof of the relevant acts and in paragraph (*e*) the fact of disqualification, is in itself sufficient to avoid the election. In the case of paragraphs (*a*) and (*b*), not only must the petitioner establish the facts in question but he must also prove that a subsequent consequence ensued—in the one case that there was no free election and in the other that the non-compliance with the provisions of the Order in Council affected the result of the election. This has, in my view, an important bearing on the question whether section 77(*a*) constitutes one ground for the avoidance of the election or whether, as submitted by Counsel for the 1st respondent, it contains a minimum of 5 grounds which can form the basis of five separate charges—general bribery, general treating, general intimidation, other misconduct and other circumstances, whether similar to those enumerated or not. I agree with learned Crown Counsel that a relevant consideration to be taken into account is that Paragraph (*a*) and (*b*) of section 77 appear to give statutory recognition to the well-known concept of freedom of election, an infringement of which was a ground for the avoidance of an election in common law. It is a concept which has been well recognised both in England and Ceylon. This principle has been admirably stated by Lord Coleridge in the case of *Woodward* v. *Sarsons*, (1875) L.R.C.P. 733, at 743, in delivering the order of the Court when he said :

* 68 C.L. W. 75 ** 68 C.L.W. 73

"We are of opinion that the true statement is that an election is to be declared void by the common law applicable to parliamentary elections, if it was so conducted that the tribunal which is asked to avoid it is satisfied, as a matter of fact, either that there was no real electing at all, or that the election was not really conducted under the subsisting election laws. As to the first, the tribunal should be so satisfied, i.e. that there was no real electing by the constituency at all, if it were proved to its satisfaction that the constituency had not in fact had a fair and free opportunity of electing the candidate which the majority might prefer. This would certainly be so, if a majority of the electors were proved to have been prevented from recording their votes effectively according to their own preference, by general corruption or general intimidation, or by being prevented from voting by want of the machinery necessary for so voting, as, by polling stations being demolished, or not opened, or by other of the means of voting according to law not being supplied or supplied with such errors as to render the voting by means of them void, or by fraudulent counting of votes or false declaration of numbers by a returning officer, or by other such acts or mishaps. And we think the same result should follow if, by reason of any such or similar mishaps, the tribunal, without being able to say that a majority had been prevented, should be satisfied that there was reasonable ground to believe that a majority of the electors may have been prevented from electing the candidate they preferred. But, if the tribunal should only be satisfied that certain of such mishaps had occurred, but should not be satisfied either that a majority had been, or that there was reasonable ground to believe that a majority might have been, prevented from electing the candidate they preferred, then we think that the existence of such mishaps would not entitle the tribunal to declare the election void by the common law of Parliament."

The same view was expressed by Andrews, J. in the *South Meath* case (4 O'Malley and Hardcastle, 139) :

"Freedom of election is at common law absolutely essential to the validity of an election. If this freedom be prevented generally, the election is void at common law, and, in my opinion, it matters not by what means the freedom of election may have been destroyed."

It was submitted by Counsel for the 1st respondent that the principles of the common law in England have no application to our election law which is governed by our Order in Council; he cited *The Drogheda Case* (1 O'Malley and Hardcastle 252), where in England a much higher standard of propriety was expected than that required by the provisions of our Order in Council. It was held in that case that the principle of freedom of election was so deeply ingrained in England that even if nine tenths of the electorate had exercised their votes freely in favour of the successful candidate and one one tenth only were intimidated, (a matter which would not ordinarily affect the result of the election), yet it was 'of vital importance to the public weal that the remaining tenth should be able to record their votes and to express their views', and therefore the election was void. I do not think the position in Ceylon is any different. Although on certain questions of practice and procedure there are differences between the English law and our Order in Council, there appear to be no differences on questions of substantive law. Pulle, J. in *Kaleel* v. *Themis* (1956) 58 N.L.R. 396 at 400, observed that "the basic principles of our election law are borrowed from the English counterpart and where it is the intention to depart therefrom one finds express provision in the Order in Council" and the decisions of the English courts have been consistently followed as an useful guide to problems that arise under our law. It would therefore be reasonable to assume that the important concept of the free and fair election as understood in the English law formed an integral part of our election law. The language used in section 77(*a*) and (*b*) of our Order in Council seem to echo the words of Lord Coleridge in *Woodward* v. *Sarsons*; it gives a right to the electorate to give full and free expression to ventilate any grievances with regard to the election and to establish to the satisfaction of the Court that the majority of the electors, due to a variety of causes, were not able to elect the candidate of their choice. Therefore the 'charge' which is implicit in section 77(*a*) is that there has been no free and fair election and the averments in a petition which substantiate such an allegation together constitute one charge, whatever be the number of instances, acts, facts or circumstances which are relied upon in support. If the submission of Counsel for the 1st respondent is correct it would mean that for every particular contained in section 77(*a*) there should be a separate charge. It is then conceivable that a case may arise where the evidence in support of each charge, while separately considered, may fail to establish that there was a free election, the cumulative effect of all the facts may be sufficient to establish that there was no free election. If they are to be regarded as separate charges, a petitioner has to stand or fall on each charge separately considered. For instance, it is possible that the majority of electors were deprived of electing the candidate of their choice because there was general treating on a widespread scale in one part of the electorate, extensive bribery in another, unprecedented rains in another, the collapse of a bridge in some part which prevented the voters from attending the polls and the immobilisation of the means of transport on the day of the election in a section of the electorate. Each single instance taken separately may be insufficient to establish that

there was no free election, but the cumulative effect of all the circumstances taken together may be amply sufficient to satisfy a tribunal that the majority of the electors were deprived of electing the candidate of their choice. I am therefore of the view that it would be contrary to the concept of the purity of an election if a petitioner were to fail by reason of his not being permitted to rely on the cumulative effect of all the facts to show that the freedom of election was or may have been imperilled. In that view of the matter, the difficulty of construing the words 'other misconduct, or other circumstances' does not assume the same importance which they would, if they could be the subject of separate charges. The words 'other misconduct, or other circumstances, whether similar to those before enumerated or not' were obviously intended to encompass practically every situation which would affect the freedom of election. Crown Counsel, to whom I am indebted for the assistance given to me, submits that the words 'other misconduct, or other circumstances' have to be considered and read together and the clause 'whether similar to those before enumerated or not' merely excludes out of an abundance of caution, an interpretation *eiusdem generis*. He submits that the use of the words in the expression 'other misconduct' and other circumstances, apart from connotations of difference or distinction may also mean additional. When one considers the sequence of words referred to in section 77(*a*), it would appear to indicate and emphasise a comprehensive enumeration of facts of every description which may give rise to a charge that there was no free and fair election. It was argued before me at length that the particulars referred to in Paragraph 6 are vague; it was suggested by Counsel for the 1st respondent that the words 'general abuse and corrupt use of public office and of public funds, utilities and amenities, corrupt patronage and influence' may give rise to a variety of charges which may or may not come within the purview of the provisions of the Order in Council. Counsel for the petitioner on the other hand submitted that all the particulars referred to in Paragraph 6 fell within the category of 'other misconduct' in section 77(*a*). In my view, for the purpose of deciding the nature of the charge, it is unnecessary to ascertain the particular category or head of the enumerated acts so long as they come under one or other of them. No prejudice is caused thereby to the respondents because under Rule 5 it will be open to them to call for particulars from the petitioner as may be necessary to prevent surprise and unnecessary expense and to ensure a fair and effective trial.

The question whether section 77(*a*) contained one charge or more than one charge did not come up for an authoritative decision of this Court until this year. In *Piyasena* v. *Ratwatte* (supra), Sri Skanda Rajah, J. referred to two *obiter dicta* which, according to him, had taken opposite views on this question. In *Silva* v. *Karalliadda*, (1931) 33 N.L.R. 85, the respondent moved for a dismissal of the petition on the ground that the security tendered, Rs. 5,000/-, was insufficient as the petition contained six charges. The petition made charges of treating, bribery, undue influence, and conveyance of voters, in paragraph 3(*d*) the petitioner alleged "that by reason of general bribery, treating, intimidation, and other circumstances the majority of voters were prevented from voting for the candidates whom they preferred." Drieberg, J. said :

> "It was, no doubt, intended to allege the offences set out in Article 74(*a*) (presently section 77(*a*)). In my opinion the charges of general bribery, general treating, and general intimidation were distinct charges from those of bribery, treating, and undue influence in regard to ascertained and named persons dealt with in Articles 51, 52 and 53 respectively.
>
> "But apart from this there are the four distinct charges I have mentioned and the bond entered into for Rs. 5,000/- is therefore inadequate."

Although the learned Judge refers to the offences set out in section 74 (*A*) and the charges of general bribery, general treating, and undue influence, it is not clear from this passage whether he was dealing with the matters referred to in section 74(*A*) as separate charges or whether he was drawing a distinction between the 'offences' of general bribery, general treating and general intimidation and the offences of bribery, treating and undue influence dealt with in Articles 51, 52 ,and 53. The evidence needed to prove the offence of bribery under the Order in Council is different from the evidence necessary to prove general bribery. In the former case, it would be necessary to establish the ingredients of the offence as set out in the section of the Order in Council, whereas in the latter it would be sufficient to establish widespread bribery among even unascertained persons by unknown persons in one part of the electorate. The same considerations would apply to the cases of general treating and general intimidation. In the words of Mr. Justice Keogh, in the *Drogheda case* (*supra*)

"To put general intimidation upon a parallel with general bribery or general treating, it must be shown to spread over such an extent of ground, and to permeate through the community to such an extent that the tribunal considering the case is satisfied, if it be so, that freedom of election has ceased to exist in consequence."

It is possible that Drieberg, J. was therefore considering the difference between general bribery, general treating and general intimidation, and the substantive offences of bribery, treating and undue influence when he made the observation referred to earlier. Again, if Drieberg, J. is right that the particulars referred to in Article 74(*A*) are offences, the petition contained seven charges and not six, and if he took into account 'other circumstances' also as amounting to a charge, the petition would have contained eight charges. In view of these infirmities, I find it difficult to accept this *obiter* as supporting the view that section 77(*a*) contains more than one charge. On the other hand, the *obiter* of Hearne, J. in *Jeelin Silva* v. *Kularatne* (supra) definitely supports the view that section 77(*a*) contains only one charge. This is the view that found favour with Sri Skanda Rajah, J. in *Piyasena* v. *Ratwatte* (supra) and with which I would respectfully agree. I am aware that Sirimane, J. in Election Petition No. 37 of 1965 (Attanagalla)* and T. S. Fernando, J. in Election Petition No. 6 of 1965 (Kolonnawa)** have taken a contrary view, but I regret that for the reasons I have stated earlier, I am unable to accept that view as being a correct interpretation of section 77(*a*). I am therefore of the opinion, that however inelegantly drafted or inartistically worded Paragraph 6 may have been, it contains only one charge and therefore the security furnished, is adequate.

Since the question has been raised, whether Paragraphs 4 and 5 contain two charges or one, I have considered this matter and I am of the view that applying the same principles which I have done in respect of section 77(*a*), they only constitute one charge—the charge of non-compliance with the provisions of section 77(*b*). Paragraph 4 specifically refers to the non-compliance with a section of the Order in Council and Paragraph 5 is based on the decision of this Court in *Kaleel* v. *Themis* (supra) that a miscount of votes was a ground for declaring that the return of the person elected was undue. Relief on this ground is only possible by invoking the provisions of the English law under section 86 (2) of the Order in Council. Learned Counsel for the 1st respondent submitted that on the face of the petition there were two charges contained in Paragraphs 4 and 5. If it is possible to argue that Paragraph 6 discloses more than one charge, when on the face of the petition it contains only one charge, I see no reason why it should not be possible to urge on behalf of the petitioner that a combination, of two paragraphs of the petition constitute only one charge.

I am therefore of the view that the objection of the 1st respondent to the inadequacy of the security fails. I dismiss the application and direct that the 1st respondent pay the costs of the petitioner which I fix at Rs. 787/-.

Objection overruled.

* 68 C.L.W. 73. ** 68 C.L.W. 75.

IN THE COURT OF CRIMINAL APPEAL

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

THE QUEEN *vs.* M. G. CAROLIS

Appeal No. 23 *of* 1965—*S.C. No.* 73/1964.
Application No. 26 *of* 1965—*M.C. Walasmulla*, 25883.

Argued and decided on : 7th June, 1965.
Reasons on : 23rd June, 1965.

Court of Criminal Appeal—Statement from the dock—Omission to refer to a matter therein—Effect of such omission.

Held : That when an accused person makes a statement from the dock, it woud be quite unsafe to draw unfavourable inferences from such a statement, and particularly from the failure or omission of the accused to mention some matter.

D. J. Walpola (*assigned*), for the accused-appellant.

R. Abeysuriya, Crown Counsel, for the Crown.

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

The appellant in this case was charged with the murder of one M. A. Kirigoris. After trial, he was convicted of culpable homicide not amounting to murder on the basis of a sudden fight, and sentenced to five years' rigorous imprisonment. We set aside the conviction and acquitted the appellant at the conclusion of the hearing of the appeal, and now state our reasons.

There was evidence that a day or two before the incident the appellant and the deceased man had abused each other. On that occasion the appellant is said to have threatened to eat the deceased. But the verdict of the Jury that the subsequent incident was in the nature of a sudden fight showed that they were not impressed by the evidence concerning this alleged threat.

The principal prosecution witness was one Heenappu. He said that on the evening of the incident he met the deceased man on the road near the stile of the house of one Pintheris. The deceased had a club in his hand. Heenappu proceeded on the road for a distance of about eighty yards to the stile leading to his own house. There he met the appellant, who had a katty in his hand. After some conversation, Heenappu went along the path towards his house. It was dark at this time for he was flashing his torch as he went.

At this stage, Heenappu heard a remark made by the appellant—"are you coming to assault me"—and soon thereafter some other sounds. Because of the remark and the sounds, he returned to the road, and he saw there the deceased man lying injured. It was subsequently found that the deceased had a cut injury on his left forearm and another in his chest. The latter resulted in his death.

When the appellant was medically examined shortly afterwards, he was found to have injuries, including an abrasion with contusions on the left side of his chest and a superficial incised wound with contusion on his head.

The learned trial Judge directed the Jury on the importance of deciding which of the two men had first attacked the other, and on the right of the appellant to defend himself if he had been attacked first. It will be seen that the available circumstantial evidence was much in favour of the appellant. His cry "are you coming to assault me" rendered it probable that the cry preceded an imminent assault on himself; and the fact that the deceased man lay on the road with severe injury to his chest made it improbable that he could have wielded his club *after* he himself sustained injuries. The circumstances thus pointed to the inference that the injuries on the appellant had been sustained before the deceased was cut with a katty by the appellant. It would appear that the Jury accepted this sequence of events, and that is probably why they did not return a verdict of murder.

Nevertheless, the verdict indicated that the Jury did not seriously consider whether the appellant had acted in self-defence. If they had done so, it would not have been reasonable to find that the appellant exceeded the right of private defence. There was no available evidence upon which to hold that the measure of force used by the deceased was excessive in the circumstances, or that he could have protected himself without using the katty which he happened to have in his hand.

There is sufficient material on the record to explain why the Jury paid no great regard to the question of the right of private-defence. The appellant only made a statement from the dock, in which he said that the deceased had tried to assault him and that he himself ran away. According to his statement, the deceased had probably been attacked by another person (named in the statement) who had come to the scene at the time. His failure to admit in his statement that he assaulted the deceased in self-defence could well have led the Jury to suppose that he had not, in fact, acted in self-defence. But it has been shown that such a supposition would have been inconsistent with the evidence. When an accused person makes a dock statement, he is not questioned even by his own counsel. It would be quite unsafe to draw unfavourable inferences from such a statement, and particularly from the

failure or omission of the accused to mention some matter. In the present case, the failure of the appellant to state that he acted in self-defence is readily explicable on the ground that he feared to admit that he cut the deceased with his katty.

It would appear that Crown Counsel submitted to the Jury that there had been a sudden fight. This submission was merely speculative, for there was no evidence showing the probability of a sudden fight.

The verdict had to be set aside on the ground that it was unreasonable.

Accused acquitted.

ELECTION PETITION NO. 8 OF 1965.

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

PELMADULLA—ELECTORAL DISTRICT NO. 140

D. RUPASINGE *vs.* W. A. KARUNASENA

Argued on: 22*nd October*, 1965.
Delivered on: 12*th November*, 1965.

Election Petition—Allegations of publishing false statements, general intimidation, undue influence, bribery and conveying voters—All allegations except general intimidation described as having been committed by respondent himself, his agents or agent and other persons on his behalf or acting with his knowledge and/or consent.

Objection to petition that charges in alternative form vague and multifarious—Whether they disclose no charge at all or numerous charges—Prayer for striking off charges or precluding petitioner from leading evidence and for dismissal of petition on ground of inadequacy of security—Ceylon (Parliamentary Elections) Order in Council 1946, *sections* 56, 57(*a*), 58(1)(*d*), 67(3), 77(*c*) *and* 86(2)—*Failure to refer to section* 77 *and imprecise statements in petition—Effect—Election Petition Rules* 4(1)(*b*) *and* 12.

The petition challenging the election of the respondent contained the following allegations :

(1) publishing false statements of fact in relation to the character of his rival candidate within the meaning of section 58(1)(*d*) of the Ceylon (Parliamentary Elections) Order in Council, 1946.

(2) general intimidation.

(3) the corrupt practice of undue influence within the meaning of section 56 of the said Order.

(4) bribery under section 57(a) of the said Order.

(5) the illegal practice of using or employing a vehicle to convey voters in contravention of section 67(3) of the Order.

Each of the allegations in (1), (3), (4) and (5) above was stated to have been committed by the respondent by himself, his agents or agent and other persons acting on his behalf or with knowledge of consent of the respondent.

The respondent moved (*i*) that no further proceedings be had on the petition, (*ii*) that grounds 1, 3, 4 and 5 above be struck off and that the petitioner be precluded from leading any evidence thereon, and (*iii*) that the said petition be dismissed.

At the inquiry it was contended :—

(*a*) that the above charges 1, 3, 4 and 5 were vague, multifarious and general in scope and did not conform to the imperative requirements of Rule 4(1)(*b*) of the Parliamentary Election Petition Rules and that the grounds and facts relied on to sustain the prayer were not briefly stated and that they should be struck off.

(*b*) that the charges in relation to section 58(1)(*d*) and to 67(3) insofar as they related to acts of the respondent by or through others were devoid of legal meaning and disclosed no offence, because under section 58 only the person committing the offence could be guilty of it and was liable to the penalties prescribed and in the case of section 67 (3) only a person who commits or abets the offence could be guilty thereof.

(*c*) that charges under section 56 (1) and 57(*a*) in the petition disclosed no offence as they were set out in the alternative.

(*d*) that the petition referred to contraventions of particular sections relating to corrupt or illegal practices, or election offences under sections 56, 57, 58 and 67(3) read with 72(1), but failed to catch up the main section relating to the ground, *viz.* section 77(*c*) of the Order in Council, by reference to the section or by relevant content.

(*e*) that consequently there were no valid charges on which the court should proceed to inquiry; or alternatively,

(*f*) that the petition contained more charges than five and the security of Rs. 9000/- given was inadequate and the petition must therefore be dismissed.

Held : (1) That in order to enable a court to declare an election to be void on a petition under section 77(*c*) it is sufficient to prove that a corrupt practice or an illegal practice was committed in connection with the election by the candidate or with his knowledge or consent or by an agent of the candidate.

(2) That an imprecise statement such as the one used in the petition that the respondent was guilty of these offences, in that he his agents, or others with his knowledge committed these acts, while it would have affected a prosecution of the respondent for these offences, will not necessitate the deletion of these charges, as all that Rule 4(1) (*b*) requires is that the facts and grounds relied on for the prayer be briefly stated.

(3) That there is no requirement in the Order in Council or in the Rules that section 77 should be specified. It is sufficient that the complaints made should pertain to matters contemplated by section 77.

(4) That the respondent was entitled under Rule 5 to make an application to Court for the particulars of the charges alleged in order to obviate any prejudice that may be caused to him.

(5) That the submission that the charges under sections 56 and 57 having been set out in the alternative disclose no offence at all was not convincing. This method of expression is a concise way of including several complaints regarding election offences of the same species in one and the same complaint.

(6) That each of the allegations in the petition aforesaid, whether they be considered alternatively or cumulatively refer to one species of charges. Hence the security of Rs. 9,000/- is in accordance with Rule 12 of the Parliamentary Election Petition Rules.

Cases referred to : *Beal and others* v. *Smith*, 19 L.T. 565; (1869) L.R. 4 C.P. 145; 38 L.J.C.P. 145.
Tillekawardene v. *Obeysekera*, (1931) 33 N.L.R. 65 ; 1 C.L.W. 12

G. T. Samarawickrema, Q.C., with *N. Samarakoon* and *D. S. Wijewardene* for the petitioner.

E. R. S. R. Coomaraswamy with *George Rajapakse, Prins Gunasekera, H. Ismail* and *S.S. Sahabandu* for the respondent.

G. P. A. SILVA, J.

The petitioner in this case sought by his petition dated 10th April, 1965, to challenge the election of the respondent, Wanni Arachchige Karunasena, as a Member of Parliament for the Pelmadulla Electoral District. The grounds urged in the petition were :-

(1) that the said Wanni Arachchige Karunasena, the respondent abovenamed, was by himself, his agents or agent and other persons on his behalf acting with the knowledge and/or consent of the said respondent, guilty in terms of Article 58 (1)(*d*) of the Ceylon (Parliamentary Elections) Order-in-Council of the corrupt practice of making and publishing before the said election false statements of fact in relation to the personal character and/or conduct of a candidate in that he had/or they made and published before the said election false statements of fact in relation to the personal character and/or conduct of Mrs. Sita Molamure Seneviratne, a candidate at the said election for the purpose of affecting the return of the said candidate, and that the said election and return of the said Wanni Arachchige Karunasena, is therefore wholly null and void;

(2) that by reason of general intimidation, the majority of the electors were or may have been prevented from electing the candidate whom they preferred and that the said election and return of the said Wanni Arachchige Karunasena, is therefore wholly null and void;

(3) that the said Wanni Arachchige Karunasena, the respondent abovenamed, was by himself, his agents or agent, and other persons acting with the knowledge and/or consent of the said respondent guilty of the corrupt practice of undue influence in terms of Article 56 of the said Order-in-Council in that before and during the elections he and/or they made use of and threatened to make use of force, violence and/or restraint and inflicted and/or threatened to inflict injury,

damage and/or harm on persons in order to induce or compel such persons to vote or to refrain from voting at the said election and that the said election and return of the said respondent, is therefore wholly null and void;

(4) that the said Wanni Arachchige Karunasena, the respondent abovenamed, was by himself, his agents or agent and other persons acting with the knowledge and/or consent of the said respondent guilty in terms of Article 57 (*a*) of the said Order-in-Council of the corrupt practice of bribery in that he and/or they gave and/or agreed to give and/or offered and/or promised money and/or valuable consideration to electors in order to induce them to vote or to refrain from voting at the said election and that the said election and return of the respondent, is therefore wholly null and void.

(5) that the said respondent is guilty of an illegal practice in that he knowingly contravened Article 67 (3) of the said Order-in-Council by himself and/or by his agents or agent and/or by other persons acting with his knowledge and/or consent using and/or employing a vehicle to convey voters to and from the poll during the said election and that the said election and return of the said respondent is, therefore wholly null and void.

By his motion dated 30th September, 1965, supported by an affidavit, the respondent moved this court for an order directing, *inter alia* :-

(*a*) (*i*) that no further proceedings be had on the petition;

(*ii*) that paragraphs (*iii*), (*v*), (*vi*) and (*vii*) (which correspond to the grounds 1, 3, 4 and 5 stated above) be struck off or that the petitioner be precluded from leading any evidence thereon;

(*b*) that the said petition be dismissed.

The grounds urged in support of the motion were :-

(*i*) that the petition contained more than five charges and that the security of Rs. 9,000/- given by the petitioner was inadequate and not in accordance with the provisions of Rule 12 (2) of the Parliamentary Election Petition Rules, 1946;

(*ii*) that the charges in paragraphs (*iii*), (*v*), (*vi*) and (*vii*) were vague, multifarious and general in scope and did not conform to the imperative requirements of Rule 4 (1) (*b*) of the Parliamentary Election Petition Rules inasmuch as the facts and the grounds relied on to sustain the prayer are not briefly stated and that each of these paragraphs contained a multiplicity of vague charges and should be struck off.

At the argument during the inquiry into the motion the submission made by the respondent's counsel was "that the petitioner has, in his petition, not appreciated the distinction between sections 58 (1)(*d*) and 67 (3) of the Ceylon (Parliamentary Elections) Order-in-Council on the one hand and sections 56 (1) and 57 (*a*) on the other regarding the vicarious liability of a candidate through others and that he had, therefore, framed the charges in relation to all the four above mentioned sections in the same manner." Even though this submission does not appear to have been envisaged in the grounds urged in the motion for a dismissal of the petition I permitted counsel to advance it. Based on this submission he developed his argument that "the charges in relation to sections 58 (1)(*d*) and 67 (3), insofar as they referred to acts of the respondent by or through others were devoid of legal meaning." He further submitted that the petition referred to contraventions of particular sections relating to corrupt or illegal practices or election offences under sections 56, 57, 58 and 67 (3) read with section 72 (*i*) but failed to catch up the main section relating to the ground, namely, section 77 (*c*) either by reference to the section or by relevant content."

There are many limbs to this argument. The first of them proceeds on the footing that in order to constitute an election offence under section 58 (1)(*d*) a person should by himself make or publish a false statement of fact in relation to the personal character or conduct of a candidate and under section 67 (3) a person, whether he be a candidate or anyone else, should by himself commit the offence of, *inter alia*, employing or using a vehicle for the purpose of conveying any voters to or from the poll or at least aid or abet any other person to do so. This contention can best be appreciated on a comparison of sections 58 (1) (*d*) and 67 (3) on the one hand with sections 55, 56 and 57 on the other. Under section 58, only the person committing the offence can be guilty of it and is liable to the penalties prescribed in sections 58 (1) or 58 (2) and in the case of section 67 (3), only a person who commits or abets the offence can be guilty thereof. Under sections 55, 56 and 57, however, a person can be guilty of committing the offences referred to in those sections either directly or indirectly, whether he commits it himself or commits it by any other person on his behalf. There is therefore much force in this contention of counsel.

The second, which flows from the first, is that when two of the charges allege :-

(*i*) that the respondent was, by himself, his agents or agent and other persons on his behalf acting with the knowledge and/or consent of the said respondent, guilty in terms of Article 58 (1)(*d*) of the Order-in-Council of the corrupt practice of making and publishing before the election false statements of fact in relation to the personal character and/or conduct of a candidate;

and (*ii*) that the respondent was guilty of an illegal practice, in that he knowingly contravened Article 67 (3) of the Order-in-Council by himself and/or by his agents or agent and/or by other persons acting with his knowledge and/or consent using and/or employing a vehicle to convey voters to and from the poll, etc.;

no offence known to the Order-in-Council was committed by him, insofar as these two charges related to the commission of an election offence through agents and others. There is soundness in this argument and it is easy to see that this second limb follows as a necessary corollary to the first. In other words, that portion of the charge which attributed guilt of an election offence to the candidate by reason of an act committed by him through an agent or through others acting with his knowledge or consent, disclosed no offence. The force of this argument, however, is limited to certain purposes under the Act. If a candidate is charged with the offence of making or publishing, before or during any election, for the purpose of affecting the return of any candidate, any false statement of fact in relation to the personal character or conduct of such candidate punishable under section 58 of the Ceylon (Parliamentary Elections) Order-in-Council, he cannot be convicted of the said offence if the evidence only proved that, in fact, it is his agent or any other person with his knowledge who committed it. Similarly, if a candidate is charged with employing or using any vehicle for the purpose of conveying any voters to or from the poll under section 67 (3) read with section 72 (1) he cannot be convicted if the only evidence is that an agent or someone else with the knowledge of the candidate committed it. In view of the provisions of section 67 (3) there must be evidence that he himself committed it or that he at least abetted it. But when an election is challenged on the ground that candidate or an agent or any other person with the candidate's knowledge committed it, different considerations would apply.

In order to enable a court to declare an election to be void on a petition in terms of section 77 (*c*) so far as it is relevant to the present question, it is sufficient to prove that a corrupt practice or an illegal practice was committed in connection with the election by the candidate or with his knowledge or consent or by an agent of the candidate. The proof that is required, therefore, is that a corrupt practice or an illegal practice was committed by the candidate or with his knowledge or consent or by an agent of the candidate. It is thus not necessary for this purpose that the candidate should himself commit an election offence and a complaint can be made to court by a petition that the candidate commited an election offence or that an agent committed such an offence, or that some other person with the candidate's knowledge or consent committed such an offence.

It is useful, in this connection, to consider also the form of an election petition. While Rule 4 gives an indication of the contents and the form of an election petition it does not prescribe a particular form. If one, therefore, considers the absence of a specific form as a *casus omissus*, section 86 (2) of the Order-in-Council would enable one to have recourse to the procedure or practice followed in England on this matter so far as it is not inconsistent with the Order-in-Council or any such Rule or Act of Parliament and is suitable for application to this Island. One is, therefore, entitled to adopt the form used in England for this purpose provided that it complies with the requirements of section 86 (2). Mr. Samarawickrema for the petitioner has pointed out that this form has been approved as being appropriate to us by a judgment of this court (33 New Law Reports, page 65) pronounced at a time when the rules applicable were attached to the Order-in-Council dealing with State Council Elections which too permitted recourse to the English procedure and practice whenever such procedure and practice were not provided for by the Order. As the Rules relevant to this matter under that Order-in-Council were identically the same as the Rules under consideration and, as this form of charges is permitted in that form, I think we are justified in adopting that form which is set out at page 523 in Rogers on Elections, 20th Edition, Volume II. That this form has been followed in election petitions filed in England is also to be gathered from the judgment in the case of *Beal and others* v. *Smith*, reported in 19 Law Times Reports (1868-1869) at page 565. An imprecise statement such as the one used in the petition that the *respondent was guilty* of these offences in that he, his agents or others with his knowledge committed these acts, while it would have affected a prosecution of the respondent for these offences as I have stated

earlier, will not, in my view, necessitate the deletion of these charges as all that Rule 4 (1) *b* requires is that the facts and grounds relied on for the prayer be briefly stated. There is no requirement in the Order or in the Rules that section 77 should be specified. It is sufficient that the complaints made should pertain to matters contemplated by section 77. It seems to me that the petition has complied with this requirement. The respondent is entitled under Rule 5 to make an application to this court for the particulars of the charges alleged in order to obviate any prejudice that may be caused to him and the court will order the necessary particulars to prevent surprise.

A further submission of counsel, which applies to the charges relating to sections 56 and 57 as well, is that, the charges being in the alternative, no offence is disclosed at all. This argument does not appeal to me as convincing. This method of expression is a concise way of including several complaints of election offences of the same species in one and the same complaint. If it is amplified it would read thus :-

(*i*) that the respondent was guilty of an illegal practice in that he did use or employ etc.;

(*ii*) that, in the alternative, his agents did use or employ etc.;

(*iii*) that, in the alternative, certain persons on his behalf and acting with his knowledge and consent did use or employ etc.;

The submission of counsel put forward as an alternative to the one last mentioned is the one relied on by him to support his main contention in regard to the insufficiency of security in view of the multiplicity of charges. According to this argument each of the paragraphs (*iii*), (*v*), (*vi*) and (*vii*) in the petition contains a multiplicity of charges and the security of Rs. 9,000/- by the petitioner, being only sufficient for five charges according to Rule 12 (2), the court is obliged in terms of the provisions of Rule 12 (3) to order the dismissal of the petition.

I cannot help feeling that the alternative nature of this argument considerably weakens it. For, it concedes that, paragraphs (*iii*), (*v*), (*vi*) and (*vii*), far from disclosing no charge at all disclose a multiplicity of charges. For, if they do not disclose any charges the petition remains only with one charge, in which event, there is no question of insufficiency of the security deposited. I shall however, proceed to consider this matter on the, basis that each ground urged in the above paragraphs contains more than one charge or more than one act of :-

(*a*) making or publishing false statements of fact;

(*b*) undue influence;

(*c*) bribery;

(*d*) using or employing a vehicle to convey voters to and from the poll;

The question that arises for decision here is whether several instances of the same species of election offence constitute a different charge which would necessitate additional security amounting to Rs. 2,000/- in respect of each additional charge in excess of three in terms of the provisions of Rule 12 (2).

In a series of cases which have been cited by both counsel this question has been the subject of judicial interpretation for over two decades in Ceylon since the introduction of the Donoughmore Constitution which preceded the State Council. In one of the earliest cases—*Tillekawardene* v. *Obeysekera*—reported in 33 New Law Reports, page 65, it was held that the word "charge" may be applied to the offence stated in the petition and also to each act constituting the offence. That case too dealt with a motion by the respondent that the election petition be dismissed on the ground that the security of Rs. 5,000/- given was inadequate as there were more than three charges. It was contended for the respondent in that case that the charge of bribery contained 17 cases of bribery, that the charge of conveyance of voters contained at least 14 offences. Drieberg, J. went on to say, "In my opinion by the word 'charges' in Rule 12 (2) is meant the various forms of misconduct coming under the description of corrupt and illegal practices; for example, whatever may be the number of acts of bribery sought to be proved against a respondent the charge to be laid against him in a petition is one of bribery. The fact that security here has to depend on the number of matters submitted for inquiry in the petition does not compel us to adopt a different view of what these matters are from what is accepted in practice in England nor does it necessitate any departure from what an election petition should state. The matters on which the petitioner prays for inquiry are that the respondent has committed the offences of bribery, treating and conveying of voters, and so far as the petition is concerned each constitutes a charge against the respondent. The word 'charge' can be applied to the offence

stated in the petition and also to each act constituting the offence though the latter are more often referred to in the reports as 'cases' or 'instances' of the offence." This is a judgment, the reasoning and the decision of which have commended themselves to a number of distinguished Judges of this court and with which I find no difficulty to agree.

It is a well-known rule of interpretation that if a particular provision of an enactment is judicially interpreted and the same provision is thereafter re-enacted, the legislature intended to give to this provision the interpretation given by court prior to the re-enactment. On this rule of interpretation it is reasonable to think that the legislature in re-enacting the same provisions in the Order-in-Council, 1946, as in the Ceylon (State Council) Elections Order-in-Council as to the quantum of security had in mind the interpretation given by the court in the case referred to.

A conspicuous feature in the petition filed in the instant case is that it sets out five types of charges in the five paragraphs urged in support of the prayer to set aside the election. They are briefly :-

(*i*) corrupt practice of making and publishing false statements regarding the personal character of a candidate—(para *iii*);

(*ii*) general intimidation—(para *iv*);

(*iii*) corrupt practice of undue influence—(para *v*);

(*iv*) bribery—(para *vi*);

(*v*) illegal practice of using or employing a vehicle to convey voters—(para *vii*);

The submission of counsel for the petitioner is that the principle to be gathered from the long line of consistent decisions commencing from the judgment of Drieberg, J. is that so long as any number of complaints forms one species of charges this is to be considered as one charge and not a number of them. This is a submission which has merit. The allegations in each paragraph of the petition whether they be considered alternatively or cumulatively refer to one species of charges. There being only five of them, I hold that the security of Rs. 9,000/- given by the petitioner is in accordance with the provisions of Rule 12.

For these reasons, I dismiss the motion of the respondent with costs which I fix at Rs. 787/50.

Motion refused.

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

VINTHURA SILVAGE GUNADASA SILVA *vs.* A. P. JAYASURIYA & ANOTHER*

In the matter of an application for a Mandate in the nature of a Writ of Certiorari in terms of Section 42 *of the Courts Ordinance No.* 1 *of* 1889 *Vol.* 1 *Cap.* 6 *of the Revised Legislative Enactments of Ceylon* (1956).

S.C. Application No. 191/65.

Argued on : 26th August 1965.
Decided on : 3rd September 1965.

Writ of Certiorari—Order made by Minister under section 184 *of the Urban Councils Ordinance removing Chairman from office—Effect of such order—Deposed Chairman deprived of electoral rights—Is it a Judicial or Administrative order—Adequacy of notice of inquiry and other opportunities to make his defence—Minister's right to disagree with explanations of petitioner—Local Authorities (Elections) Ordinance, section* 9 (3) (*c*).

In this application for a Writ of Certiorari the petitioner prayed for the quashing of an Order made by the Minister of Local Government under section 184 of the Urban Councils Ordinance removing the petitioner from the office of Chairman of an Urban Council.

It was argued on his behalf that as one consequence of the said Order was that the deposed Chairman was disqualified for a period of five years (under section 9(3) (c) of the Local Authorities (Elections) Ordinance) from being elected as, or voting at any election of a Senator, or Member of Parliament or a member of any local authority, the Order itself was

* For Sinhala translation, see Sinhala section, Vol. 11 part 3, p. 9.

one made in the exercise of judicial power and that a decision on this application should therefore be deferred until the decision by a bench of five judges to whom a similar question had already been referred.

Held : That in so far as the Order had the effect of removal of the Chairman from office, the Minister was duly empowered to make it under section 184 of the said Ordinance, being essentially an administrative order. In regard to the effect of the Order on his electoral and voting rights he could take any steps as he may be advised.

It was contended further on his behalf that—

(*a*) the petitioner was not given due notice of the inquiry into the petitions alleging maladministration on the part of the petitioner, as he was informed only on 27th of April, that the inquiry would be commenced on the next day—28th April 1964.

(*b*) that the Inquiring Officer stated that the inquiry was only a preliminary one and that the petitioner had no fair opportunity to defend himself as he expected that there would be a subsequent investigation.

(*c*) that the petitioner had no proper opportunity when called upon by the Minister to show cause against the order of removal and that the Minister had failed to consider the explanations furnished.

(*d*) that he was denied an opportunity by the Minister to produce the Council's files in his defence.

Held further : (1) That as the petitioner had been previously furnished with a report on the two petitions against him and as the inquiry continued on 29th April, 8th May, 13th May and and as evident from the proceedings, he had ample opportunity to present his side of the case before the inquiry terminated.

(2) That, there was no reason to doubt the good faith of the inquiring officer, and the record of the proceedings showed that the petitioner was aware that the purpose of the inquiry was to ascertain the truth of the allegations and he must reasonably have known that any explanation he had to offer would be entertained and considered. The record showed that at various stages that petitioner made statements, questioned witnesses and referred to files and no application had been made for a lawyer to represent him.

(3) That, the Minister was entitled to disagree with the explanations furnished by the petitioner in reply to the former's letter setting out in full detail the grounds for removal, and that it would be unreasonable for the Court to suppose that these explanations were not considered by the Minister before he made the Order for removal.

(4) That if the Minister was entitled to hold the petitioner guilty of maladministration because he had failed to maintain adequate supervision over the performance of the duties of the Council's officers, nothing in the Council file would serve to negative the charge of maladministration. Also, that if the production of these files could have assisted the petitioner, he had ample opportunity to produce them during the investigation.

H. W. Jayawardene, Q.C., with *Lakshman Kadirgamar*, for the petitioner.

Nimal Senanayake, for the 1st respondent.

R. S. Wanasundere, Crown Counsel, for the 2nd respondent.

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

This is an application to quash an Order, made by the Minister of Local Government and published in the Gazette of February 12th 1965, in purported pursuance of section 184 of the Urban Councils Ordinance, removing from office the Chairman of an Urban Council.

One consequence of the Order is that, by reason of Section 9 (3) (c) of the Local Authorities (Elections) Ordinance (Cap. 262), the deposed Chairman becomes disqualified for a period or five years from being elected as, or voting at any election of, a Senator or Member of Parliament or a member of any local authority. Counsel for the petitioner has argued that, because such a disqualification follows upon the Order for removal from the office of Chairman, the Order itself is one made in the exercise of judicial power; for that reason, he invited me to defer a decision in this application until a bench of five Judges of the Court renders its decisions in a series of cases in which is involved the question of the validity of orders made by certain tribunals not appointed by the Judicial Service Commission.

Counsel has to concede that an Order under section 184, *simpliciter*, is a purely administrative one referable to the intention of the Legislature that the Minister is entrusted with the supervision of the administration of local

authorities and with the executive power to be exercised in the course of such supervision. This being in my opinion the dominant purpose of section 184, an order under, that section is essentially an administrative order properly within the functions of the Minister. Even if it be correct that the disqualification created by section 9 (3) (c) of the Local Authorities (Elections) Ordinance can legally attach only to an order made by the holder of a judicial office, the validity of the Order for removal from the office of Chairman is not thereby impaired. In so far, therefore, as the Order has the effect of removal from office, I must hold that the Minister was duly empowered to make it. The petitioner can take such steps as he may be advised to do if it is thought that the Minister's Order cannot deprive him of electoral and voting rights.

To turn now to the facts of this case, petitions alleging maladministration on the part of the present petitioner, as Chairman of the Urban Council, was received by the Commissioner of Local Government. These were referred in April 1964 to the petitioner for his explanations, which he duly furnished. The documents show that by an order made on 26th April 1964, an Assistant Commissioner of Local Government was directed to hold an inquiry into the *allegations* in the petitions. The Assistant Commissioner decided to commence his inquiry on 28th April 1964. There is in the affidavits some conflict of testimony regarding the day on which the petitioner was informed of the date of the inquiry. But even if it be correct that (as he avers) he was only thus informed on 27th April, the point is not in my opinion material, for the inquiry continued on 29th April, 8th May, 13th May and 16th May; so that he had ample opportunity to present his side of the case before the inquiry terminated, even if he was unprepared when the inquiry commenced on 28th April. I note in this connection that his report on the two petitions had previously been furnished, and that he was therefore not previously unaware of the allegations which had been made against him.

On 28th April, 1965, the Assistant Commissioner held two sessions. At the commencement of the morning session, he recorded the "charges" made in one of the petitions. At the commencement of the afternoon sessions he recorded the "allegations" made in the second petition. On each occasion there were present the Chairman and the signatories to the petition under consideration. There is no averment in the affidavit of the Assistant Commissioner that the petitioner was made aware of the precise "charges" and "allegations" which were recorded; but it is reasonable to assume, in the absence of any contrary averment at this stage, that the inquiring officer did announce, at least for the benefit of the "accusers", the accusations which were to be the subject of his inquiry. I have no doubt that the present petitioner was thus made aware of the precise grounds of maladministration to which the inquiry related.

Counsel relied strongly on an averment by the petitioner that the inquiring officer had stated that the inquiry was only a preliminary one. The inquiring officer admits in his affidavit that *he may have made* such a statement. Counsel has therefore argued that, although the petitioner did have an opportunity at the inquiry to defend himself against the charges under investigation, it was not a *fair* opportunity, because the petitioner was led to expect that there would be a subsequent investigation. This point has certainly caused me some anxiety, which however is very nearly dispelled by circumstances to which I am about to refer.

The record of the proceedings on 8th May 1964 commences with a note of a question put by the petitioner to the inquiring officer, in answer to which the latter stated that the purpose of the inquiry was to find out whether there was any truth in the allegations made against the petitioner and whether there had been other instances of maladministration. According to this note, the inquiring officer had on an earlier occasion informed the petitioner to the same effect. I have no reason to doubt the good faith of the inquiring officer, who conducted the investigations on the orders of his superior, who maintained what appears to be a careful record of the investigation, and who thereafter submitted a report running into fifteen closely typed pages. If, as I must hold, the petitioner was aware that the purpose of the inquiry was to ascertain the truth of the allegations (indeed the inquiry was otherwise without purpose), then he must reasonably have known that any explanations he had to offer would be entertained and considered. The inquiring officer's report states that, in the case of all but two of the witnesses, the petitioner had the right to cross-examine, and the record shows that at various stages the petitioner made statements, questioned witnesses, and referred to files. Counsel's submission that the petitioner was not represented by lawyers at the inquiry is of

little force in view of the fact that no application appears to have been made by the petitioner for a lawyer to represent him. What natural justice required was that the petitioner should have had an opportunity to defend himself. His case, at its highest, can only be that, because of some misunderstanding on his part, he did not take full advantage of the opportunity which was in fact afforded to him.

By the Minister's letter of 9th December 1964 the petitioner was called upon to show cause why he should not be removed from office. The grounds for removal were set out in full detail. In regard to two at least of these grounds, the omissions allegedly constituting maladministration were not denied by the petitioner in his reply to the Minister; but he explained that the Chairman should not be held responsible for those omissions, which had arisen through the fault of the Council's officers. The Minister presumably did not agree with that explanation, and in my opinion the Minister was entitled to so disagree.

The petitioner's reply to the Minister's letter of 9th December contains explanations regarding very many of the grounds for the removal specified by the Minister. It would be unreasonable for me to suppose that these explanations were not considered by the Minister before he made the Order of removal on 21st February 1965. Here again, therefore, the petitioner was given an opportunity to defend himself before the Order of removal was made.

Finally, there was the submission that, in his reply to the Minister, the petitioner requested an opportunity to produce the Council's files in his defence, but was not allowed that opportunity. It seems to me that, in regard to at least some of the grounds for removal, production of files would have been of no avail to the petitioner; if, on grounds of policy, the Minister was entitled (as I think he was) to hold the Chairman guilty of maladministration because he had failed to maintain adequate supervision over the performance of the duties of the Council's officers, nothing in any Council file could serve to negative the charge of maladministration. Moreover, if the production of the Council's files could have assisted the petitioner, he had ample opportunity to produce them during the investigation which was conducted on five dates of inquiry.

The application is dismissed, with costs fixed at Rs. 315 payable to the first respondent.

Application dismissed.

Present : **Sansoni, C. J., T. S. Fernando, J., Abeyesundere, J., Sri Skanda Rajah, J. and G. P. A. Silva, J.**

R. RASAH & OTHERS *vs.* M. THAMBIPILLAI

S.C. No. 414/62 *(F)—D.C. Point Pedro Case No.* 6611/*P.*

Argued on : 27th and 28th October, 1965.
Decided on : 7th December, 1965.

Partition action—Failure to register action duly as a lis pendens under Registration of Documents Ordinance—Effect on interlocutory decree—Partition Act, sections 13 (1), 26, 36, 48, 49 *and* 70 (1).

Held : By Sansoni, C. J., T. S. Fernando, J, Abeyesundere, J. (Sri Skanda Rajah J, and G. P. A. Silva J. dissenting)

(1) That the effect of the failure to register an action under the Partition Act duly as a *lis pendens* under the Registration of Documents Ordinance is not to render an interlocutory decree invalid, but to deprive the decree of its final and conclusive effect as against a stranger to the action claiming an interest independently of the decree. He is not bound by it and is free to attack it as being incorrect when it defines the rights of the parties.

(2) That registration of an action as a *lis pendens* under the Registration of Documents Ordinance (as required by section 13(1)of the Partition Act)does not mean registration in accordance with all the provisions of that Ordinance, since due registration is not required by the said section 13 (1).

Per G. P. A. SILVA, J. (dissenting)—" The only reasonable view, therefore, seems to me to interpret the section in a way that will not lead to such a situation. This situation will not arise if it is construed that an interlocutory decree which is entered without due registration of the *lis pendens* is not the interlocutory decree which is in the contemplation of section 70 (1). Such a construction is, to my mind, not based on an argument of convenience but on the special

provision contained in section 48 (3). Obvious as it may seem, chronologically too, section 48 precedes section 70 and the latter has, therefore, to be read subject not only to the main provision but also to the exception contained in the former. To refrain from doing so will be to ignore the exceptional circumstances provided for in section 48 (3) and to leave the person who is protected by this sub-section with only the feeling of satisfaction that the interlocutory decree does not have the conclusive effect so far as he is concerned but without any direction by the legislature as to what step he should or can take to retrieve his position after his lands have been apportioned in divided lots among his original co-owners by a decree of court. It has to be borne in mind that the remedies available to him are not those specifically provided by law but only those which have been judicially interpreted as possible remedies. The judgment referred to earlier and the judgment in the case of *Odiris Appuhamy vs. Caroline Nona*, reported in 66 New Law Reports, page 241, which have decided that a person coming within the exceptions in section 48 (3) can bring a separate action, does not base such a right on a specific provision of law. A person who comes within the exception to section 48 (3) should, therefore, be allowed to intervene at any stage and the District Judge would have the power to set aside the interlocutory decree entered by him for this purpose because it ceases to be an interlocutory decree."

Cases referred to : *Noris* v. *Charles*, (1961) 63 N.L.R. 501
Odiris Appuhamy v. *Caroline Nona*, (1964) 66 N.L.R. 241

C. Ranganathan, Q.C., with *K. Thevarajah* for the intervenients-appellants.

V. Arulambalam, for the plaintiff-respondent.

SANSONI, C. J.

The question arising on this appeal is the effect, on an interlocutory decree entered in a partition action, of the failure to register the action duly as a *lis pendens* under the Registration of Documents Ordinance. The appellants petitioned the District Court to quash all the proceedings on this ground, but the District Judge held that once interlocutory decree had been entered no such relief could be given to them and dismissed their application.

In two cases decided recently it was held that even if the *lis pendens* had not been duly registered, the interlocutory decree entered under section 26 and the final decree entered under section 36 cannot be set aside. The cases are—*Noris v. Charles* (1961) 63 N.L.R. 501, and *Odiris Appuhamy v. Caroline Nona* (1964) 66 N.L.R. 241. According to these decisions there can be no intervention by a stranger to the action who pleads such a defect in the registration. The former decision does not refer to section 70 of the Partition Act, Cap. 69, but the latter does.

Section 70 (1) provides that the Court may at any time before interlocutory decree is entered add as a party to the action—

(*a*) any person who, in the opinion of the court, should be, or should have been, made a party to the action, or

(b) any person who, claiming an interest in the land, applies to be added as a party to the action.

The effect of this provision is that no intervention can be permitted at any stage after interlocutory decree has been entered.

The argument for the appellants is that the interlocutory decree does not exist so far as they are concerned, and therefore section 70 does not apply. The reasoning on which this argument is based is that where the action has not been duly registered as a *lis pendens*, the appellants are entitled under section 48 (3) to say that there is no valid interlocutory decree.

To consider this argument one must have regard to the whole of section 48. Section 48 (1) reads:—

"Save as provided in sub-section (3) of this section, the interlocutory decree entered under section 26 and the final decree of partition entered under section 36 shall, subject to the decision on any appeal which may be preferred therefrom, be good and sufficient evidence of the title of any person as to any right, share or interest awarded therein to him and be final and conclusive for all purposes against all persons whomsoever, whatever right, title or interest they have, or claim to have, to or in the land to which such decrees relate and notwithstanding any omission or defect of procedure or in the proof of title adduced before the court or the fact that all persons concerned are not parties to the partition action; and the right, share or interest awarded by any such decree shall be free from all encumbrances whatsoever other than those specified in that decree."

I omit the definition of "encumbrance" which follows, as it has no bearing on the matter under consideration.

Subsection (3) provides that neither the interlocutory decree nor the final decree shall have the final and conclusive effect given to it by sub-section (1) "as against a person who, not having been a party to the partition action, claims any such right, title or interest to or in the land or any portion of the land to which the decree relates as is not directly or remotely derived from the decree

if, but only if, he proves that the decree has been entered by a court without competent jurisdiction or that the partition action has not been duly registered under the Registration of Document Ordinance as a *lis pendens.*"

Subsection (2) is not relevant to the question at issue and I need not consider it.

The terms of the relevant subsections show that whether a decree has been entered in a court of competent jurisdiction or not, and whether the action has been duly registered as a *lis pendens* or not, the only effect of any omission or defect in these respects is to deprive the decree of its final and conclusive effect as against a stranger to the action claiming an interest independently of the decree. He is not bound by it and is free to attack it as being incorrect when it defines the rights of the parties.

There is nothing in section 48 or any other section of the Act to support the argument that a decree which has either of the two flaws mentioned in section 48 (3) is invalid. On the contrary, the provision in section 48 (1) that "the decree shall be good and sufficient evidence of the title of any person as to any right, share or interest awarded therein to him", is deliberately left unaffected. The decree is still to be treated as being in force, and effective, though it is not final and conclusive against the particular persons just mentioned.

Mr. Ranganathan then sought to equate the wrong registration of a *lis pendens* with the non-service of summons on a party to the action, by arguing that each constitutes a failure to take an essential step in procedure. Even if it be conceded that the correct registration of a *lis pendens* is an essential step in procedure which the Proctor for the plaintiff, and perhaps also the Proctros for the defendants, should seek to ensure, a wrong registration is still nothing more than an omission or defect of procedure such as section 48 (1) specially provides for. It is in no way to be compared with the non-service of summons on a party, for that has always been recognised as offending the first principle of justice, which requires that a party is entitled to be summoned and to be heard.

It is impossible to overlook, in this connection, the repeal of section 12 of the Registration of Documents Ordinance, Cap. 101 by the Partition Act. Section 12 had laid down that "a precept or order for the service of summons in a partition action shall not be issued unless and until the action has been duly registered as a *lis pendens.*"

We have now the much less stringent provision in section 13 (1) of the Partition Act that "where the court is satisfied that a partition action has been registered as a *lis pendens* under the Registration of Documents Ordinance" it shall order that summonses etc. shall be issued to the Fiscal. The Legislature cannot have overlooked the wording of the earlier provision, or inadvertently failed to provide for due registration if that was intended. Furthermore, the Partition Act itself shows that when due registration is necessary it says so in express terms. For sections 51 and 67 speak of due registration, and the omission of that requirement in section 13 (1) is significant.

Finally, Mr. Ranganathan who laid stress on the word "under" argued that an interlocutory decree entered under section 26 and a final decree entered under section 36 can only mean decrees which are regular in the sense that they have been entered after all the requirements of the Act have been obeyed, and that they are valid not merely in form but in substance. This argument cannot be sustained in view of the very terms of section 48 (1) which contemplate decrees entered despite omissions or defects of procedure, or inadequate proof of title, or non-joinder of parties who had an interest in the land. For the same reason I would hold that registration of an action as a lis pendens *under* the Registration of Documents Ordinance (as required by section 13 (1), does not mean registration in accordance with all the provisions of that Ordinance, since due registration is not required by section 13 (1).

Before I conclude I ought to say that my judgment dated 3rd February 1961 in S.C. 74—D.C.

(Inty.) Colombo 8116/P, which was not followed in the two later judgments which I have cited, must be treated as wrong and is now overruled.

I would dismiss this appeal with costs.

T. S. FERNANDO, J.
I agree.

ABEYESUNDERE, J.
I agree.

SRI SKANDA RAJAH, J.

After careful consideration of the arguments submitted to us from the Bar and the judgment of My Lord the Chief Justice I am confirmed in the view to which I ventured to give expression in the dissenting judgment in the Divisional Bench case of *Odiris Appuhamy v. Caroline Nona:* 66 N.L.R. 241 at 244.

The appeal should be allowed with costs.

G. P. A. SILVA, J.

It is with regret that I find myself in disagreement with the judgment of my Lord The Chief Justice and the other Judges who have concurred in it. As the facts are already set out in the main judgment I propose to state below my views on certain aspects of the law which persuade me to take a decision different from the one reached by the majority of this court.

The entire question at issue revolves round section 48 and 70 of the Partition Act. Sub-section (1) of section 48 sets out in strong terminology the finality attaching to an interlocutory and final decree in a partition case filed under this Act, subject to the exception contained in sub-section (3). Sub-section (2) seeks to fortify this finality by expressly removing the exceptional circumstances in section 44 of the Evidence Ordinance which would ordinarily affect the finality of any other judgment. Sub-section (3) , which is in the following terms, sets out the exceptional case referred to in sub-section (1):—

> " The interlocutory decree or the final decree of partition entered in a partition action shall not have the final and conclusive effect given to it by sub-section (1) of this section as against a person who, not having been a party to the partition action, claims any such right, title or interest to or in the land or any portion of the land to which the decree relates as is not directly or remotely derived from the decree if, but only if, he proves that the decree has been entered by a court without competent jurisdiction or that the partition action has not been duly registered under the Registration of Documents Ordinance as a *lis pendens* affecting such land. "

On an analysis of this sub-section the conditions which would prevent an interlocutory decree from having that final and conclusive effect are:—

(i) the person to be affected should not have been a party to the partition action,

(ii) he should claim any such right, title or interest to or in the land or any portion of the land to which the decree relates as is not directly or remotely derived from the decree and

(iii) he should prove that the decree has been entered by a court without competent jurisdiction or that the partition action has not been duly registered under the Registration of Documents Ordinance as a lis pendens.

There being no dispute as to the existence of any of these conditions in the instant case, I shall proceed to examine the question on the basis that the appellant in this case fulfilled these conditions and was, therefore, qualified to be a person to whom the final and conclusive effect of the interlocutory decree did not attach. If one pauses to consider what the resulting position will be, one will see that the law intended that such a person should not be adversely affected. The only reasonable way in which his right, title or interest to or in the land can be preserved will, in my view, be by permitting him to intervene. If any other view is taken such as that the party aggrieved should be entitled to assert his rights as against a holder of a decree in any steps which are sought to be taken under it, it can lead to results which are far from reasonable. In *Noris vs. Charles*, reported in 63 New Law Reports, page 501, Sinnetamby, J. stated in the course of his judgment at page 503 as follows:—

" A person who was not a party to the partition action is not bound by the interlocutory decree if the *lis pendens* had not been properly registered. This does not mean that he is entitled to intervene and to have the interlocutory decree set aside. His position would be much the same as a person who is not a party to a vindicatory action. He is unaffected by the decree and is entitled to assert his rights as against the holder of the decree in any steps which are sought to be taken under it. He is in exactly the same position as a claimant to an interest in the land which had been partitioned under the repealed Ordinance where the final decree had not been entered 'as hereinbefore provided'."

Earlier in this judgment, Sinnetamby, J. expressed the view that the Partition Act of 1951 sought to put an end to the considerable delay occasioned by such interventions. While this was a very correct observation, if I may say so with respect, it seems to me that the main decision he took in the appeal was to some extent influenced by this consideration. One has to be careful not to overstress the importance of expedition in the disposal of a partition case to the extent of overlooking the paramount consideration underlying such a case, namely, to put an end to the various problems arising from common possession and to give an unimpeachable title to the co-owners. It is because of the strictly binding nature of a partition decree once it has been entered that the law has taken great care to impose certain safeguards by way of obligations on the parties, on the proctor, and even on the court before the stage of the interlocutory decree so that any party who has a claim of title etc., shall be before court and that his case shall not go by default. A necessary corollary to this consideration is that the sanctity attaching to an interlocutory decree can only prevail when all the necessary parties are before court. The finality given to such a decree in section 48 (1) is also based on the broad assumption that all the parties have been represented, despite the notwithstanding clause which gives finality in spite of certain omissions. The notwithstanding clause does not, in my opinion, give a licence to omit certain essential steps. Whatever that may be, subsection (3) definitely creates an exception to the notwithstanding clause or, to put it in another way, it expressly provides for two instances in which finality does not attach to an interlocutory or final decree. The instance with which we are concerned in this case is where a person, not having been a party to the action, claims a share in the land through a title not directly or remotely derived from the decree and is able to prove that the *lis pendens* was not properly registered.

There would be no purpose in making an exception in such a case unless it were to give the party who is benefited by such exception an opportunity to intervene and have his title investigated and his shares allotted. If such a course is not open to him and if he is to follow the course suggested in the judgment cited earlier he would either have to file a *rei vindicatio* action against all persons who were allotted any shares or, his rights as a co-owners not being extinguished, to bring a fresh partition action. This would, in my judgment, lead to negation of the very object that the new Partition Act intended to serve, namely, the expeditious disposal of partition cases. For, instead of being allowed to intervene after the interlocutory decree was entered which would be a comparatively early stage in this situation we will have the curious position of an interlocutory decree having been entered in the teeth of a claim having been brought to the notice of court and the person affected filing another partition action or a vindicatory action all over again.

For these and other reasons which are not relevant to this case, I think that in referring to the interlocutory decree in the Act the legislature had in mind the normal interlocutory decree to which no exception was attached and which was unqualified in its scope.

Therefore, when section 70 (1) went on to provide for the point of time before which a court may add a party, namely, at any time before the interlocutory decree is entered, it must be deemed to refer to an interlocutory decree in the normal case and not an interlocutory decree which was qualified by the exception provided in

section 48 (3). For, if it is conceded that a person, who comes within the exceptions provided in section 48 (3), can, by reason of the inconclusive nature of an interlocutory decree or even the final decree so far as he is concerned, file another partition action or a vindicatory action in order to establish his rights which are protected by section 48(3), it must surely stand to reason that he should be allowed to intervene in the same action rather than be told that even though his claim of title is sound he cannot intervene as the interlocutory decree has been entered. If he can bring an action long after an interlocutory and a final decree and, if successful, disturb all the shares allocated in the partition decree, *a fortiori*, it must be possible for him to intervene soon after the interlocutory decree. In such an event the interlocutory decree will, by necessary implication, have to be set aside and a fresh interlocutory decree will have to be entered after consideration of the new claim of the intervening party.

In short, one cannot, in my view, give a meaning to section 48 (3) unless it be construed as enabling a person falling in the category to which that sub-section refers to assert his rights which are kept alive by that sub-section. The other view, to my mind, will result in a situation which savours of being illogical and unreasonable. For, if a person in such a case is not allowed to intervene and the parties to the action have been allotted their respective shares of a land by the interlocutory and final decrees, there would be nothing to prevent such person who fell within the exception in sub-section (3) of section 48 and, therefore, was unaffected by these decrees, from filing another partition action on the basis of the original shares owned by him and the others who were parties to the action. In such a case the object of expeditious disposal will be completely defeated and there will be two partition cases in respect of the same corpus. Even though the earlier judgments have referred to the possibility of a vindicatory action in such a situation, I can see serious difficulties in the way of such an action which will make it even more chaotic than a second partition action. The plaintiff in such a case will have to ask for a declaration of title to his share from each of the parties to the original partition action who have by now been allotted divided lots. Either alternative, therefore, would lead to a curious, not to call an absurd result. The only reasonable view, therefore, seems to me to interpret the section in a way that will not lead to such a situation. This situation will not arise if it is construed that an interlocutory decree which is entered without due registration of the *lis pendens* is not the interlocutory decree which is in the contemplation of section 70 (1). Such a construction is, to my mind, not based on an argument of convenience but on the special provision contained in section 48 (3). Obvious as it may seem, chronologically too, section 48 precedes section 70 and the latter has, therefore, to be read subject not only to the main provision but also to the exception contained in the former. To refrain from doing so will be to ignore the exceptional circumstances provided for in section 48 (3) and to leave the person who is protected by this sub-section with only the feeling of satisfaction that the interlocutory decree does not have the conclusive effect so far as he is concerned but without any direction by the legislature as to what step he should or can take to retrieve his position after his lands have been apportioned in divided lots among his original co-owners by a decree of court. It has to be borne in mind that the remedies available to him are not those specifically provided by law but only those which have been judicially interpreted as possible remedies. The judgment referred to earlier and the judgment in the case of *Odiris Appuhamy vs. Caroline Nona*, reported in 66 New Law Reports, page 241, which have decided that a person coming within the exceptions in section 48 (3) can bring a separate action, does not base such a right on a specific provision of law. A person who comes within the exception to section 48 (3) should, therefore, be allowed to intervene at any stage and the District Judge would have the power to set aside the interlocutory decree entered by him for this purpose because it ceases to be an interlocutory decree.

Although no submission was made by either counsel on this aspect it occurred to me during the consideration of this judgment that it may useful to peruse the proceedings in Parliament during the passage of the New Partition Bill in order to get an insight into the intention of the legislature in regard to the relevant sections. A perusal of these proceedings has fortified me in the view I have already expressed as I find therein a definite pointer to the intention of the legislature in enacting sub-section (3) of section 48.

According to the Hansards, the Partition Bill was presented in the Senate on 20th September, 1950, deemed to have been read the first time, and ordered to be printed. On the 4th of October, 1950, the Bill was read a second time and debated. On the 6th of October, 1950, it was decided that the Bill be referred to a Select Committee. At that stage section 48 of the Bill contained only sub-section (1) of the present Act and not sub-sections (2) and (3). The Select Committee which consisted of some eminent lawyers held several meetings at which a large volume of evidence and suggestions was received. On the 20th of March, 1951, the Report of the Select Committee was presented together with the Minutes of the Proceedings, and was ordered to lie upon the Table. The Select Committee reported that clause 48—which is the present section 48 (1)—should be amended by adding a proviso as follows:-

" Provided that it shall not prevent any person who is not a party to the proceedings or privy of such party from impeaching such a decree on the ground that the *lis pendens* has not been duly registered or on the ground of want of jurisdiction." (Minutes of Proceedings—20th January, 1951.)

On the 27th of March, 1951, clauses 34 to 52 as amended by the Select Committee were ordered to stand part of the Bill. It must, therefore be assumed that sub-sections (2) and (3) were inserted in section 48 to give effect to the decision of the Select Committee. The result was that the Bill laid down definitely that the validity of an interlocutory decree can only be impeached on the ground that the *lis pendens* in respect of the action has not been duly registered or on the ground of want of jurisdiction. On the same day the Bill was reported with the amendments, read the third time, and passed. The second and third readings of this Bill were taken up in the House of Representatives on the 6th of April, 1951, and passed without amendment.

The history of the Partition Act, therefore, shows that the intention of the legislature was to give an opportunity to a party who was prejudiced by an absence of due registration of the *lis pendens* to impeach the decree. It seems fairly clear that it was not the intention of the legislature to give this same opportunity to the other categories such mortgagees, lessees, fideicommissaries, beneficiaries of trusts, etc. In my view, it is to safeguard these categories whose rights may have been extinguished by an interlocutory decree that specific provision has been made in section 49 empowering such party by a separate action to recover damages from any party to the action by whose act, whether of commission or omission, such damages may have accrued, and where the whole or any part of such damages cannot be recovered from any such party, recover such damages or part thereof from any person who has benefited by any such act of such party. The fact that there is no such specific provision to protect a person who has been prejudiced by the failure to register duly the *lis pendens* by empowering him to bring a separate action appears to me to be an additional reason for thinking that the impeachment of the interlocutory decree referred to by the Select Committee was to be achieved by such a party being allowed intervention after the interlocutory decree. The fact that what was sought to be achieved was the impeachment of the interlocutory decree presupposes that an interlocutory decree did exist in form earlier. Such interlocutory decree would, however, be lacking in one of the essential attributes, namely, the due registration of the *lis pendens* at the appropriate stage, which decree for that reason will be invalid. The requirement in section 70 that a party should intervene before the interlocutory decree will, therefore, have no

application to a case where the *lis pendens* has not been duly registered.

The question may arise here as to whether the remedy prescribed in section 49 is or is not available to the category of persons referred to in section 48 (3). I can see at least three reasons for answering this question in the negative. In the first place, section 48 (3) refers to a person who claims any such *right, title or interest* to or in the land or any portion of the land to which the decree relates as is not directly or remotely derived from the decree, while section 49 refers to a party whose *rights* to the land to which the action relates have been extinguished or who is otherwise prejudiced by the interlocutory decree entered in the action.

Secondly, a party under section 48 (3) to whom the final and conclusive effect will not apply can claim the benefit of this sub-section if, but only if, he proves that the decree has been entered by a court without competent jurisdiction or that the partition action has not been duly registered as a *lis pendens*. There is no such requirement for one to claim a benefit under section 49. Thirdly, if the remedy under section 49 was to apply to the category of persons mentioned in section 48 (3) as well, I should have expected section 49 to have been part of section 48 or at least to have some connecting link with section 48 (3) so as to include among the persons who can recover damages by a separate action, the category referred to in section 48 (3). In all humility and with the utmost respect to the views of my Lord The Chief Justice and my brother Judges from which I have dissented I would say that the interpretation which I have given above will, without doing any violence to the provisions of the Act, enable the smooth working thereof and where two views are possible it behoves the court to lean towards the view that is conducive to the smooth working of an Act of the Legislature.

As there was considerable argument on the question of registration simpliciter and due registration of the *lis pendens*, it is apposite to say a word or two on that aspect. When I state in the earlier paragraph that the requirement of section 70 will have no application to a case where the *lis pendens* has not been duly registered, I must not be understood to mean that under section 13 of the Act it is necessary for a court to be satisfied that a partition action has been duly registered as a *lis pendens*. I think the ommission of the word " duly " in this section and its presence in section 48 (3) is of significance. Whereas under section 13 a court has to be satisfied, *inter alia*, that the step of registering the *lis pendens* has been taken, under section 48 (3) the categories of persons mentioned therein will be able to impeach the decree if only the *lis pendens* has not been duly registered. That is to say, that, despite all the steps for the registration of the *lis pendens* being taken by the plaintiff as required by section 6, if some error has occurred in the actual registration in consequence of which a necessary party would have been prejudiced, such a party would be able to impeach the decree.

For these reasons, I would allow the appeal, set aside the order of the learned District Judge dated 31st August, 1962, as well as the decree of sale dated 30th November, 1960, and make order that proceedings be held *de novo* from the point of time of the registration of the *lis pendens*. In view of the circumstances under which the learned District Judge found himself constrained to decide this matter against the apellant, I make no order for costs.

Appeal dismissed.

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

WALKER SONS & CO. LTD., *vs.* F. L. W. FRY

S.C. No. 9 *of* 1962 (*LT*/1/6209)

K. W. DEWANAYAGAM *vs.* UNITED ENGINEERING WORKERS' UNION

S.C. Nos. 18-23 *of* 1962 (*LT*/6/9088-9093)

HONG KONG & SHANGHAI BANKING CORPORATION *vs.* SUBRAMANIAM, PRESIDENT LABOUR TRIBUNAL

S.C. Application No. 319 *of* 1963

MOOSAJEES LTD., *vs.* P. O. FERNANDO & 3 OTHERS

S.C. Application No. 144 *of* 1964

MOOSAJEES LTD., *vs.* P. O. FERNANDO & 3 OTHERS

S.C. Application No. 158 *of* 1964.

ROCKLAND DISTILLERIES *vs.* S. A. WIJAYATILAKE & 2 OTHERS.

S.C. Application No. 37 *of* 1965

Argued on : 12th, 13th, 17th, 18th, 19th, 20th, 21st May, 26th, 27th, 28th, 29th and 30th July, 2nd, 3rd, 4th, 5th & 6th, August and 7th, 8th, and 9th September, 1965.
Judgment reserved on : September 9, 1965.
Judgment delivered on : November 30, 1965.

Industrial Disputes Act, No. 43 *of* 1950—*Amending Act No.* 62 *of* 1957—*Powers of Labour Tribunals, Arbitrators and Industrial Courts in the settlement of Industrial Disputes—Do they exercise judicial power —Whether validly constituted—Ceylon* (*Constitution*) *Order in Council,* 1946, *section* 55.

Of the above matters :—

(a) S.C. No. 9 of 1962 and S.C. Nos. 18—23 of 1962 were appeals from orders made by Labour Tribunals established under Part IV A of the Industrial Disputes Act No. 43 of 1950, as amended by Act No. 62 of 1957, on applications being made under section 31B of the Act.

(b) S.C. No. 319 of 1963 and S.C. No. 37 of 1965 were applications for Writs of Certiorari to quash orders made by arbitrators to whom two industrial disputes had been referred under sections 4 (1) and 3 (1) (d) respectively of the Act.

(c) S.C. No. 144 of 1964 and S.C. No. 158 of 1964 were applications for Writs of Certiorari to quash the proceedings of the Industrial Court to which the Minister of Labour and Nationalised Services had referred the two disputes under Section 4 (2) of the Act, *Viz.*—(i) whether the non-employment of a certain number of workers was justified and to what relief they were entitled to, and (ii) whether the notice of discontinuance of certain persons was insufficient and whether they were entitled to compensation.

These matters were referred by His Lordship, the Chief Justice under section 51 of the Courts Ordinance to a Bench of five judges. The only matter argued before them was whether the Tribunals concerned had been validly appointed. The arguments of Counsel on each case was directed to the question whether each Tribunal was a judicial officer as that term is used in the Ceylon (Constitution) Order in Council, 1946 (Cap. 379); and if so, whether it was validly constituted in that it had not been appointed by the Judicial Service Commission.

In respect of appeals, S.C. No. 9 of 1962 and S.C. Nos. 18—23 of 1962.

Held : by Sansoni, C.J., H. N. G. Fernando, S. P. J and T. S. Fernando, J., (Tambiah J. and Sri Skanda Rajah, J. dissenting):—

(1) That on an examination of the features of the new Part IV A of the Industrial Disputes Act (introduced by Amending Act No. 62 of 1957) which distinguish the case of a workman's application to the Labour Tribunal under section 31B of the said Part IV A from the modes of settlement of disputes originally prescribed in the Act it is clear that disputes which had always fallen within the jurisdiction of ordinary Courts of Law have been assigned to Labour Tribunals for hearing and determination, thus establishing Courts of concurrent jurisdiction in regard to contracts of service, calling them Labour Tribunals.

(2) That the Labour Tribunals acting under Part IV A of the Act are holders of judicial office and fall clearly within the category of those required to be appointed by the Judicial Service Commission, under section 55 of the Ceylon (Constitution) Order in Council, 1946.

(3) That the judgment of the Privy Council in *The Bribery Commissioner vs. Ranasinghe* (1964) 66 N.L.R. 73, is decisive against any argument that the jurisdiction which the Courts possessed at the time of the enactment of our Constitution can validly be superseded by creating new tribunals which are not appointed by the Judicial Service Commission.

(4) That as the Labour Tribunals concerned have not been appointed by the Judicial Service Commission, they had no jurisdiction to hear and determine the matters placed before them for decision, and the orders made by them must be set aside.

(5) That a Labour Tribunal need not be appointed by the Judicial Service Commission, if it performs only arbitral functions referred to it under Section 3 (1) (d) and Section 4 (1) of the Act.

In respect of applications, S.C. No. 319 of 1963 and S.C. No. 37 of 1965.

Held : (All judges agreeing) That the disputes concerned having been referred to Arbitrators under section 4 (1) and 3(1) (d) of the Act by the order of the Minister of Labour and Nationalised Services and by the consent of parties respectively, the arbitrators do not hold judicial office and need not have been appointed by the Judicial Service Commission.

In respect of Applications No. 144 of 1964 and No. 158 of 1964.

Held : (1) (All judges agreeing) That an Industrial Court under the Industrial Disputes Act is not a judicial offiicer, even though it holds a paid office. There is no requirement that it should be appointed by the Judicial Service Commission.

(2) (Sansoni, C. J., and T. S. Fernando J. dissenting) That the Courts concerned had jurisdiction to entertain and decide even the disputed questions of fact which arose for their decision.

In regard to the above mentioned four applications which were for Writs of Certiorari, their Lordships H. N. G. Fernando, S. P. J., Tambiah J., and Sri Skanda Rajah, J., while holding that the tribunals concerned were not exercising judicial power and therefore validly appointed, set them down for hearing on other points raised in the petitions.

However, Sansoni, C.J., with T.S. Fernando, J. agreeing, held that these Tribunals who had only arbitral powers had acted outside the ambit of those powers and exercised judicial power. As the nature of the remedy available to the petitioners has not been argued, their Lordships set them down for further argument before a Bench of two Judges.

Per Sansoni, C. J.—(*a*) " The judicial power is the power ' which every Sovereign must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action. ' This is the definition given by Griffiths C. J., in *Huddart, Parker & Co. Proprietary Ltd., vs. Moorehead* (1908) 8 C.L.R. 330 at 357, and is the one most frequently cited. It has been approved more than once by the Privy Council. "

(*b*) "Sections 25 and 26, like sections 18 and 19 which apply to an arbitrator's award, make it clear that the award of an Industrial Court is to have effect only for the future and not for any period prior to the date on which the dispute first arose. It continues in force for a future period, which is definite or indefinite according to the period specified in it. Its terms are made binding on the parties and become implied terms of the contract of employment by reason of the provisions of section 26. "

(*c*) " Whether it is an Industrial Court or an arbitrator acting under this Act, that is concerned, it seems to me that the only power they are authorised to exercise is arbitral power, that is, to make an award which decides what the agreement between the parties should be in the future. They are not authorized to exercise judicial power, which is what they have done in the cases before us. But since this particular point was not argued before us, I would set these two applications also down for further argument before a Bench of two Judges. "

(*d*) " Consequently section 340 (2) of the Criminal Procedure Code, Cap. 20, which requires a statement of the matter of law and a certificate by an advocate or proctor, does not apply to the form of a petition of appeal filed under section 31D, Cap. 131. "

Per H. N. G. FERNANDO.—(*a*) " The scope of the relief or redress required by Section 31C to be granted in any case is in my opinion limited to the matters in respect of which relief or redress may be claimed under Section 31B. "

(*b*) " The possibility of ordering discontinuance upon an application under Section 31B can never arise, because the application can only be made after termination of a workmen's service. "

(*c*) " What the amending Act of 1962 did was to vest in Labour Tribunals powers to make orders of precisely the same character as a Court may make in the same circumstances, with the addition of a new power to order re-instatement. In substance, the Act set up new Tribunals to administer some part of the law relating to contracts of employment, while at the same time amending that law in order to permit such tribunals to grant re-instatement. But even this new power is circumscribed; sub-section (3) of Section 33 selects cases in which orders for re-instatement must compulsorily include the alternative of compensation, thus limiting the apparently wide power conferred by the terms of Section 31 C. "

(*d*) " I have previously stated what is in effect the opinion that Section 31C, in requiring ' just and equitable ' orders to be made by Labour Tribunals, does not allow to such a Tribunal the freedom of the wild ass in making its orders, and that the scope of a ' just and equitable order ' is limited by the nature of the matters which may be submitted to a Tribunal in an application under Section 31B, and by the provisions in Section 33 as to the content of orders of such Tribunals. "

(*e*) " Section 55 of the Constitution, as I have indicated, failed to preclude the possibility of the entrustment of judicial power to some authority *bona fide* established for administrative purposes. If administrative officials, the majority of whose powers and functions are administrative, are in addition entrusted on grounds of expediency with judicial power, there would not in my opinion be conflict with section 55. But if, under cover of expediency, judicial powers are vested in an office administrative only in name, then the principle that you cannot do indirectly that which you cannot do directly will apply. "

Per TAMBIAH, J.— (*a*) " After a careful consideration of the arguments put forward by counsel I am of the view that the judicial power of the State is not vested in the Supreme Court and the other courts in Ceylon. In some cases we have ventured to express the view that judicial power is vested in the Supreme Court and the minor courts (*vide Queen vs. Liyanage* (1962) 64 N.L.R. 313; *Senadhira vs. Bribery Commissioner* (1961) 63 N.L.R. 313 at 318; *Piyadasa vs. Bribery Commissioner* (1962) 64 N.L.R. 385 at 390). But for the decision of these cases it was not necessary to hold that judicial power of the State vested in the Judges only. In *Piyadasa's Case* I did not have the benefit of a full argument as there was no counsel for the appellant. In the present appeals this matter has been fully argued and I am of the view that judicial power of the State is vested in Her Majesty who exercises them through the Judges in Ceylon but has reserved to Herself the right to exercise this power as the final Court of Appeal. "

(*b*) " Before the constitution came into force judges were appointed by the Governor on the recommendation of a Judicial Service Commission which served only as an advisory body at that time. Under the Ceylon (Constitution) Order in Council, subject to certain limitations, the legislative function is no doubt now delegated to the Queen in Parliament. The executive function still remains in Her Majesty (*vide* section 45 of the Constitution). The judicial power is still vested in Her Majesty and not in the courts. Her Majesty exercises this power directly with the advice of the Privy Council through the judges of the Supreme Court and the other Courts. If judicial power is vested in the Supreme Court and the other courts functioning under the Courts Ordinance, then the Privy Council will have no power to advise Her Majesty to affirm or allow appeals which are taken from the decisions of the Supreme Court to Her Majesty in Council. Although such a view was taken by this court, it has been held by the highest tribunal of this Island that Her Majesty still retains her prerogative rights to hear appeals from the courts of Ceylon. (*vide The Queen vs. Hemapala* (1963) 65 N.L.R. 313). This power can be with Her Majesty only if judicial power of the State is still vested in Her. "

In S.C. No. 9 of 1962

H. V. Perera, Q.C., with *R. A. Kannangara, Lakshman Kadirgamar,* and *R. L. Jayasuriya* for the employer-appellant.

G. E. Chitty, Q.C., with *George Candappa, K. Thevarajah, Norman Weerasooria,* and *Kumar Amarasekera* for the applicant-respondent.

V. Tennakoon, Q.C., Solicitor-General, with *R. S. Wanasundera, C.C., V. S. A. Pullenayagum, C.C., H. L. de Silva, C.C.,* and *G. G. D. de Silva, C.C.* as *amicus curiae.*

H. W. Jayawardena, Q.C., with *G. T. Samarawickreme, Q.C., N. R. M. Daluwatte,* and *Mark Fernando* as *amicus curiae.*

In S.C. Nos. 18-23 of 1962

C. Ranganathan, Q.C., with *S.C. Crossette-Tambiah*, for the employer-appellant.

N. Satyendra with *J. Perisunderam*, for the applicant-respondent.

V. Tennakoon, Q.C., Solicitor-General, with *R. S. Wanasundera, C.C., V. S. A. Pullenayagum, C.C., H. L. de Silva, C.C.*, and *G. G. D. De Silva, C.C.*, as *amicus curiae*.

In S.C. Application No. 319 of 1963

H. V. Perera, Q.C., with *S. J. Kadirgamar, Lakshman Kadirgamar, K. Viknarajah, R. Ileyperuma, Mark Fernando* and *D. C. Amerasinghe* for the petitioner.

(Dr.) Colvin R. de Silva, with *Nimal Senanayake, Prins Rajasooriya, (Miss) Manouri de Silva, Bala Nadarajah* and *I. S. de Silva* for the 2nd respondent.

V. Tennakoon, Q.C., Solicitor-General with *R. S. Wanasundera, C.C., V. S. A. Pullenayagum, C.C., H. L. de Silva, C.C.*, and *G. G. D. de Silva, C.C.*, for the 1st and 3rd respondents.

In S.C. Application No. 144 of 1964

H. V. Perera, Q.C., with *Lakshman Kadirgamar* and *Mark Fernando* for the petitioner.

Nimal Senanayake, for the 2nd respondent.

V. Tennakoon, Q.C., Solicitor-General with *R. S. Wanasundera, C.C., V. S. A. Pullenayagum, C.C., H. L. de Silva, C.C.*, and *G.G.D. de Silva, C.C.*, for the 3rd respondent.

In S.C. Application No. 158 of 1964

H. V. Perera, Q.C., with *Lakshman Kadirgamar* and *Mark Fernando* for the petitioner.

Nimal Senanayake, for the 2nd respondent.

V. Tennakoon, Q.C., Solicitor-General, with *R. S. Wanasundera, C.C., V. S. A. Pullenayagum, C.C., H. L. de Silva, C.C.*, and *G. G. D. de Silva, C.C.*, for the 3rd respondent.

In S.C. Application No. 37 of 1965

H. W. Jayawardene, Q.C., with *G. T. Samarawickrema, Q.C.*, and *N. R. M. Daluwatte* for the petitioner.

S. S. Sahabandu, for the 2nd respondent.

SANSONI, C. J.

These six cases were referred by me under section 51 of the Courts Ordinance to a Bench of five Judges. The question that has been argued is whether the Tribunals concerned, all of which are mentioned in the Industrial Disputes Act, Cap. 131, have been validly appointed. In S.C. No. 9 of 1962 and S.C. Nos. 18 to 23 of 1962, the Tribunals concerned are Labour Tribunals. In S.C. No. 319 of 1963 the Tribunal is an arbitrator to whom the dispute was referred by the Minister of Labour and Nationalised Services under section 4 (1) of the Act. In S.C. No. 144 of 1964 and S.C. No. 158 of 1964, the Tribunal concerned is an Industrial Court of one person to whom the dispute was referred by the Minister under section 4 (2) of the Act. In S.C. No. 37 of 1965 the Tribunal is an arbitrator to whom the dispute was referred by the Commissioner of Labour under section 3 (1) (d) of the Act.

The arguments of counsel appearing in each case were directed to the question whether each tribunal was a judicial officer as that term is used in the Ceylon (Constitution) Order in Council, 1946, Cap. 379; and if so, whether it was validly constituted in that it had not been appointed by the Judicial Service Commission.

The Industrial Disputes Act No. 43 of 1950 was the first legislative enactment in Ceylon to

contain legislation " for the prevention, investigation and settlement of industrial disputes, and for matters connected therewith or incidental thereto "—to quote the long title. Ceylon came very late into this field, which covers collective agreements and settlement by conciliation and arbitration. Before 1950 practically all countries had established some form of conciliation or arbitration for dealing with industrial disputes. It had been known for a long time that parties to such disputes should be assisted by the State in arriving at amicable settlements through conciliation and arbitration procedures.

The Act No. 43 of 1950, after providing in Part III for collective agreements, and settlement by conciliation and arbitration, provided in Part IV for the constitution of Industrial Courts, from a panel of not less than five persons appointed by the Governor-General, to whom such disputes might be referred for settlement. The original Act provided also for the reference of disputes for settlement by arbitration. An amending Act No. 62 of 1957 which introduced Labour Tribunals also gave them in Part IVA, and particularly section 31B, power which, it has been argued, amounts to judicial power. By the same amending Act, Labour Tribunals were included among those to whom disputes could be referred for arbitration, but that amendment merely added one more arbitrator to those already in existence.

Since the first two cases we were dealing with, *viz.*, S.C. No. 9 and S.C. Nos. 18 to 23 concern Labour Tribunals, I shall deal with them at this stage. Section 31B of the Act enables a workman, or a trade union on behalf of a workman who is a member of it, to apply in writing to a Labour Tribunal for relief or redress in respect of any of the following matters :—

(a) the termination of his services by his employer;

(b) the question whether any gratuity or other benefits are due to him from his employer on termination of his services and the amount of such gratuity and the nature and extent of any such benefits;

(c) such other matters relating to the terms of employment or the conditions of labour of a workman as may be prescribed.

It will be seen that the application is made directly to the Tribunal, and in this respect is similar to the procedure prescribed for filing a plaint in a Civil Court. In the case of Industrial Courts or arbitrators there is no such provision enabling a workman to make such a direct application for relief, and an order of reference to an arbitrator or an Industrial Court can only be made by the Commissioner of Labour or the Minister.

An application to a Labour Tribunal is described as one " for relief or redress ". In this respect also it resembles an action in a Civil Court which, according to section 5 of the Civil Procedure Code, is " a proceeding for the prevention or redress of a wrong "; and according to section 6 of the Code is an " application to a Court for relief or remedy obtainable through the exercise of the Court's power or authority. "

Items (a), (b) and (c) already set out cover the whole range of matters which come within a contract of service entered into between a workman and his employer. Although the subject of wages is not specifically mentioned, I have no doubt that a Labour Tribunal can make an order in respect of wages as well. Section 31B (6) states that notwithstanding that any person has ceased to be an employer, a Labour Tribunal may, on an application under sub-section (1), order such person to pay the workman any sum as wages in respect of any period during which that workman was employed by such person.

Section 31B (5) provides that when a Labour Tribunal has concluded the hearing of an application under sub-section (1), the workman shall not be entitled to any other legal remedy in respect of that particular matter; and where the workman has first resorted to any other legal remedy, he shall not thereafter be entitled to the remedy under sub-section (1). Thus Labour Tribunals have been given concurrent jurisdiction with the ordinary Courts over matters which form the subject of dispute between a workman and his employer.

Section 31D provides that an order of a Labour Tribunal shall be final and shall not be called in question in any Court, though a party dissatisfied with the order may appeal to the Supreme Court on a question of law. This means, in effect, that a Labour Tribunal is empowered to make an order which finally determines the dispute between the parties to the contract.

Section 31B (4) provides that any relief or redress may be granted by a Labour Tribunal to a workman notwithstanding anything to the contrary in any contract of service between him and his employer. Much time was spent during the

arguments on an elucidation of the meaning of this provision. One view which was expressed was that a Labour Tribunal need not determine the rights of the parties as known to the civil law; that the contract could be entirely ignored by the Tribunal; and that matters of policy could also be considered by it. I do not read the provision in that way. It certainly does not say that the contract should, or even may, be ignored. It seems to me to empower the Tribunal to give relief against any harsh terms that the employer may have imposed in the contract. The Tribunal has been given, I think, a discretion to be exercised judicially to give relief against such terms. It is similar to the relief a Court of equity would give when it has before it an unconscientious or oppressive contract; this is sometimes done in cases of specific performance; similarly, in cases covered by the Money Lending Ordinance a Court can relieve a borrower against unconscionable terms appearing in the contract. The point I make is that a provision such as sub-section (4) is entirely consistent with the Tribunal that is exercising the power of granting equitable relief being one that exercises judicial functions or judicial power.

Section 31C (1) empowers the Labour Tribunal, after making inquiries and hearing evidence, " to make such order as may appear to the tribunal to be just and equitable." It was sought to be argued that a Tribunal which makes an order that is just and equitable is not analogous to a Court of justice exercising judicial functions, but is a tribunal exercising arbitrary functions of an entirely different order from judicial functions. On the other hand, it was pointed out that an order which is just and equitable is the very sort of order which is often made by the ordinary Courts of justice. We were referred to the Partnership Act and the Companies Act, by which the Court is empowered to make an order of dissolution or winding up when it considers such a course to be " just and equitable." Such an order is clearly one which can only be made by a tribunal exercising judicial and not arbitrary power.

All persons exercising judicial power and responsibility must act so as to produce a result which is both '*bonum*' and '*aequum*', and if a statute reminds a tribunal of that duty it is no argument to say that the tribunal is by that circumstance given jurisdiction to make a purely arbitrary decision. Dr. J. Duncan M. Derrett has said, when writing of Justice, Equity, and good conscience: " Contrasted with the office of the Judge is the so-called arbitrium rusticorum, which seems to have been the Romanic counterpart of " palm tree justice ", whereby " the arbiter " divided the disputed property equally between the two parties; here no juridical activity can be seen and he splits it between them like the monkey in Aesop's fable, as the simplest way of appeasing the noisier party. It is not even ' rough justice ' or ' substantial justice ', for no judicial discretion whatever has been used, and where there is no judicial discretion there is no justitia. " To enact that a Labour Tribunal should exercise its power according to justice and equity, for that is what the phrase " just and equitable " connotes, is to remind it of the maxim " *bonus judex secundum aequum et bonum judicat aequitatem stricto juri praefert* " (Co. Litt. 24 B). " I commend the Judge that seems fine and ingenious, so it tend to right and equity ", observed Lord Hobart. (Hob. 125). I find it impossible to treat seriously an argument that suggests that a Tribunal that is empowered to make a just and equitable order is not, for that reason, exercising judicial power. On the contrary, it is by those very words required to do what a Court of law and equity is required to do, and that is to hold an even hand between conflicting interests. It must conform to that standard, and has no power to act in a purely arbitrary manner.

Mr. Satyendra, in support of his argument that a Labour Tribunal is not a Court and does not exercise judicial functions, relied on the Privy Council decision in *Moses v. Parker* (1896) A.C. 245. That case dealt with a Statute of 1858, which vested in the Supreme Court of Tasmania jurisdiction to deal with disputes regarding claims to grants of land. Such disputes had, prior to the Statute, been dealt with by certain Commissioners, and they reported to the Governor who was, " in equity and good conscience ", entitled to make a grant. It was expressly provided in the Statute that the Supreme Court should not " be bound by the strict rules of law or equity in any case, or by any technicalities or legal forms whatever. " In an appeal from an order of the Supreme Court, the Privy Council held that the decision of the Supreme Court was not a judicial decision. The Privy Council in the later case of *Canadian Pacific Railway vs. Toronto Corporation* (1911) A.C. 461 explained the earlier decision, and said that " as the tribunal from which it was desired to appeal was expressly exonerated from all rules of law or practice, and certain affairs were placed in the hands of the Judges as the persons from whom the best opinions might be obtained, and not as a Court administering justice between

the litigants, such functions do not attract the prerogative of the Crown to grant appeals." I do not think that the functions of a Labour Tribunal acting under Part IVA bear any resemblance to the functions performed by the Supreme Court of Tasmania in the case relied on.

Thus when one considers the manner of making the application to a Labour Tribunal, the subject matters which may be covered by such an application, the order which may be made by the Tribunal, and the final effect of such an order, it is plain that disputes which had always fallen within the jurisdiction of ordinary Courts of law have been assigned to Labour Tribunals for hearing and determination. The Tribunal is required to determine facts in dispute, to interpret contracts to apply the relevant rules of law, to adjudicate on the respective rights of the parties, and to make a just and equitable order which finally binds them. This is what any ordinary Court does when hearing a dispute that goes up before it. After all these years, during which contracts of service were justiciable by the ordinary Courts, the Legislature chose in 1957 to take them out of the jurisdiction of those Courts, or at any rate to establish Courts of concurrent jurisdiction calling them Labour Tribunals. True it is that the Act in terms enables a Labour Tribunal to grant equitable relief, notwithstanding the express terms of the contract, and requires it to make a just and equitable order: it could well have imposed the same terms on the ordinary Courts which dealt with such disputes. The imposition of such terms would not have changed the character of such Courts in any way; they would still have been exercising judicial power. And I do not see how the conferment of the power to grant equitable relief and to make a just and equitable order on a Labour Tribunal makes the power it exercises anything other than judicial. Section 31C(2) makes the Tribunal master of its own procedure, just as Bribery Tribunals were made, in another Act enacted at about this time, the masters of their procedure.

What we have to consider is whether a Labour Tribunal is a judicial officer within section 55 (1) of the Order in Council, that is to say, the holder of any judicial office, for section 55 (5) defines "judicial officer" for the purposes of this section as the holder of any judicial office except a judge of the Supreme Court or a Commissioner of Assize.

Labour Tribunals are appointed, we were informed by the Solicitor-General, by the Public Service Commission, and they are permanent officers drawing salaries. I have no doubt therefore that they are the holders of an office, as that term was defined by the Privy Council in the *Bribery Commissioner vs. Ranasinghe* (1964) 66 N.L.R. 73.

Apart from being holders of an office, I hold that when acting under Part IV A of the Act they act as holders of judicial office. They are given power in that Part to try disputes, to modify existing legal relationships, to make orders which confer legal rights and impose legal liabilities, and to determine, as between a workman and his employer, whether one of them possesses as against the other some existing legal right or is subject to some existing legal liability. As Isaacs J. said in *Federal Commissioner of Taxation vs. Munro* (1926) 38 C.L.R. 173, 'some functions are appropriate exclusively to the judicial power, for example the punishment of crime, or adjudication in actions in tort or contract.' And as Dixon, C. J. and McTiernan J. said in *The Queen vs. Davison* (1954) 90 C.L.R. 353 at 369—"The truth is that the ascertainment of existing rights by the judicial determination of issues of fact or law falls exclusively within judicial power."

It is true that Labour Tribunals have jurisdiction to inquire into and determine only disputes of a particular class, *viz.*, those arising between a workman and his employer. But the fact remains that a Labour Tribunal is given jurisdiction to apply the law, to interpret the agreement, to decide the facts, and by its adjudication to create an instant right or liability, on the basis of some previously existing legal standard. It is not merely under a duty to act judicially and observe the principles of natural justice: that is a feature common to all tribunals, whether they exercise judicial or arbitral power. A Labour Tribunal under Part IV A of the Act corresponds in every respect to a Court as described by Blackstone in his Commentaries (Vol. 3 p. 23): "In every court there must be at least three constituent parts, the actor, reus, and judex: the actor, or plaintiff, who complains of an injury done; the reus, or defendant, who is called upon to make satisfaction for it; and the judex, or judicial power, which is to examine the truth of the fact, to determine the law arising upon the fact, and, if any injury appears to have been done, to ascertain, and by its officers to apply the remedy." I adopt and apply the view of Isaacs J. that Blackstone's Commentaries

are "a legitimate source of instruction for the purposes of our own Constitution.....a key to the meaning of the terms we are now considering." A Labour Tribunal has "power, by its determination within jurisdiction, to impose liability or affect rights. By this I mean that the liability is imposed, or the right affected, by the determination only, and not by the fact determined, and so that the liability will exist, or the right will be affected, although the determination be wrong in law or in fact." This is the famous dictum of Palles C. B. in *The Queen vs. Local Government Board* (1902) 2 I.R. 349 at 373, where the learned judge had to consider what made a tribunal a "Court" or "jurisdiction" so as to make its determination judicial. As the Privy Council tersely put it in *Attorney-General for Australia vs. The Queen* (1957) A.C. 288 : "The exercise of the judicial function is concerned, as the arbitral function is not, with the determination of a justiciable issue."

The Solicitor-General argued that the Order in Council vested only jurisdiction and not judicial power in Part VI which is entitled "The Judicature." He also argued that only the Courts existing at the time the Constitution was enacted were contemplated. It is not necessary to decide the first point. I cannot accept the second. In Part III which is entitled "The Legislature", Parliament and the power and procedure appertaining to Parliament are dealt with. In Part V the Executive and the executive power are referred to. Part VI makes no specific mention of the judicial power (unlike the case of some other written Constitutions) but I have no doubt that one essential characteristic of the authorities mentioned in Part VI, *viz.*, the Supreme Court, Commissioners of Assize, "judicial officers" is that they exercise judicial power.

The judicial power is the power "which every Sovereign must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action." This is the definition given by Griffiths C. J. in *Huddart, Parker & Co. Proprietary Ltd. vs. Moorehead* (1908) 8 C.L.R. 330 at 357, and is the one most frequently cited. It has been approved more than once by the Privy Council.

Jurisdiction, on the other hand, denotes the type of case, according to subject-matter or value or situation or the character of the parties, with respect to which a Court can judicially act. Judicial power is the whole mass of the judicial authority which can be exercised by the Court within the area of its jurisdiction : it is the power with which the Court is clothed in order to try and determine causes, to determine rights and obligations, and to grant a remedy. It is enough for me to point out that the judgment of the Privy Council in *The Bribery Commissioner vs. Ranasinghe* (1964) 66 N.L.R. 73 is decisive against any argument that the jurisdiction which the Courts earlier possessed can validly be superseded by creating new tribunals which are not appointed by the Judicial Service Commission. There is no room now for anybody to argue that the jurisdiction of the Courts can be eroded in such a fashion.

I derive no assistance from being told that there are many trappings of a tribunal which do not make it a Court exercising judicial power. This negative approach does not help me to decide the question whether a particular tribunal is exercising judicial power.

I take the view that the tribunal which is required to be appointed by the Judicial Service Commission must be the holder of a paid judicial office, in the sense that it exercises judicial power, and a Labour Tribunal acting under Part IV A of the Act clearly falls within this category. In the result, the orders made in S.C. No. 9 of 1962 and S.C. Nos. 18 to 23 of 1962 must be set aside since the tribunals were not appointed by the Judicial Service Commission.

I shall now turn to the earlier provisions of the Act which appear to me to indicate that the whole purpose of the Act, as the long title indicates, was to provide for the settlement of industrial disputes. Part II sets out that such disputes may be referred by the Commissioner or the Minister for settlement by conciliation or by arbitration or by an Industrial Court. Indeed, the heading of Part II of the Act specifically mentions "settlement by conciliation or by arbitration or by an Industrial Court", and the provisions of this Part which deal with these matters put the issue beyond doubt.

When the Commissioner of Labour apprehends or is satisfied that an industrial dispute exists, he may (according to section 3) use one of four methods, *viz.*—

(a) use the machinery of a collective agreement, if such an agreement exists between the employers and workmen;

(b) and (c) endeavour to settle the dispute himself by conciliation, or refer it to an authorised officer for that purpose;

(d) with the consent of the parties refer the dispute for settlement by arbitration to an arbitrator nominated by them, or in the absence of such nomination, to an arbitrator or a body of arbitrators appointed by himself, or to a Labour Tribunal.

I draw attention again to this reference to a Labour Tribunal acting as an arbitrator, because it shows that the jurisdiction of Labour Tribunals set out in Part IV A, which I have already dealt with earlier in this judgment, is not the only power given to them. The Act in section 3 (1) (d) contemplates a Labour Tribunal acting as an arbitrator to settle an industrial dispute.

Section 4 gives further instances of how a dispute may be settled when the Minister chooses to intervene. Under section 4 (1) he may refer a minor dispute for settlement by arbitration to an arbitrator appointed by himself or to a Labour Tribunal—note the function allotted again to a Labour Tribunal—even if the parties do not consent. He may also, under section 4 (2), refer any industrial dispute to an Industrial Court for settlement.

I need not refer to the provisions of sections 5 to 15 which deal with collective agreements and settlement by conciliation, because they do not arise for consideration on the cases before us.

Sections 15 A to 21 deal with settlement by arbitration. Under section 17, an arbitrator is required to make all such inquiries as he may consider necessary, and hear such evidence as may be tendered by the parties, and thereafter make such award as may appear to him just and equitable. Under section 18 the award must be transmitted to the Commissioner to be published in the Gazette, and it comes into force on the date it was made or on such date, if any, as may be specified therein, but " not being earlier than the date on which the industrial dispute to which the award relates first arose." Where the award specifies the period for which it shall have effect, it " shall continue in force with effect from the date on which it comes into force until the end of the period," unless it ceases to have effect under section 20. If no period is specified it continues in force indefinitely again unless it ceases to have effect under section 20. Under section 19 an award shall be binding on the parties, trade unions, employers and workmen referred to in it, " and the terms of the award shall be implied terms in the contract of employment between the employers and workmen bound by the award." It seems clear to me from the provisions of sections 18 to 19, which I have just set out, that an award is to have effect only in the future and not for any period to the date on which the dispute first arose, and it continues in force for such future period, which may be either definite or indefinite. Its terms become, because of the peremptory provisions of section 19, implied terms of the contract of employment, and bind the parties to it.

All these characteristics of an award which I have just set out are entirely consistent with the view that what is exercised by an arbitrator in settlement of industrial disputes is purely arbitral power, the function of which is " to ascertain and declare, but not enforce, what in the opinion of the arbitrator ought to be the respective rights and liabilities of the parties in relation to each other." This is an entirely different power from the judicial power which is concerned with " the ascertainment, declaration and enforcement of the rights and liabilities of the parties as they exist or are deemed to exist, at the moment the proceedings are instituted "—see the judgment of Isaacs and Rich J.J. in *Waterside Workers' Federation of Australia vs. J. W. Alexander Ltd.* (1918) 25 C.L.R. at 462 and 463. These dicta were approved in *The Queen vs. Kirby and Others* (1955-56) 94 C.L.R. at 281, and also cited with approval in *Attorney-General for Australia vs. The Queen* (1957) A.C. 288 at 310. Isaacs and Rich JJ. went on to say in their judgment that an industrial dispute is a claim by one of the disputants that existing relations should be altered, and by the other that the claim should not be conceded. It is therefore a claim for new rights, and the duty of the arbitrator is to determine whether the new rights ought to be conceded in whole or in part. As Professor Sawer has said, " the doctrine that it is not judicial power to determine whether a rule should be created, or shall be brought into operation in particular circumstances, has had and will have a powerful influence in limiting the scope of the doctrine of separation of judicial power " : see Essays on the Australian Constitution (2nd Edition) p. 74.

As provided in our Act in section 19, the arbitrator's decision is given the character of a legal right or obligation. The arbitrator's power is to say what, in his opinion, ought to be the

respective rights and liabilities, and when he says so they become their mutual rights and liabilities because the award is given binding force by the statute. This is why it has been said that it partakes of the character of legislative power. The creation of such rights or liabilities is not the ordinary work of a court of law. The arbitrator declares what he thinks just and expedient. The functions exercised by a judge and an industrial arbitrator are quite distinct. To quote from the same judgment of Isaacs and Rich JJ., "the arbitral function is ancillary to the legislative function, and provides the factum upon which the law operates to create the right or duty. The judicial function is an entirely separate branch, and first ascertains whether the alleged right or duty exists in law, and, if it binds it, then proceeds if necessary to enforce the law."

The distinction drawn between the two functions is plain to see. The industrial arbitrator creates a new contract for the future, a judge enforces the rights or liabilities arising out of an existing contract. This distinction has been drawn over and over again in judgments which have dealt with the distinct and separate nature of the two powers. An industrial arbitrator settles disputes by dictating new conditions of employment to come into force in the future where he cannot get the parties to agree on them; a judge determines the existing rights and liabilities of the parties. This is no new theory. As Isaacs J. said in *Federated Saw Mill &c. Employees of Australasia vs. James Moore & Son Proprietary Ltd.* (1909) 8 C.L.R. at 521 : "As far back as 1882 Professor Jevons, in distinguishing this class of arbitration (in settlement of trade disputes) from arbitration relating to past contracts, states : 'Here the freedom of industry is at stake, for the arbitrator will now have to decide, not what agreement was made, but what is to be made.....' 'in regard to the future an arbitrator in assigning the terms on which the disputants are to agree necessarily restricts their liberty.' Isaacs J. has said : "If the dispute is as to the relative rights of parties as they rest on past or present circumstances, the award is in the nature of a judgment, which might have been the decree of an ordinary judicial tribunal acting under the ordinary judicial power. There the law applicable must be observed. If, however, the dispute is as to what shall in the future be the mutual rights and responsibilities of the parties—in other words, if no present rights are asserted or denied, but a future rule of conduct is to be prescribed, thus creating new rights and obligations, with sanctions for non-conformity—then the determination that so prescribes, call it an award, or arbitrament, determination, or decision or what you will, is essentially of a legislative character, and limited only by the law which authorised it." .....Then the learned Judge says : "If a dispute is industrial, it is not an ordinary legal dispute, i.e. it is not a dispute as to what *are* the rights and liabilities of the parties with respect to past or existing facts. It necessarily looks to the future, and therefore it is not, as I conceive, legally possible to say that all disputes lead to an ordinary judicial decree, and therefore that every settlement of every dispute is necessarily an ordinarily judicial decree....." "A federal award prescribing industrial conditions expounds nothing and interprets nothing, but introduces new obligations. This is legislation by means of a subordinate body.....there is not, and never can be, any resemblance between an ordinary judgment and such an award, except in the prodecure by which they are arrived at."

Under section 20 of the Act, any party, trade union, employer or workman bound by an arbitrator's award may repudiate it by notice given to the Commissioner and the other parties. Upon the expiration of 3 months succeeding the month on which the notice is so given or upon the expiration of 12 months from the date on which the award came into force, whichever is later, the award ceases to have effect. The principle underlying this provision is that an arbitrator's award is a mere temporary settlement of an industrial dispute, which does not have the effect of preventing new disputes arising or new conditions of work, wages etc., being laid down in the future.

Part IV of the Act deals with Industrial Courts and consists of sections 22 to 31. Section 22 provides for the appointment by the Governor-General of a panel of not less than five persons from which Industrial Courts shall be constituted. Such persons hold office for a period not exceeding 3 years. The Minister in his discretion selects from the panel either one person or three persons to constitute the Industrial Court.

The provisions of section 23, 24, 25, 26 and 27 contain provisions corresponding to section 16, 17, 18, 19 and 20 which refer to arbitrators. Section 23, like section 16, requires the order referring the dispute for settlement by an Industrial Court to be accompanied by a statement setting out each of the matters in dispute between the parties. Section 24 requires the Industrial Court to make all such inquiries and hear all such evidence as

it may consider necessary, and make such award as appears to it to be just and equitable. The Court may lay down its own procedure for the conduct of the inquiry. This section corresponds to section 17 which applies to arbitrators.

Section 25 requires the award of the Industrial Court to be transmitted to the Commissioner, who shall cause it to be published in the Gazette. The award comes into force on the date it was made or on such date, if any, as may be specified therein " not being earlier than the date on which the industrial dispute to which the award relates first arose." Where the award provides that it shall have effect for any period or until any dates specified in it, it continues in force until the end of that period or the dates so specified, otherwise it continues in force indefinitely. Under section 26 every award of an Industrial Court is binding on the parties, trade unions, employers and workmen referred to in it, " and the terms of the award shall be implied terms in the contract of employment between the employers and workmen bound by the award. "

Sections 25 and 26, like sections 18 and 19 which apply to an arbitrator's award, make it clear that the award of an Industrial Court is to have effect only for the future and not for any period prior to the date on which the dispute first arose. It continues in force for a future period, which is definite or indefinite according to the period specified in it. Its terms are made binding on the parties, and become implied terms of the contract of employment by reason of the provisions of section 26.

As in the case of an arbitrator, I am satisfied that an Industrial Court, when it acts within the terms of these sections, exercises only arbitral power *viz.*, the power of examining the circumstances of a particular dispute and making an award which provides for the variation of the terms of a contract of employment in the interests of industrial peace, such variation to take effect at some date after the date on which the dispute arose between the parties. The Industrial Court, like an arbitrator, decides only what agreement should be made in regard to the future.

Section 27 provides, as does section 20 (which applies to an arbitrator's award), for any party, trade union, employer or workman bound by an award of an Industrial Court, who desires such award to be set aside or replaced or modified or altered, to apply to the Minister, who may then ask the Industrial Court to review the award and make a decision on such an application in terms of sections 28, 29 and 30.

All these provisions indicate plainly that an Industrial Court was never intended to exercise judicial power in the sense in which that expression has always been used. It follows that such a Court is not a judicial officer, even though it holds a paid office. But a perusal of the orders made in S.C. No. 144 of 1964 and S.C. No. 158 of 1964 shows that the Industrial Court, misapprehending its functions and powers and the true nature of the duties it was authorised to perform under the Act, heard evidence and ultimately made orders which only a duly appointed judicial officer is entitled to make. In S.C. No. 144 it decided certain disputed questions of fact, *viz.* (1) whether certain workmen were in fact employed by the petitioner, (2) whether the discontinuance of certain workmen was justified or not, (3) whether the claim of the petitioner or that of the workmen was correct in regard to the rates of wages to be paid. It then made order giving relief on these matters which only a duly appointed judicial officer could have done. Indeed, the Industrial Court appears to have acted in much the same way as a Labour Tribunal functioning under Part IV A of the Act.

A similar misconception of its functions appears from the proceedings and the order made by it in S.C. No. 158 of 1964. There also there were disputed questions of fact which arose for decision, *viz.* (1) whether certain workmen were employed by the petitioner or not, (2) whether the discontinuance of certain workmen was justified or not, and if not what relief they were entitled to, (3) what compensation should be paid to certain workmen. The Industrial Court, having decided these issues, made an order granting relief on these matters. Its order is one which a Court of Law alone can make, for the declaration and enforcement of rights, and the imposition of liabilities, under a contract, is of the essence of judicial power.

What remedy is the petitioner entitled to against such an unwarranted assumption of jurisdiction? We have here a statutory body, holding a paid office, whose powers are strictly defined by the Act, acting completely outside the ambit of those powers. The Industrial Court which is expected to act and did act quasi-judicially, but which was never intended or authorised to exercise judicial power, has wrongly assumed jurisdiction and exercised such power. The petitioner in each

such case, subject to any arguments that may be urged against this view, would be entitled to the grant of Certiorari to have the orders so made quashed on the ground that they were made without jurisdiction. But since this aspect of the matter was not argued before us, but only the question whether an Industrial Court is under the Act authorized to exercise judicial power, I would set these two applications down for further argument before a Bench of two Judges.

There remain the two applications No. 319 of 1963 and No. 37 of 1965. In each of these cases an industrial dispute was referred to arbitration, under section 4 (1) and section 3 (1) (d) respectively. The order made by each arbitrator has been attacked on the ground that the appointment of the arbitrator was not made by the Judicial Service Commission, and the application for Certiorari, to quash it is based on that ground. The short and I think adequate, answer to this argument is that an arbitrator appointed under either Section 4 (1) or section 3 (1) (d) does not hold an office, and in view of the test set out in the Privy Council decision in *The Bribery Commissioner vs. Ranasinghe* (1964) 66 N.L.R. 73, no doubt can exist on this point.

The submission for the petitioners was that since he has in fact exercised judicial power he should have been appointed by the Judicial Service Commission. But the Commission cannot appoint anyone and everyone who exercises judicial power : it appoints only those who hold any judicial office.

There is one aspect of the matter that I have already adverted to in dealing with the impugned orders of the Industrial Court, which concerns these orders of the arbitrators as well, and it is this. Whether it is an Industrial Court or an arbitrator acting under this Act, that is concerned, it seems to me that the only power they are authorized to exercise is arbitral power, that is, to make an award which decides what the agreement between the parties should be in the future. They are not authorized to exercise judicial power, which is what they have done in the cases before us. But since this particular point was not argued before us, I would set these two applications also down for further argument before a Bench of two Judges.

Before I conclude there are two objections in the nature of preliminary objections which I have to deal with.

Mr. Chitty argued that no appeal lay in S.C. No. 9 of 1962 because (1) the appellant was attacking the order of the Labour Tribunal as having been made by a tribunal which was not validly appointed, and (2) the petition of appeal did not set out the questions of law on which the order of the Labour Tribunal was challenged. I do not think there is substance in either objection. With regard to the first, the appellant was exercising a right of appeal on a question of law which section 31 D conferred upon him. The invalidity of the appointment of the Labour Tribunal is such a question. It is not the whole Act that is attacked as invalid, and this distinction makes the Privy Council decision from India, which Mr. Chitty cited, inapplicable. With regard to the second, nowhere does section 31 D require that the petition of appeal should state the question of law. Nor does the manner of drawing up a petition of appeal come within the expression "the hearing and disposal of an appeal"; consequently section 340 (2) of the Criminal Procedure Code, Cap. 20, which requires a statement of the matter of law and a certificate by an advocate or proctor, does not apply to the form of a petition of appeal filed under section 31D, Cap. 131.

The Solicitor-General referred us to the judgments in *Re. Toronto Railway Co. vs. City of Toronto* (1919) 46 D.L.R. 547 and *Parameswaran vs. State Prosecutor* A.I.R. (1951) Travancore 45, and argued that the validity of the appointment of the Labour Tribunals, Industrial Courts and arbitrators in these cases before us could only be challenged by applications for a writ of *Quo Warranto* and in no other way. In view of my earlier findings, this objection is relevant now only to the attack on the appointment of the Labour Tribunals, since I hold that the other tribunals do not require to be appointed by the Judicial Service Commission because they are not the holders of judicial office. But even the objection to the attack on the appointment of the Labour Tribunals must fail because, as I have shown, a Labour Tribunal has other functions to perform apart from those in Part IV A. It can act as an arbitrator, as it did in No. 319 of 1963. When so appointed to act it need not be appointed by the Judicial Service Commission. In short, a Labour Tribunal must be appointed by that Commission only when it performs judicial functions under Part IV A. It need not be appointed by that Commission if it performs only arbitral functions. There is thus no total lack of validity in the manner of its appointment, such as, on the two decisions cited, could only

be shown by a writ of *Quo Warranto* to which the Labour Tribunal would also be a party.

A further answer to the Solicitor-General's argument is that this Court and the Privy Council have previously entertained, in appeal, objections to the validity of the appointment of Bribery Tribunals. The practice in other countries may be different.

To sum up my findings, I would allow the appeals in S.C. Nos. 9 and 18 to 23 of 1962 with costs. I would set down the applications in S.C. Nos. 144 and 158 of 1964 and S.C. Nos. 319 of 1963 and 37 of 1965 for further argument, on the point indicated by me, before a Bench of two Judges.

T. S. FERNANDO, J.

I have had the advantage of reading the judgment perpared by my Lord, the Chief Justice. I agree with the views expressed therein and agree to the making of the orders proposed by him.

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

As a sequel to the recent decisions of this Court concerning the validity of appointments to Bribery Tribunals and Quazi Courts, there has been a number of other cases in which the exercise of what is said to be judicial power by officers or tribunals not appointed by the Judicial Service Commission has been challenged. These cases were reserved by order of His Lordship the Chief Justice for consideration by a Bench of five Judges. After arguments commenced, however, it was decided to hear only cases affecting tribunal functioning under the Industrial Disputes Act. It is to be hoped that the decision of this Bench of those cases will enable Benches constituted in the ordinary manner to dispose of the other cases in which the same question arises for determination.

What has now to be decided is whether any of the different tribunals established under the Industrial Disputes Act is or is not a "judicial officer" within the meaning of Section 55 of the Constitution. If any such tribunal is a "judicial officer", then in accordance with the decisions of this Court which were affirmed by the Privy Council in *Bribery Commissioner vs. Ranasinghe* (66 N.L.R. 73), the tribunal must be held to have no jurisdiction on the ground that the appointment to the tribunal was not made by the Judicial Service Commission.

It is helpful in the first instance to examine the provisions of the Industrial Disputes Act as originally enacted in 1950, read with amendments thereto enacted prior to Act No. 62 of 1957. The purpose of the principal Act, as stated in its long title, was "to provide for the Prevention, Investigation and Settlement of Industrial Disputes." For this purpose, the Act recognises "collective agreements" between employers and workmen or trade unions and workmen as to the terms and conditions of employment, which agreements, obviously, tend to prevent disputes; it authorised the Commissioner of Labour to investigate existing or apprehended disputes and to endeavour to *settle* such disputes by conciliation; it provided for reference of such disputes for *settlement* to arbitrators or to the Industrial Court. The Minister had the power in Section 4 to make such a reference, but Section 3 (1) shows that the Minister's power is one of last resort exercisable only if conciliation fails, and if the parties themselves do not agree to reference to arbitration. Settlement of a dispute by conciliation in only possible if the parties agree to a settlement, the terms of which have to be set out in a *memorandum of settlement*. In the case of arbitration, whether voluntary or compulsory, or in the case of a reference to the Industrial Court, the object in each case being *settlement* of the dispute, what follows is an *award* of the arbitrator or the Industrial Court.

Turning now to the effect of collective agreements, settlement by conciliation, and awards of arbitrators or of the Industrial Court, it is clear that the most important purpose secured by such means is that the terms and conditions of employment are determined for the future. In each of these cases, the Act provides (Sections 8, 14, 19 and 26) that the agreement, settlement, and award will be binding on specified employers and workmen, and will be implied terms of their contracts.

The arguments of counsel appearing on behalf of the respondents, that the object of the Act was to enable disputes to be settled by means of what have been described in the Australian Cases as "arbitral awards", are borne out by a consideration of Section 33 which sets out (although not exhaustively) the decisions which an award may contain. Sub-section (1) (a) mentions the most important and most common decision, namely

" as to wages and all other conditions of service ". Manifestly, such a decision will be operative for the future. The decision may also provide that the specified wages or conditions shall be payable or applicable from a date earlier than the date of the award; this earlier date, in my opinion, cannot be earlier than the date on which the relevant dispute arose, since that is the limit set by Section 25 (2) for the restrospective operation of an award. In thus making new terms and conditions effective retrospectively, an award clearly does not determine pre-existing rights, and has instead the character of a legislative or administrative act creating rights and duties.

Much of the argument was based upon Section 33 (1) (b), which authorises provision in an award for the re-instatement or dis-continuance of workmen. On the one hand it was argued that, since a Court cannot order re-instatement, the power to provide for re-instatement in an award is of legislative or administrative character. For the appellants, it was argued that Section 33 (1)(b) has altered the Common Law in permitting provision for re-instatement to be made in an award. In my opinion, there had been no such alteration of the Common Law; the appropriate mode of making such an alteration would be to declare that specific performance may be granted by contracts of employment. Section 33 (1)(b) contains provision also for the discontinuance of workmen from service, i.e. for a *prima facie* arbitrary power to terminate a contract which neither employer nor employee had voluntarily terminated. Considered together, these powers to provide for re-instatement and discontinuance can be explained only on the basis that the Legislature intended them to be used as a just an equitable means of settling industrial disputes, but did not intend to confer rights capable of determination and enforcement by the Courts. If a contract of employment does not provide for reinstatement, and if neither the common law nor the statute law confers a right of reinstatement *in specific circumstances* the existence or non existence of which are capable of being determined by a tribunal, then there is no pre-existing right to re-instatement, and the decision of the tribunal upon the question of re-instatement lacks the essential characteristics of a judicial determination. Instances such as Section 2 of the Money Lending Ordinance (and such instances are comparatively few), which empowers a Court to re-write a contract considered to be harsh and unconscionable, are in my opinion merely exceptions to the general principle that the function of the judicial office is the determination of pre-existing rights. In such an exceptional instance, the power though in character not judicial, may nevertheless be regarded by the Courts as being judicial, on application of the " historical criterion " discussed by Dean Roscoe Pound :—

> " We ask whether, at the time our Constitutions were adopted, the power in question was exercisable by the Crown, by Parliament, or the Judges. "

The same question, if asked in respect of the power to order re-instatement and thus to create a new contract of employment, cannot receive the answer that the power was exercisable by the Judges, since the power is itself the creation of a new statute and was not previously exercisable by any authority. Indeed, the matter of discontinuance (which is linked with reinstatement in Section 38 (1)(b) of the Act) well illustrates how vitally such a decision lacks the character of being " judicial ". The power to decide in favour of discontinuance would not only be in conflict with the desire of both employer and workmen to maintain their contractual relationship. Far from ascertaining facts from the existence of which pre-existing rights are determined, such a decision abolishes pre-existing contractual rights.

The other provisions of Section 33 are well suited to the concept of a settlement. When new terms and conditions of employment are set out in an arbitral award, it is only reasonable that those terms and conditions can be made applicable from the time when the dispute arose, i.e. when the new terms and conditions were formally demanded. So also, if a dispute is *settled* by an award, it may be appropriate that absence from work during a strike or lock-out arising in the course of the dispute should be disregarded.

It is well to repeat at this stage that I have been considering the Industrial Disputes Act without reference to the amendments made by Act No. 62 of 1957 and thereafter. In its unamended form, the Act did not in my opinion create a new *judicial* power, in providing that in the course of " settling" an industrial dispute, the Industrial Court or an arbitrator may decide not only upon new terms and conditions of employment, but also on re-instatement, back wages and similar matters.

The amending Act No. 62 of 1957 made many changes in the principal Act. The most important

of these was the addition of a new Part IV A providing for the establishment of Labour Tribunals and for the special and primary purpose of their establishment. That purpose is to be ascertained from Section 31B, although amendments in other Parts of the Act secured in addition that Labour Tribunals may be utilised for the purpose of settlement by arbitration previously contemplated in the principal Act.

Compared with the machinery and the powers of settlement contained in the principal Act, the innovations introduced in Part IV A are significant:-

(1) Recourse may be had by a workman direct to the Tribunal as of right, whereas recourse to the machinery of settlement can be had only of consent, and through the intervention of the Minister under Section 4 acting presumably in the public interest and in a " neutral " capacity.

(2) The application to the Tribunal is for relief or redress. According to the Concise Oxford Dictionary the primary meaning of " relief " is " alleviation of or deliverence from pain, distress, anxiety ". But it is clear that in the present context the only Dictionary meaning which can reasonably attach to the word is " redress of hardship or grievance ". In substance therefore the application is for " redress ", which means " to remedy, get rid of, or rectify some distress, wrong, damage or grievance, " the noun " redress " means " reparation for a wrong ".

If then the purpose of the application is to secure reparation for a wrong, and whether the application relates to the termination of services (paragraph *a*) of Section 31 (B) or to gratuity or other benefits due (paragraph *b*), what is involved is the allegation of a wrong suffered in the past in respect of the subject-matter of the application. The investigation of such an allegation is surely different from the process of settlement of industrial disputes by arbitral awards, which are concerned not with reparation for wrongs, but instead with the determination of future terms and conditions.

(3) It is clear beyond doubt that the redress claimed in an application to a tribunal *can be* identical with that claimed by a workman in a civil court, e.g. damages for breach of contract, payment of a gratuity due under contract, etc. As Mr. H. V. Perera suggested, the sole purpose of an application under Section 31 B can well be to obtain a decision on a question of fact, e.g. whether a workman had been guilty of theft or incompetence and therefore rightly dismissed, or whether a contract of employment expressly or impliedly provides for the payment of a gratuity on retirement. In application No. 9 of 1962, wrongful and unlawful dismissal was alleged, and a good part of the order of the Tribunal is devoted to a discussion of the actual or implied terms of the contract of employment; some redress granted by order is referable to a finding as to the implied terms of the contract. In application No. 21 of 1962, the order relates almost wholly to the question whether the workman was guilty of insubordination and whether his contract was terminated on that ground, and the ultimate finding is that the workman was guilty of disobedience, but not wilful disobedience. Arbitral awards under the principal Act could not ordinarily, and would only incidentally, provide for " redress " of the nature which might commonly be granted by a Labour Tribunal under the new Part IV A of the Act.

(4) The term " industrial dispute " is widely defined in Section 48, but Section 31 B specifies as the subject matter of an application to a Labour Tribunal two precisely stated matters having reference to existing or past facts. In *Richard Pieris vs. Wijesiriwardene* (62 N.L.R. 233) it was held that paragraph (b) of Section 31 B permitted an application only in respect of a gratuity or other benefit *legally* due to a workman. The Concise Oxford Dictionary states the primary meaning of " due " to be " Owing, payable as a debt or obligation ". Other meanings attach to the word only when used in special contexts mentioned in the Dictionary. I know of no statute in which reference to a thing due to or from a person has been construed otherwise than in the primary sense of the word. It is fallacious to argue that the decision in the case just cited involves the interpretation of the word " legally " before the word " due ". The word " due " carries the intrinsic connotation of something owing or payable as a debt or obligation, that is, something owing or payable legally.

(5) A workman who makes an application under Section 31 B is debarred by Subsection (5) from claiming a legal remedy in a civil court in respect of the same matter; so too, an application under Section 31 B cannot be made by a workman who has already sought another legal remedy. In regard to the process of settlement by arbitration

by an Industrial Court, there was and is no corresponding exclusion of the jurisdiction of the Courts in matters referred for settlement under the principal Act. (This appears to be a significant expression of the intention of the Legislature to commit for determination by the Labour Tribunals matters which are within the scope of the jurisdiction of Civil Courts.) The absence from the original Act of a provision similar to Subsection (5) of Section 31 B shows that the reference of a dispute for settlement by arbitration would not, in the intention of the Legislature, involve the determination of matters in respect of which civil actions lie.

(6) Part IV A introduced into the Act the term "order", which was not previously used in the Act in connection with the machinery for the settlement of disputes, and which indeed is inconsistent with the concept of "settlement". In cases of the nature which I mention at paragraph (3) above, "order" is perfectly appropriate as an alternative for "decree", having regard to the fact that there is not available to a Labour Tribunal its own machinery for execution.

I have thus far examined features in the new Part IV A of the Act which distinguish the case of a workman's application to a Labour Tribunal under Section 31B from the modes of settlement of disputes originally prescribed in the Act. It is perfectly clear that a workman, who is aggrieved by what he regards as wrongful termination of his employment or the wrongful failure of his employer to pay him a gratuity or other benefit legally due to him, is given by Section 31B a right of recourse to a Labour Tribunal in lieu of his existing right of action in a Civil Court. It is equally clear that a Labour Tribunal can in such a case determine the facts and rights of the parties in just the same way as would a Court. While Section 31 C (1) requires a Tribunal to make a just and equitable order, it does not follow that a determination of a Tribunal will often be different from those of a Civil Court; for a Tribunal may often consider it just and equitable to make an order merely giving effect to the contractual rights and obligations of the parties.

The argument that a Labour Tribunal does not exercise judicial power depended heavily on the provision in Section 31 C that a tribunal shall make a "just and equitable order". I cannot agree that the criterion which distinguishes an administrative tribunal from a judicial tribunal is that the former makes just and equitable orders, while the latter does not. The Courts surely administer justice and equity, save that in so doing they adhere to standards of justice and equity set by written or unwritten law.

Some instances were cited during the argument of statutory provisions requiring established judicial tribunals to make orders consistent with equity and good conscience. But the best example has been brought to notice only after the conclusion of the arguments. Ordinance No. 10 of 1843 was our earliest statute which provided for the establishment of Courts of Request of Inferior Civil Jurisdiction. Section 5 of this Ordinance provided that these Courts shall be Courts of Record, "and shall hear and determine in a summary way, *and according to equity and good conscience*, all actions, plaints and suits for the payment and recovery of any debts, demands or damages or matter not exceeding five pounds in value". Here then was a clear instance of a tribunal bound to act in accordance with equity and good conscience, but which was in all respects a judicial tribunal. The provisions of the Ordinance show that in determining whether or not a particular tribunal is judicial, mere labels like "justice and equity" and "good conscience" are apt to mislead, and that it is necessary to examine what precisely is the nature and scope of the powers conferred on the tribunal.

In the first place, I have already stated my opinion that an order of a Labour Tribunal granting redress to which a workmen is entitled under the Common Law governing his contract can be a just and equitable order. But what other orders could lawfully be made by a Tribunal? Let me take for example a case where, in terms of a contract, the employment of a workman paid a salary of Rs. 200/- a month is terminated upon his reaching the final retirement age and he is granted the full retirement benefits for which the contract provided. Can a Labour Tribunal in such a case make order that some small extra payment or benefit must be paid or provided? Suppose that on identical facts one Tribunal makes such an order, while another does not, can it be said that both Tribunals have made just and equitable orders? Or if it must be said that one has acted rightly and the other wrongly, then which tribunal was right and which wrong? The absurdities which can arise on the basis that a Tribunal can lawfully make orders for some small *ex gratia* relief are the same in principle as the absurdity of orders which might require the employer of a workman to purchase a residence

with a swimming pool for the retired workman, or to entertain him periodically in the employer's home, or to provide employment to all his sons, or to dower his daughters, or to pay him a capital sum of a million rupees *ex gratia*? No counsel contended that Section 31C enabled a Tribunal to make such orders, and it seems to me that such a wide and absurd construction of Section 31C is precluded in two different ways by the Act itself.

Firstly, there are the terms of Section 31B which define the scope of an application to a Labour Tribunal. Under paragraph (a), the workman can raise the question of the termination of his employment ; and under paragraph (b) he can raise the question whether any gratuity or benefit is due to him. Consideration of paragraph (c) does not arise because no additional matters of dispute have been prescribed under the Act. When therefore, Section 31C requires a just and equitable order to be made, it has in contemplation an order which allows *relief or redress* reasonably connected with the subject matter of the workman's application. Section 31B does not permit him to raise the question of dowries for his daughters, and equally Section 31C does not contemplate that justice and equity require his employer to provide such dowries, or other benefits not legally due to the workmen. The scope of the relief or redress required by Section 31C to be granted in any case is in my opinion limited to the matters in respect of which relief or redress may be claimed under Section 31B.

While it was conceded in some arguments for the respondents that a workman cannot in an application under Section 31 ask for any benefit not due under his contract, it was nevertheless contended that in disposing of such an application a Tribunal has power to grant some benefit not sought by the applicant. With respect, I know of no tribunal, judicial or administrative, which has such power, nor can I see any sense in the intention thus imputed to the Legislature that a workman who asks for a stone may instead receive bread.

Secondly, there is Section 33 in which the Legislature has attempted to set down the nature of the relief or redress which a Labour Tribunal may grant in an *order* made under Section 31C. Let me first take paragraph (b) of the Section 33 (1), which provides for re-instatement or for discontinuance from service. Clearly re-instatement si relief or redress of a character connected with an application which raises the question of the termination of a workman's services, (cf. Section 31B (1) (a)). But although Section 33 (1) *appears to contemplate* that such an order may provide for discontinuance from service, it is manifest that an order under Section 31C can never include such a provision. The possibility of ordering discontinuance upon an application under Section 31 can never arise, because the application can only be made after termination of a workman's service.

It will be seen that paragraph (c) of Section 33(1) is only incidental to paragraph (b). It provides only that where re-instatement is ordered, a period of absence from work shall be either taken into account or else disregarded for certain purposes. In other words, paragraph (c) merely enables an order of reinstatement to be made fully effective.

Paragraph (d) of Section 33 (1) is also connected with paragraph (b). This point is expressly illustrated in Section 33, sub-sections (3) and (4) which provide for compensation as *an alternative, to re-instatement*. Having regard to the limitation in Section 31 B of the subject-matter of an application to a Labour Tribunal, the " compensation " specified in Section 33 (1) (d) is only appropriate as a relief alternative to the relief of re-instatement. Compensation means " amends or recompense *for something* ", and the subject matter of an application under Section 31B cannot involve anything, other than termination of employment, which requires to be compensated.

Paragraph (e) of Section 33 (1) provides for an order for payment of a gratuity or pension or bonus. Such an order can be made when the question raised in an application under Section 31 B is " whether any gratuity or other benefit is due " to a workman. I have already stated my opinion that a workman may thus raise only the question whether a gratuity or other benefit is legally due, i.e. due under his contract. Paragraph (a) of Section 33 (1) appears to empower a Tribunal to make an order as to wages and other conditions of service. Here again, there is little connection between this apparent power and the subject-matter of an application under Section 31B, for wages and conditions are not in terms of Section 31B, the subject of such an application. But where re-instatement is ordered, then paragraph (a) of Section 33 (1) will permit the Tribunal also to make order as to the wages and conditions of service to be applicable on reinstatement. It

will be seen therefore that in practice paragraph (a) has a much more limited and incidental scope than appears on its face, in so far as it operates in cases of applications to Labour Tribunals under Section 31B.

To summarise the scope of Section 33 in cases of applications under Section 31B, *and* reading the two Sections together :—

(1) A Tribunal may (Section 33 (1) (a)) order a gratuity, bonus or pension to a retired employee if a gratuity bonus or pension is due.

(2) A Tribunal may order re-instatement of a workman whose employment has been terminated.

(3) Where re-instatement is ordered, but not otherwise, a Tribunal may *in addition* prescribe (Section 33 (1) (a), the wages and conditions of employment, order that absence from work may be disregarded (Section (1) (c)), or order payment of compensation in lieu of re-instatement.

There is to my mind a simple explanation for the *appearance* that the powers of a Labour Tribunal are wider than I hold them to be. Section 33 in its original form applied only to *awards* made in the process of settlement of disputes, and it was undoubtedly intended to state very widely in Section 33 the decisions which an award may contain. When, however, the new Part IV A was introduced, there was no separate statement of the powers of a Labour Tribunal under that Part. Instead, the draftsman adopted the method of merely adding, in the first lines of Section 33, the words " or in any order of a labour tribunal ", without considering whether each and every power already specified in Section 33 could be exercised by a Tribunal under Part IV A. Thus I have shown already the absurdity of the apparent power of a Tribunal to order discontinuance from service, when in fact the possibility of discontinuance can never arise upon an application under Section 31 B. While this method was perfectly appropriate to provide for *awards* which the new Tribunals may make when required to undertake the process of *settlement* of disputes, it leaves room for misconception as to the scope of the orders which a Labour Tribunal may make upon an application under Section 31 B. " Patchwork " Legislation (such as was the Amending Act of 1962) not uncommonly gives occasion for such misconceptions.

I have referred to the fact that in many cases, the just and equitable order which a Labour Tribunal may make can be precisely the same order as a Civil Court would make in an action for breach of contract. An order for the payment of a gratuity bonus or pension would also be of the same character. Hence it will be seen that the only new power conferred on a Tribunal is to order re-instatement and to make other orders ancillary to a re-instatement order. Now if the Legislature had chosen to make a general amendment of the law relating to contracts of employment by conferring on all employees a right to re-instatement, it could not reasonably have been argued that a Civil Court which applies the new law in deciding an action would not be doing so in exercise of judicial powers. What the amending Act of 1962 did was to vest in Labour Tribunals powers to make orders of precisely the same character as a Court may make in the same circumstances, with the addition of a new power to order re-instatement. In substance, the Act set up new Tribunals to administer some part of the law relating to contracts of employment, while at the same time amending that law in order to permit such tribunals to grant reinstatement. But even this new power is circumscribed; sub-section (3) of Section 33 selects cases in which orders for re-instatement must compulsorily include the alternative of compensation, thus limiting the apparently wide power conferred by the terms of Section 31 C.

Another provision upon which the respondents depended was subsection (4) of Section B :—

> " Any relief or redress may be granted by a labour tribunal to a workman upon an application made under subsection (1) notwithstanding anything to the contrary in any contract of service between him and his employer. "

It was assumed on all sides during the argument that this subsection means that *the content* of the relief or redress granted by a tribunal may be something not contemplated, or something even prohibited, by the contract of service between a workman and his employer; and that accordingly a tribunal, not being bound to accept the rights and obligations created by contracts of service, does not merely determine pre-existing rights.

It is unfortunate that a quite different construction of this sub-section occurred to me only after conclusion of the hearing of these cases, and that

it would be highly inconvenient, (particularly when Election Petitions have been fixed for trial), for the Bench to re-assemble to hear further argument on this point. But without benefit of argument, I venture with some confidence to adopt this different construction.

In my opinion, sub-section (4) of Section 31B was intended to overcome objection to the jurisdiction of a Labour Tribunal which might otherwise have been taken on the ground that a contract of service precluded recourse to that jurisdiction. Such an objection would have been tenable in the case of a contract which expressly provides for reference of disputes to arbitration or to a Civil Court, or which expressly excludes the jurisdiction of a Labour Tribunal.

The *powers* of a Labour Tribunal, *as opposed to its jurisdiction*, are conferred by Section 31C and Section 33; and if the provision in sub-section (4) of Section 31C was intended to reinforce those powers, one would expect the reinforcing provision to be placed together with and after Section 31C and 33. Instead this provision in fact occurs in Section 31C which deals with applications to a Tribunal and their entertainment by the Tribunal. What immediately follows subsection (4) is subsection (5) which itself quite clearly deals with a question of jurisdiction.

I have previously stated what is in effect the opinion that Section 31C, in requiring "just and equitable" orders to be made by Labour Tribunals, does not allow to such a Tribunal the freedom of the wild ass in making its orders, and that the scope of a "just and equitable order" is limited by the nature of the matters which may be submitted to a Tribunal in an application under Section 31B, and by the provisions in Section 33 as to the content of orders of such Tribunals. Section 31B (4), if given the meaning which was assumed for it during the argument, would lend support to the contention that the Legislature did intend to vest Labour Tribunals with unbridled unreasonable and unnecessary powers. I much prefer, in the context, to attribute to the Legislature the moderate and reasonable intention which appears from the interpretation which I place on Section 31B (4).

I hold that a Labour Tribunal hearing and determining an application under Section 31B exercises judicial power, and is therefore a judicial tribunal. A Labour Tribunal is admittedly a paid office. Nevertheless, the learned Solicitor General argued that the person appointed to a Labour Tribunal, even if he does exercise judicial power, is not a "judicial officer" within the meaning of Section 55 of the Constitution. The argument was, briefly, that Section 55 only entrenched the jurisdiction of the Courts in existence at the time of the enactment of the Constitution, and required that appointments to those Courts should be governed by Section 55. That argument was rejected by the Judicial Committee in *Bribery Commissioner vs. Ranasinghe* (66 N.L.R. 73). The effect of that decision is (in my understanding) that if any jurisdiction hitherto vested in any Court, is to be vested in some new tribunal which is a paid office established for the purpose of exercising that jurisdiction, then appointments to that office will be governed by Section 55. For the reasons set out at length above, I am of opinion that a Labour Tribunal is by Part IV A of the Industrial Disputes Act established for the purpose of exercising a jurisdiction concurrently vested in the District Courts and Courts of Requests. The fact that a Labour Tribunal has in the exercise of that jurisdiction power to grant the new remedy of re-instatement, and other ancillary or alternative remedies, makes no difference of substance. If for instance, the Bribery Act, in its form as considered by the Judicial Committee, had contained some special provision for a Bribery Tribunal to make some order imposing some new civil liability, in addition to fine and imprisonment, on a person convicted of bribery, their Lordships would surely not have held on that score that members of Bribery Tribunals are not "judicial officers".

In one of the applications before us, a Labour Tribunal established under Part IV A of the Act functioned as arbitrator by virtue of a reference made by the Minister under Section 4 of the Act. Since the Minister has the power to refer a dispute to any person for arbitration, it does not appear to me that any irregularity in the appointment of the member of that Labour Tribunal can affect the validity of that reference.

In two of the applications, reference to arbitration had been made to Industrial Courts. As stated in earlier parts of this judgement, Industrial Courts were established for the purpose of making "arbitral awards" within the meaning of that expression in decisions of the Australian Courts. An Industrial Court is therefore not a "judicial office."

In the case of one of the applications, a dispute had been referred to the arbitration of a selected individual. Even though the individual was paid by the state for his services in that connection, he held no office and was not a "judicial officer."

The four applications to which I have just referred fail on the ground that the functions of arbitration were in each case exercised by a person or body not being the holder of a "paid judical office". Nevertheless, I feel bound to direct attention to the fact that, in all these cases, the terms of reference to arbitration did not involve matters which properly call for the making of "arbitral awards" in the sense understood in the Australian Cases. On the contrary, each of those cases involve a question whether a termination of a contract of service had been wrongful, and was therefore not different in character from the case of an application made to a Labour Tribunal under Section 31B of the Act. For that reason, each such case called for the exercise of judicial power in the same way (as I hold) as a Labour Tribunal exercises judicial power under an application under Section 31B, and was also one in which an ordinary civil court would have had jurisdiction. Each of these cases called for the determination of contested questions of facts as to the conduct of workmen or employers or as to the terms and conditions of pre-existing contracts of service. In my view, the framers of our Constitution expected that determinations of that nature should ordinarily be made by Judges of Courts, whose appointments should be made under Section 55 of the Constitution. That expectation has not been fully realized in the brief terms of Section 55. But it is at least discordant with the spirit of Section 55 that a considerable number of disputes between employers and employees, ordinarily justiciable by the established Courts, should be regularly determined by tribunals which are not appointed under that section. The Solicitor General argued that the purpose of Section 55 was only to secure that the choice of persons to be appointed as Judges should be made by a Commission the members of which have special knowledge of the ability and capacity of persons competent to function as Judges. Accepting that argument for present purposes, I see in these four cases a practice whereby persons chosen by some other authority have functioned as substitutes for Judges of ordinary Courts.

Section 55 of the Constitution, as I have indicated, failed to preclude the possibility of the entrustment of judicial power to some authority *bona fide* established for administrative purposes. If administrative officials, the majority of whose powers and functions are administrative, are in addition entrusted on grounds of expediency with judicial power, there would not in my opinion be conflict with Section 55. But if, under cover of expediency, judicial powers are vested in an office administrative only in name, then the principle that you cannot do indirectly that which you cannot do directly will apply. That principle will also apply if there is frequent entrustment of judicial power to unpaid functionaries. I do not hold that the practice of entrusting to Industrial Courts and to arbitrators the power to adjudicate in cases of termination of an individual's employment and upon rights alleged to arise on such termination calls for the application of that principle. But the question whether that practice should continue merits consideration by the authorities responsible for the administration of the Act. Experience certainly has not shown that cases of that kind, which so closely resemble or are even identical with cases instituted in the ordinary Courts, have been dealt with more expeditiously by Industrial Courts, arbitrators and Labour Tribunals.

I would allow with costs the appeals in Cases Nos. S.C. 18 to 23 of 1962 and No. 9 of 1962, and set aside the orders of the Labour Tribunals in those cases.

I hold that in Applications Nos. S.C. 319/63, 144/64, 158/64 and 37/65, the Court or Arbitrator had in each such case jurisdiction to entertain the reference. The applications will be set down for further hearing upon other matters raised by the Petitioners.

TAMBIAH, J.

These six cases were referred by my Lord, the Chief Justice, under section 51 of the Courts Ordinance to a Bench of five Judges. Although several points have been raised in the petitions of appeal, the question which was referred for the determination of this court is whether the tribunals which heard these cases were exercising judicial power, and if so, whether the persons who presided over these tribunals were validly appointed. The contention of the appellant in these cases is that these tribunals exercised judicial power and therefore should have been appointed by the Judicial Service Commission. In S.C. 144 of 1962 and

S.C. 158 of 1964 the tribunals concerned are Industrial Courts to which the disputes were referred by the Minister under section 4 (2) of the Act; in S.C. 9 of 1962 and S.C. 18—23 of 1962 the tribunals concerned are Labour Tribunals; in S.C. 319 of 1963 the tribunal is an arbitrator to whom the dispute was referred by the Minister of Labour and Nationalised Services under section 4 (1) of the Act and in S.C. 27 of 1965 the tribunal is an arbitrator to whom the dispute had been referred to by the Commissioner of Labour under section 3 (1) d of the Act.

These cases were argued on the footing that if this court holds that the tribunals referred to were not validly appointed then the orders should be quashed. But should it hold otherwise the cases should be remitted to be heard by a Bench consisting of two judges in order to hear and determine the other points raised in the petitions of appeal filed in these cases.

I have read through the judgment of my Lord, the Chief Justice, and I regret that I am unable to agree with the orders made by him in these cases and therefore it has become necessary to express my dissenting views.

I shall first deal with the appeals in S.C. 9 of 1962 and S.C. 18—23 of 1962 where the tribunals concerned are the Labour Tribunals. In the *Ceylon Transport Board Ltd. vs. Samastha Lanka Motor Sevaka Samithiya* (1963) 65 N.L.R. 184, my brother Sri Skanda Rajah J. has already dealt with this matter and held that the Labour Tribunal need not be appointed by the Judicial Service Commission.

The point of law raised in these cases is not free from difficulty and requires careful consideration. This court had the benefit of hearing a full argument in these cases and I thank all counsel for the able argument presented by them and the help rendered to this court.

The question raised before us is whether the persons who presided over the Labour Tribunals in these cases should have been appointed by the Judicial Service Commission. The answer to this question will depend on the precise meaning which has to be given to the words "judicial officer" in section 55 of the Ceylon (Constitution) Order in Council (Cap. 379 as amended and adopted by the Ceylon Independence Act of 1947, which will hereinafter be referred to as the "Constitution").

Section 53 of the Constitution constitutes the Judicial Service Commission and confers on this body the powers of appointment, transfer, dismissal and disciplinary control of the judicial officers.

It has been strenuously contended by counsel for the appellants in these two cases that the Labour Tribunal exercises judicial power of the State and therefore the person who fills in this office has to be a judicial officer within the meaning of section 55 (1) of the Constitution. The term "judicial officer" is nowhere defined but section 3 of the Constitution defines "judicial office" as any "paid judicial office". Therefore the short point to be decided is as to what is meant by "judicial office" in section 55 of the Constitution.

In order to place the correct construction on the words "judicial officer" it is necessary to set out briefly the legal system and the constitution of the courts in Ceylon prior to the attainment of Dominion Status in 1947. During the earlier period there were in existence a number of courts such as the Supreme Court, District Courts, the Courts of Requests, the Magistrate's Courts and the Rural Courts which administered civil and criminal justice in Ceylon. These courts administered the law of this country and determined the rights of parties, whether the dispute was between subject and subject, or the State and the subject and granted the remedies provided by law. There also existed at the time the Constitution came into force, and still exist, a number of officers and persons who preside over tribunals, who in addition to their executive and administrative functions also perform the strict functions of a court within a limited scope. Thus, the Divisional Registrar under the Kandyan Marriage and Divorce Act (Cap. 133), apart from his other multifarious duties, also sits as a judge in contested divorce proceedings between Kandyans whose marriages have been registered under the Kandyan Marriage and Divorce Act (*vide* section 32 of Cap. 113 for grounds of divorce).

The Workmen's Compensation Ordinance (Cap. 139) provides for tribunals which are empowered to grant compensation to a workman who receives injuries in the course of his employment, or if he is dead, to give relief to his dependents. The Registrar of Trade Marks, apart from his administrative functions, also performs judicial functions when he acts under section 19 of the Trade Marks Ordinance (Cap. 150). Special officers could also constitute a Court Martial to

try offences committed by persons who are governed by the military or naval law. These officers have the power to inflict punishment on those who have been found guilty by sentencing them to a term of imprisonment and giving other forms of punishment. A tribunal consisting of the District Judge and two visitors also have jurisdiction to try prisoners who commit offences against prison discipline and inflict punishment on them (*vide* section 81 of Cap. 54 and section 42 and 43 of Cap. 357). The Rent Restriction Tribunal and the Board of Appeal exercise judicial functions (*vide* Cap. 274). It is not necessary to set out all the tribunals, which apart from other functions, administered justice in Ceylon at the time Ceylon attained Dominion Status.

Before Ceylon attained independence, a Royal Commission referred to as the Soulbury Commission was sent to Ceylon to advise His Majesty on the type of constitution that Ceylon should get. There was the Minister's Draft which served as a guide to the Soulbury Commissioners. The Commission heard evidence and made its recommendations to His Majesty. The recommendations they made were intended to preserve the independence of the Supreme Court and to prevent political interference of the minor judiciary consisting of the District Judges, Magistrates, Commissioners of Requests and the Presidents of Rural Courts. They suggested that these minor judges should be appointed by the Judicial Service Commission consisting of two judges of the Supreme Court and a retired judge or three judges of the supreme Court. In order to preserve the independence of the Supreme Court they recommended that the Judges of this court could only be removed from office for mis-conduct by the Governor General after a resolution in both Houses of Parliament and that their salaries should not be diminished during their tenure of office.

The Order in Council of 1946 was enacted giving effect to these recommendations and provisions were made that persons who hold judicial office should be appointed by the Judicial Service Commission. Any interference with this body was made a penal offence.

The learned Solicitor General, who appeared as *amicus curiae*, Mr. Chitty and Mr. Satyendra submitted that the term "judicial office" in this context means the office held by judges of the courts of law that were in existence at the time the Constitution came into force, or the offices which may be held by those who preside or hear cases in analagous courts or courts performing similar functions.

After a careful consideration of the arguments presented by counsel I am inclined to accept the contention put forward by Mr. Satyendra and the learned Solicitor General.

Much reliance was placed by Counsel for the appellant on the case of the *Bribery Commissioner vs. Ranasinghe* (*vide* 66 N.L.R. 74) in which it was held that the Bribery Tribunal exercised purely judicial functions and therefore the person who presided over it should have been appointed by the Judicial Service Commission. It was held that since he was appointed only by the Public Service Commission he had no power to make an order sentencing a person accused of bribery to a term of imprisonment. It was urged that the *ratio decidendi* in that case applies to these cases. It was also contended by Mr. Jayawardene that judicial power of the State is vested in the Supreme Court and the Judges appointed by the Judicial Service Commission and the exercise of this power by any other person or body would be illegal. In this case although it is sufficient to decide the question whether a Labour Tribunal is a judicial office within the meaning of the Constitution, in view of the submissions made, I shall express my opinion on the question whether the judicial power of the State is vested in the Judges of the Supreme Court and the Judges appointed by the Judicial Service Commission.

In the case of the *Bribery Commissioner vs. Ranasinghe* (supra) Their Lordships of the Privy Council did not express the view that the judicial power of the State is vested in the Supreme Court and the Judges appointed by the Judicial Service Commission. In that case they were dealing with a statute which created a special tribunal and vested it wih powers of a court in hearing cases of bribery after depriving the courts of the jurisdiction to try this offence. There was a clear usurpation of the jurisdiction of the courts by the Bribery Tribunal which performed the same functions as a court. Since the person who constituted the tribunal was not appointed by the Judicial Service Commission, it was held that if such a course was allowed there will be an erosion of the jurisdiction of the courts, and the Legislature, without amending the constitution, can create a number of such tribunals and take away the jurisdiction of the courts conferred by the Consti-

tution. The effect of the legislation creating the Bribery Tribunals is in pith and substance an attempt to create a rival court. (*vide Toronto Corporation vs. York Corporation* (1938) A.C. 415). In dealing with the Bribery Tribunal I have expressed a similar view in *Piyadasa vs. The Bribery Commissioner* (1962) 64 N.L.R. 385. The two cases which we are dealing with presently are clearly distinguishable.

The constitutional law of Ceylon is found not merely in the Ceylon (Constitution) Order in Council and the Ceylon Independence Act of 1947 but has to be gathered from the various instruments and statutes. The Courts Ordinance provides for the constitution of courts. For the determination of the meaning of the term "judicial officer" the pertinent question may be posed: what did the framers of the Constitution intend by the use of the words "judicial officer".

In the construction of doubtful provisions of the Constitution, the historical test has been adopted. Dean Pound said (cited in *Queen vs. Liyanage and others* (1962) 64 N.L.R. at 356) "In doubtful cases, however, we employ a historical criterion. We ask whether, at the time our Constitutions were adopted, the power in question was exercised by the Crown, by Parliament, or by the Judges." The historical test has been applied in Ceylon in construing the Constitution (*vide dictum* of T. S. Fernando, J. in *Queen vs. Liyanage and others* (supra) at p. 357, 358, where this test has been applied in Ceylon: *vide* also *The Queen vs. Davison* (1954) 90 Commonwealth Law Reports at 382).

Where the words are not clear it is permissible to look at the objects and reasons of the framers of the constitution (*vide* Maxwell's Interpretation of Statutes, 9th Edn. p. 22). In order to ensure that the minor judiciary should be free from political influence the Soulbury Commissioner's recommended that District Judges, Commissioners of Requests, Magistrates and Presidents of Rural Courts should be appointed by the Judicial Service Commission, an independent body which is not amenable to political interference. (*vide* para 358 of the Soulbury Commissioners Report, Cmd 6677). Mr. Ranganathan contended that although the Soulbury Commissioners specifically referred to the Judges who functioned in the District Courts, Courts of Requests, Magistrate's Courts and the Rural Courts, as persons who should be appointed by the Judicial Service Commission, yet in the Constitution it is provided that a person who holds a paid judicial office should be appointed by the Judicial Service Commission. Therefore he urged that any person who performs any judicial function either solely or in addition to his executive functions, should be appointed by the Judicial Service Commission. It appears to me that this process of reasoning is a *non sequitur* and does not help the court in determining the meaning of the words "judicial officer". Further if this line of reasoning is adopted the whole structure of the administrative and judicial system of Ceylon will be in a state of chaos and many provisions of statutes will become inoperative. A Court, in considering a statute, should construe it in such a way that its provisions are not repugnant to other statutes.

In my view the term "paid judicial office" in section 55 of the Constitution does not apply to the post held by the Divisional Registrar under the Kandyan Marriage and Divorce Act, who in addition to his duties as Government Agent, hears and decides contested cases of divorce between Kandyans; the office of the persons who preside over tribunals constituted under the Workmen's Compensation Act, the Rent Restriction Act, the Registrar of Patents and Trade Marks and even jurors who strictly perform purely judicial functions. If the contention of the appellants is to be accepted, all these persons should be appointed by the Judicial Service Commission. The learned Solicitor General submitted that if the term "judicial officer" is given the construction given by the counsel for the appellants then the Court of Criminal Appeal is wrongly constituted, since its members are not appointed by the Judicial Service Commission. He further submitted that should there be a higher court established by the Legislature to review the orders of the Supreme Court, then the members of such court should be appointed by the Judicial Service Commission. Such a result appears to be untenable.

The term "judicial officer" had a specific connection which was well understood at the time the constitution came into force although no definition could be found in any of the statutes of Ceylon at the time the constitution came into force. In the Courts Ordinance a Commissioner of Assize is referred to as a "judicial officer" (*vide* section 22 of the Courts Ordinance, Cap. 6). The Oaths Ordinance (No. 7 of 1869) requires judicial officers to take oaths. The Municipal Councils Ordinance (Cap. 252) enacts that a Municipal Magistrate should take a judicial oath.

A judicial oath was taken by all the judges who presided over courts. All other officers who perform executive functions but occasionally performed judicial functions, such as the officers mentioned earlier, were not required to take judicial oaths but only the oath of allegiance.

Applying the historical test it is clear that the framers of the Constitution meant by the term "judicial office" the posts held by District Judges, Commissioners of Requests, Magistrates, Presidents of Rural Courts and other similar officers.

The Labour Tribunal does not have the same functions as a court. It cannot be said that it is deciding a *lis* between parties. The reasoning laid down in the decision of the Privy Council in the case of *Labour Relations Board of Saskatchewan vs. John East Iron Works Ltd.*, (1949) A.I.R. (P.C.) 129, is equally applicable to the two appeals under consideration. In that case the question decided was whether a Provincial Act in Canada constituted a labour tribunal whose members were to be appointed by the Governor General, was *ultra vires* the Canadian Constitution which came into existence by the British North America Act of 1867. Under section 96 of that Act the Judges of the "superior, district and county Courts" were to be appointed by the Governor General of the Dominion. Their Lordships of the Privy Council, after examining the provisions of the Statute creating the Labour Relations Board, held that the Board is not a tribunal analagous to the Courts envisaged by section 96 of the Act. In the view they took it was found unnecessary to decide the question whether judicial power was vested in the courts and tribunals envisaged by section 96 of that Act.

After stating that the borderline in which the judicial and administrative functions overlap is a wide one and the boundary is more difficult to define in the case of a body such as the Labour Relations Board, Lord Simonds said : (*vide* 1949 A.I.R. (P.C.) at 133).

> "It is a truism that the conception of the judicial function is inseparably bound up with the idea of a suit between parties, whether between Crown and subject or between subject and subject, and that it is the duty of the Court to decide the issue between those parties, with whom alone it rests to initiate or defend or compromise the proceedings. Here at once a striking departure from the traditional conception of a Court may be seen in the functions of the appellant Board. For as the Act contemplates and the Rules made under it prescribe, any trade union, any employer, any employers' association or any other person directly concerned may apply to the Board for any order to be made (a) requiring any person to refrain from the violation of the Act or from engaging in an unfair labour practice, (b) requiring an employer to reinstate an employee discharged contrary to the provisions of the Act and to pay such employee the monetary loss suffered by reason of such discharge, (c) requiring an employer to disestablish a company dominated organisation or (d) requiring two or more of the said things to be done. Other rules provide for the discharge by the Board of other functions. It is sufficient to refer only to (b) supra, which clearly illustrates that, while the order relates solely to the relief to be given to an individual, yet the controversy may be raised by others without his assent and, it may be, against his will, for the solution of some far-reaching industrial conflict. It may be possible to describe an issue thus raised as a 'lis' and to regard its determination as the exercise of judicial power. But it appears to their Lordships that such an issue is indeed remote from those which at the time of confederation occupied the superior or district or county Courts of Upper Canada."

Some of these functional differences exist between a Court in Ceylon and the Labour Tribunal. Counsel for the appellant referred to some similarities between the Labour Tribunal and a Court of Law. The mere fact that a tribunal has some of the trappings of a Court of Law does not make it a court vested with judicial power. As Lord Sankey said in *Shell Company of Australia vs. Federal Commissioner of Taxation*, 47 The Times Law Reports 115 at 117, a tribunal may have all the trappings of a court and still may not exercise judicial power. A careful perusal of the relevant provisions of the Industrial Disputes Act shows that the Labour Tribunal functions differently from a court.

The qualifications necessary to function as an officer presiding over an Industrial Court are of a special nature. Such an officer must be acquainted with labour practices. Industrial disputes can spark off a general strike and it is the clear function of a Labour Tribunal, Industrial Court or arbitrator, appointed under this Act, to settle the disputes in a just and equitable manner and bring about industrial peace. But a court is vested with powers of adjudication of existing rights and granting reliefs provided by law. Judges should have different qualifications. They are appointed by the Judicial Service Commission, the members of which are competent to select suitable persons from the Bar who are learned in the Law and acquainted with the practice in Courts.

The provisions of the Industrial Disputes Act (Cap. 131) dealing with the constitution and powers of the Labour Tribunal may be examined with a view to finding out whether the Tribunal

is performing the functions of a court. The Industrial Disputes Act was enacted to preserve industrial peace. The preamble to the Act reads as follows : " An Act to provide for the prevention, investigation and settlement of industrial disputes and for matters connected therewith or incidental thereto." The provisions governing Labour Tribunals came into existence by the amending Act No. 62 of 157. It was not seriously disputed that before the amending Act of 1957 came into existence the provisions of the Industrial Disputes Act, as enacted in 1951, contained provisions for the objects set out in the preamble to the Act. But it was contended that the amendment of 1957 brought into existence a tribunal in the nature of a court of law, and that the preamble to the original Act did not apply to the provisions of the amending Act. If the intention of the legislature was to make a radical change in the structure of our courts there is no reason why the preamble to the original Act was not altered when the amending Act was passed or the Courts Ordinance amended. But the preamble remained the same and it is a clear rule of construction that the preamble to an Act applies not only to the original Act but also to all amendments. " The preamble of the Statute," says Coke, in 1 Inst. 79a, " is a good means to find out the meaning of the statute, and as it were a key to open the understanding thereof." (*vide* Craies on Statute Law, 5th Edn., by Sir Charles E. Odgers, p. 186). I am of the view that the preamble governs as much the provisions of the original Act as the provisions contained in the amending Act of 1957 which brought into existence the Industrial Tribunals and is a guide to enable this court to find out the objects and purposes for which the amending Act was enacted.

The scheme of the Act shows that it was the intention of the legislature to bring about industrial peace by the settlement of industrial disputes by means of collective agreements (*vide* section 5 to 10), settlements by conciliation (section 11 to 15) settlement by arbitration (sections 16 to 21), by awards by Industrial Courts and Labour Tribunals and by decisions of an arbitral nature by the Labour Tribunals (sections 22 to 30). There is also provision for industrial courts to make arbitral orders which are " just and equitable " in order to prevent strikes, lockouts etc., and to ensure industrial peace between employer and employee.

Under section 4 of the Industrial Disputes Act, the Minister may, if he is of opinion that the industrial dispute concerned is a minor one, refer it by an order in writing for settlement by arbitration by an arbitrator appointed by the Minister or to a Labour Tribunal, notwithstanding that the parties to such dispute do not consent to such reference. The creation of Labour Tribunals with the power to make orders of an arbitral nature is for the same purpose.

Section 31 A enables the Minister to appoint a number of Labour Tribunals as he may determine and each Labour Tribunal is to consist of one person. The Minister is also empowered to make regulations for prescribing the manner in which applications under section 31 B may be made to the Labour Tribunal. Section 31 B sets out the matters in respect of which relief or redress may be obtained by a workman or by a trade union on behalf of the workman who is a member of the trade union. The matters set out are :—

" (a) the termination of his services by his employer;

(b) the question whether any gratuity or other benefits are due to him from his employer on termination of his services and the amount of such gratuity and the nature and extent of any such benefits ;

(c) such other matters relating to the terms of employment or the condition of labour or the workman as may be prescribed."

It was conceded at the argument that the provisions of section 31 A applies both to a legal as well as an illegal termination of services of an employee by his employer. Such a view has been taken by this Court (*vide Shell Conpany of Ceylon Ltd., vs. Pathirana* (1962) 64 N.L.R. 71). In granting relief or redress under section 31B (1) (a) the Tribunal can make an order reinstating or discontinuing the services of any workman whose dismissal or continuance in employment is the matter in dispute. Thus, although the termination may be lawful, yet the Tribunal is empowered to order a reinstatement and such an order will take effect from the date of dispute. Thus a new contract is brought about by the order of the Tribunal from that date. When a Tribunal makes an order of this kind there is no question that it gives relief by creating new rights between parties. Could it be said that the Tribunal, as a court of law does, only declares and adjudicates on the existing rights of parties and grants relief or redress for the infringement of such rights?

Another matter in respect of which the Tribunal is given power to inquire into and give relief or redress is when there is a question whether any gratuity or other benefit is due to the workman from the employer on the termination of his services. In such cases the Tribunal is given the power to fix the amount of such gratuity and set out the nature and extent of such benefits. In two judgments of this court the view had been taken that the word " due " in section 31B must be interpreted as legally due, and therefore a tribunal cannot grant anything more than what a court of law could do when giving relief to a workman (*vide Richard Peiris & Co. Ltd., vs. Wijesiriwardena* (1960) 62 N.L.R. 233; *Electric Equipment and Construction Co.* vs. *Cooray* (1961) 63 N.L.R. 164). With respect I am unable to agree with this restrictive construction. As Mr. Satyendra contended nowhere in section 31 B (1) is it stated that this tribunal is empowered to consider what amount is legally due by way of gratuity or benefits. Sections 31B (1) sets out the matters in which the Tribunal has the power to act. The section empowering the Tribunal to make an order is set out in section 31C (1) which enacts as follows:

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

No doubt in making an order which is just and equitable, as is stated in an earlier case, a Tribunal cannot mis-state the law of the Courts and completely ignore the provisions of the contract (*vide Hayleys Ltd., vs. R. W. Crossette Thambiah* (1961) 63 N.L.R. 248.

It seems to me that a Tribunal in making an order which is just and equitable is not fettered by the terms of the contract and therefore is not bound by the strict letter of the law of contracts. Industrial peace cannot be secured if another court is created merely to enforce legal rights. The employer, being in a position to dictate terms of employment to the workman, could always provide terms in the contract in such a way that no gratuity or other benefits would be payable to the workman or he may contract that such benefits should be paid on a niggardly basis.

Fears have been expressed that in view of the wide powers given to a Labour Tribunal, the person appointed by the Public Service Commission who officiates as President of the Labour Tribunal can order an arbitrary sum to be paid to the workman according to his whim and fancy and will not observe the rule of law. These fears are unjustified in view of the fact that any order that he has to make has to be just and equitable. An arbitrary order cannot be just and equitable. No order which penalises an employer by ordering him to give a penal sum, is just and equitable. If such an order is made, there is a right of appeal to the Supreme Court on a point of law. The employer could contend that an arbitrary order made according to one's whim and fancy is not a just and equitable order within the meaning of section 31C of the Industrial Disputes Act. This contention would apply equally to a President of a Labour Tribunal who is appointed by the Judicial Service Commission. Both the Public Service Commission and the Judicial Service Commission are independent bodies and it cannot be said that an officer appointed by the Judicial Service Commission will act with greater restraint than an officer appointed by the Public Service Commission. Both these bodies were designed to be free from political control or influence.

Legislation which is *intra vires* is good although it may have ill-effects (*vide* 1945 A.C. 14 at 27 & 28). It is an accepted rule of construction that nothing should be read into a statute on the ground that there could be an abuse of the provisions of a statute (*vide* 1943 A.I.R. 30 Fed. 36 at 57: Legislative, Executive and Judicial Powers in Australia by W. A. Wynes, 2nd Edn. at page 16).

It may be contended that section 31B(4) was enacted to ensure a Labour Tribunal to make an order which is just and equitable despite the terms of the contract between parties that the dispute should not be taken before the Labour Tribunal. Counsel who appeared in these two cases and the other cases referred to, did not venture to put forward such a construction. If that was the intention of the Legislature, then the wording of section 31B(4) would have been different. It should have been as follows :—

> " Any relief or redress may be granted by a Labour Tribunal to a workman upon an application made under sub-section 31B(1) not withstanding anything in the agreement to the contrary between the employee and the employer. "

The words "relief" and "redress" in section 31B(4) are also significant. Redress is a word that is used with reference to grievance. A grievance arises when something legally due is not given. The word relief clearly indicates cases where a person is not enforcing a legal right. Relief may be given to a workman although the employer has adhered to the terms of the contract and has fulfilled his legal obligation.

The scope and ambit of the powers of the Labour Tribunal become clear when one examines section 33 of the Act. Section 33 sets out the contents of the relief or remedy which could be granted by a Labour Tribunal. Under section 33(1)(a) the order of a tribunal may contain decisions as to wages and all other conditions of service, including decisions that any such wages and conditions shall be payable or applicable with effect from any specified date, which may, where necessary, be a date prior to the date of such award or such order and decisions that wages shall be payable in respect of any period of absence by reason of any strike or lockout. Under this provision the Tribunal can order wages, although an employee's services have been legally terminated, and it could also order his reinstatement. As stated earlier, in making such an order the Tribunal creates new rights and is not determining or enforcing existing rights.

A company may retrench some of its employees after lawfully terminating their services. But if in all the circumstances of the case it is just and equitable to give compensation to such employees, a Tribunal is not precluded from granting such relief. If the Tribunal follows such a course it creates new rights which did not exist under the law because when there is an unlawful strike the strict legal position is the employer is not bound to pay any wages to the employees.

Under section 33(1)(b) the tribunal could order reinstatement of a workman who has been dismissed either legally or illegally. If the dismissal was legal still the tribunal may find that it is just the equitable that a workman should be reinstated as from a date anterior to the date of the dismissal. Here again, as stated earlier, new rights are created as a result of this order. The tribunal could also order the discontinuance from service of any workman as a result of whose employment there has been labour unrest. Here again the tribunal does not enforce any rights but terminates the rights that existed under the contract. An employer may cause a justifiable lockout if the workmen have acted in an illegal manner. But there may be a workman who is prepared to go for work but was prevented from doing so as a result of the lockout by the employer. If such a workman asks for relief, a tribunal can give relief to him by ordering that his wages should be paid as from a particular date if such a course is just and equitable. By such an order new rights are created between parties.

Under section 33(1)(c) the Tribunal may also make order containing decisions as to the extent to which the period of absence from duty or any workman, who it has decided should be reinstated, should be taken into account or disregarded for the purpose of his rights to any pension, gratuity or retiring allowance or to any benefit under any provident scheme. Such orders create new rights.

A court of law declares existing rights of parties whether vested or contingent and grants relief or redress for a breach. A court administers justice according to law. But a tribunal in giving relief or redress to a workman upon an application made under subsection 1 of section 31B *may do so notwithstanding anything to the contrary in any contract of service between a workman and his employer.* Therefore how could it be said that a Labour Tribunal is a court whose function is to administer the law of the land between parties and give judgment declaring the rights and obligations of the parties and grant them relief for breach of contract? Any Tribunal which alters the rights of parties and not declares the rights is not a court (*vide* 67 Commonwealth Law Reports 28).

In dealing with the distinction between arbitral and judicial power, Isaacs and Rich JJ. stated as follows : (*vide Waterside Workers Federation of Australia vs. Alexander Ltd.*, (1918) 25 Commonwealth Law Reports 434 at 463) .:—

> "But the essential difference is that the judicial power is concerned with the ascertainment, declaration and enforcement of the rights and liabilities of the parties as they exist or are deemed to exist, at the moment proceedings are instituted; whereas the function of an arbitral power in relation to industrial disputes is to ascertain and declare, but not enforce, what in the opinion of the arbitrator ought to be the respective rights and liabilities of the parties in relation to each other."

This distinction has been approved by the Privy Council (*vide Attorney General of Australia vs. Reginam* (1957) 2 A.E.R. 45). It has been held that the functions of an arbitral tribunal are different from those of a court and the requirement that both of them should not act without hearing both sides of the case, does not weigh against the

proposition that the exercise of the judicial function is concerned, as the arbitral function is not, with the determination of a justiciable issue (*vide supra* at p. 55).

Other differences between Courts functioning in Ceylon and the Labour Tribunal are as follows:—

1. A Labour Tribunal is not open to an employer. It is only the employee who can seek relief or redress under the provisions of section 31B of the Industrial Disputes Act, but a court of law is open to both an employer and employee.

2. The Labour Tribunal has to suspend proceedings when it is satisfied, after such inquiry, as may be necessary, that the matter in respect of which the application is made under section 31B(1)(a) is one under discussion with the employer of the workman to whom the application relates by trade union of which that workman is a member. Further upon conclusion of such inquiry if a settlement is reached in the course of the discussion, the tribunal is bound to make an order according to the terms of such settlement. It may be noted that a settlement may be brought about between the employer and such trade union by considerations of policy with which the workman may be not in agreement. But a court of law has to hear the case instituted till a final decision is reached. A court of law is not influenced by matters of policy.

3. Where the tribunal is satisfied that such matter constitutes or forms part of an industrial dispute referred by the Minister under section 4 for settlement by arbitration, or for settlement by an Industrial Court, it may make order dismissing the application without prejudice to the rights of parties to the dispute. But a party before a Court is entitled to have a full hearing and have his case decided according to its merits.

4. Where an application under section 31B(1) relates—(a) to any matter which in the opinion of the tribunal, is similar to or identical with the matter constituting or included in the industrial dispute to which the employer to whom that application relates is a party and to which an inquiry under the Act is held or (b) to any matter the facts affecting which are in the opinion of the tribunal, facts affecting any proceeding under any other law, the tribunal should make an order suspending its proceeding. After such conclusion the tribunal could resume proceedings. But in making an order upon such application it shall have regard to the award or decision of the said inquiry or proceeding under any other law. It is significant that under the provisions referred to above an employee is affected by orders made in proceedings to which he is not a party. The mere membership of a Labour Union which has taken part in the proceedings does not make the Union the agent of the employee. The Labour Union, in effecting a settlement or collectively bargaining, may be influenced by policies. Here again there is a clear distinction between a court of law and a tribunal. In a court of law the parties are not bound by settlement and orders made in proceedings in which they are not parties and a court of law cannot be influenced by matters of policy but is under a duty to adjudicate according to law. A tribunal which has to consider a matter of policy is not a court.

5. A court of law is bound to interpret the contract and hear only the parties, whereas the Labour Tribunal is bound to hear the Commissioner of Labour who may set out the policy of the government. Here again a Labour Tribunal may be influenced by matters of policy in determining an application before it.

6. The orders of a Tribunal cannot be enforced by it. But the court is given the power to enforce its orders.

From these differences it is clear that the functions of a Labour Tribunal and a court of law are entirely different and the objects for which they are created and their powers are not the same.

In amending the Industrial Disputes Act and providing for Labour Tribunals in addition to the existing machinery for the peaceful settlement of strikes and lockouts which can paralyse the country, it could never have been the intention of the Legislature to provide an additional court which administers the law of contract since such courts were in existence and are still functioning.

In this context the dictum of Powers J. in the case of *Waterside Workers' Federation of Australia vs. J. W. Alexander Ltd.*, (25 C.L.R. 435 at 483) is apposite. In dealing with the courts and arbitration tribunals of Australia he said :—

"I find, on looking at the Act to see if it was intended to make it a Court of the Judicature, six very strong grounds why I am satisfied that it was only intended to make it a Court of compulsory arbitration—and not a Court of judicature : (1) the title of the Act (section 1); (2) the declared objects of the Act; (3) the fact that no

power has been given to the Court to punish for any breach of the Act; (4) the fact that by section 25 it declares that " in hearing and determination of every industrial dispute and in exercising any duties or powers under or by virtue of this Act the Court of the President shall act according to equity, good conscience and the substantial merits of the case, without regard to technicalities or legal forms, and shall not be bound by any rules of evidence, but may inform; (5) that the only power given to it as to penalties is to impose penalties for breaches of its awards or orders made as an Arbitration Court (this power, I assume, was conferred because Parliament considered it incidental to the power to make awards); (6) that no power of execution to enforce even the power to impose penalties was given to the Arbitration Court—(under section 46 orders made by the Arbitration Court imposing penalties are to be enforced by execution only in Federal or State Courts of judicature, not by the Arbitration Court). "

These observations, *mutatis mutandi*, apply equally when the functions of a court of law in Ceylon are compared with those of a Labour Tribunal.

As stated earlier, at the time the Constitution came into force, many tribunals and officers exercised judicial power although they were not functioning as courts. The canon of construction which should be adopted in interpreting a constitution is set out as follows :—" In doubtful cases, however, we employ a historical criterion. We ask whether at the time our Constitution was adopted, the power in question was exercised by the Crown, by Parliament or by the Judges. Unless analysis compels us to say in a given case that there is a historical anomaly, we are guided chiefly by the historical criterion. " This view has met with approval in our Courts (*vide Queen vs. Liyanage* (1962) 64 N.L.R. 313 at 356). Applying this test the term " judicial office " in section 55 of the Constitution means the office of a District Judge, Commissioner of Requests, Magistrate, Presidents of Rural Courts and other similar offices and does not apply to a Labour Tribunal.

Mr. Jayawardena in the course of his argument strongly urged that judicial power of the State has vested in the Supreme Court and the other Courts constituted under the Courts Ordinance. He contended that there is a separation of judicial, executive and legislative powers in Ceylon. As a corollary, he submitted that where a Tribunal which has functions of an executive and arbitral nature performs a limited judicial function, then the person who presides over it must be appointed by the Judicial Service Commission in order to perform the judicial functions, otherwise the judicial orders he makes are null and void. Although in view of the interpretation I have placed on the words " judicial officer " it is unnecessary to decide this point; yet in view of its importance I would like to express my views.

After a careful consideration of the arguments put forward by counsel I am of the view that the judicial power of the State is not vested in the Supreme Court and the other courts in Ceylon. In some cases we have ventured to express the view that judicial power is vested in the Supreme Court and the minor courts (*vide Queen vs. Liyanage* (1962) 64 N.L.R. 313; *Senadhira vs. Bribery Commissioner* (1961) 63 N.L.R. 313 at 318; *Piyadasa vs. Bribery Commissioner* (1962) 64 N.L.R. 385 at 390). But for the decision of these cases it was not necessary to hold that judicial power of the State vested in the Judges only. In *Piyadasa's Case* I did not have the benefit of a full argument as there was no counsel for the appellant. In the present appeals this matter has been fully argued and I am of the view that judicial power of the State is vested in Her Majesty who exercises them through the Judges in Ceylon but has reserved to Herself the right to exercise this power as the final Court of Appeal.

In this connection a distinction has to be drawn between a jurisdiction of a Court and the judicial power of the State. In England there is no separation of judicial, executive and legislative powers, though in political theory political institutions are ceremoniously divided into three groups. As Sir Ivor Jennings remarks : (*vide* the Law and the Constitution, 4th Edn. p. 9) " It is not a political theory but political experience, the logic or accident of events which caused England to develop this three-fold division." As regards administrative bodies, it is to be noted that in England from the earliest days of its legal history a mingling of administrative and judicial powers is to be found. Before the end of the 12th century the King's Court had become the dominant governing authority in England and it had at one and the same time powers which were judicial, administrative and financial. By the medieval period the chief administrative organ—the King's Council, came to be regarded as an administrative body. Referring to the separation of powers in the English Constitution Professor Holdsworth said : " But as yet the boundaries between the executive functions on the one hand, judicial and legislative functions on the other hand were very indistinct. ". (*vide* History of English Law by W. S. Holdsworth, Vol. 1 page 478 to 479). Gradually with the increase of work and pressure of judicial business a large amount of

judicial work was placed on the King's Council when it began to split into two parts, a judicial court and an administrative court. The powers of the Common Law Courts and the importance of the Kings' Council was stressed. The administration of law shifted to the Courts of Requests and to the Courts of Chancery which were at that time for all intents and purposes administrative tribunals. The 17th century however, witnessed the ascendency of justices of the peace, a small group of country gentlemen who were appointed to keep the peace and to arrest wrong doers. They gradually acquired extraordinary collection of judicial and administrative duties which as Maitland remarks, " No theorist could attempt to classify since their rich variety was not the outcome of theory but experience. "

The mingling of powers arose more as a result of convenience until Montesquieu apparently mis-read the English legal system and in his famous chapter "esprit des lois" Book II Cap. 6 where he adumberated the doctrine of separation of powers. But even in modern times, in strict legal theory, such separation of powers do not exist in England or Ceylon. The blending of the executive and judicial functions is not confined to the lowest grades but extends to the highest officials. Responsible ministers now often perform a variety of functions which sometimes frequently overlap with judicial functions.

In the Australian and American Constitutions there is a clean separation of powers. But even there, as has been pointed out, the constitution cannot be worked if there is a strict separation of powers (*vide* Administrative Law by David, Vol. I page 64). The Constitution of Ceylon is based on the English Constitution (*vide* the observations of the Soulbury Commissioners—Soulbury Commissioners' Report, Cmd. 6677, para 408 to 410). At no time in the history of our legal system has there been in theory any separation between judicial, administrative and legislative powers.

Before the constitution came into force judges were appointed by the Governor on the recommendation of a Judicial Service Commission which served only as an advisory body at that time. Under the Ceylon (Constitution) Order in Council, subject to certain limitations, the legislative function is no doubt now delegated to the Queen in Parliament. The executive function still remains in Her Majesty (*vide* section 45 of the Constitution). The judicial power is still vested in Her Majesty and not in the courts. Her Majesty exercises this power directly with the advice of the Privy Council through the judges of the Supreme Court and the other Courts. If judicial power is vested in the Supreme Court and the other courts functioning under the Courts Ordinance, then the Privy Council will have no power to advise Her Majesty to affirm or allow appeals which are taken from the decisions of the Supreme Court to Her Majesty in Council. Although such a view was taken by this court, it has been held by the highest tribunal of this Island that Her Majesty still retains her prerogative rights to hear appeals from the courts of Ceylon. (*vide The Queen vs. Hemapala* (1963) 65 N.L.R. 313). This power can be with Her Majesty only if judicial power of the State is still vested in Her.

If the contention of Mr. Jayawardena is to prevail, as the learned Solicitor General submitted, should Ceylon abolish appeals to the Privy Council, then only the Judicial Service Commission can appoint a court higher than the Supreme Court, unless the constitution is amended. It could hardly be conceived that the Judicial Service Commission which consists of at least two Supreme Court Judges and a third member who is either a judge of the Supreme Court or a retired judge, should appoint judges to the highest tribunal which will have jurisdiction over the Supreme Court in such an event. If Mr. Jayawardena's argument is carried to its logical conclusion the Court of Criminal Appeal is badly constituted. Therefore it is permissible under the Constitution of Ceylon, for administrative tribunals to have a residuum of judicial powers and the existence of such judicial powers will not be a criterion to draw the line of demarcation between a court of law and a tribunal. The correct line of demarcation between a judicial office and a non-judicial office, is to apply the functional test and ask the question whether an officer or tribunal is performing analogous or same functions as a judge, before determining whether such tribunal or office is a judicial office.

It remains to consider some of the arguments put forward by counsel in these cases. Mr. Ranganathan submitted that the duty to make an order which is just and equitable imposes on a judicial tribunal the functions of a judge who presides in a court of law since he has to act according to this form. In the case of legislation he stated that there was no norm or limitation placed. Although these observations may be justified in considering legislation by a Supreme Parliament, it is not true

of delegated legislation. When a Supreme legislature delegates legislative functions to a body of persons it sets out the scope and ambit of such legislation and the norms or standards which the delegated body has to conform in enacting subordinate legislation. Any legislation in excess of the powers given to a delegated body would be *ultra vires*. The duty to act judicially imposed on a tribunal does not make it a Court of Law exercising judicial power.

It was also contended that it is only a court which is under a duty to act justly and equitably and the use of such a phrase is not appropriate in the case of arbitral tribunals. The duty to act " in equity and good conscience is not a decisive test to differentiate between a court of law and an administrative tribunal. " Thus in *Moses vs. Parker* (1896) A.C. 245, the Privy Council held that the Supreme Court of Tasmania which is vested with jurisdiction to deal with disputes regarding claims to grants of land was not pronouncing judicial decisions from which there was a right of appeal to the Privy Council. Such disputes had, prior to the statute, been dealt with by certain Commissioners and they reported to the Governor who was bound to act " with equity and good conscience ". Although it was expressly provided that the Supreme Court is not bound by strict rules of law and equity in any case or any technicalities or legal forms whatsoever, yet it was not absolved from acting in good conscience. Despite this restriction it was held that the Supreme Court in exercising this jurisdiction was not performing the functions of a court.

Mr. Jayawardena also placed reliance on a passage from an article contributed by Dr. Duncan Derret in " Law in the Changing World ", who while writing on justice, equity and good conscience said, " Contrasted with the office of Judge is the so called *arbitrium rusticorum*, which seems to have been the Romanic counterpart of palm tree justice whereby the arbitrator divided a disputed property equally between two parties, here no juridical activity can be seen and he splits it between them like the monkey in Aesop's Fables, as the simplest way of appeasing the noisier of parties. " It is not even rough justice or substantial justice. For when there is no juridical discretion, there is no justice. This passage cannot be taken out of its context and given a meaning which the writer does not intend. At no stage does the writer apply this as a test to distinguish between a court of law and an arbitral tribunal. If this is a distinguishing feature then all tribunals could act arbitrally—a proposition which is not tenable.

I did not understand Mr. Satyendra's argument to mean that a tribunal that is empowered to make a just and equitable order, is not for that, reason exercising judicial power. His argument as I understand, is that this provision taken along with the other provisions of the Industrial Disputes Act authorises the Tribunal to make an order which is just and equitable, notwithstanding the terms of the contract.

Further arbitral functions must be distinguished from arbitrary functions. When a tribunal is given the power to act in a just and equitable manner, it cannot act in an arbitrary manner. A number of administrative tribunals in England and Ceylon cannot act in an arbitrary way but have to act judicially and yet they are not courts, although their orders could be reviewed by the Supreme Court on an application by way of writ of certiorari or prohibition.

It was contended by counsel for the appellants that the powers to alter the terms of the contract is no decisive test to determine whether a tribunal is an arbitral tribunal or a court of law. Mr. Jayawardena cited section 2 of the Money Lending Ordinance which enables a court to re-open the transaction and take an account between the lender and the person sued, and relieve a debtor from payment of any sum in excess of the sum adjudged by the court to be fairly due in respect of such principal, interest and charges as the court, having regard to the risk and all the circumstances may adjudge to be reasonable. This jurisdiction can only be exercised if the court is satisfied on the evidence led that—" (a) the return to be received by the creditor over and above what was actually lent, having regard to the sums already paid on account, is excessive, and that the transaction was harsh and unconscionable, or as between the parties thereto, substantially unfair; or, (b) that the transaction was induced by undue influence, or is otherwise such that according to any recognised principle of law or equity the court would give relief; or (c) that the lender took as security for the loan a promissary note or other obligation in which the amount stated as due was to the knowledge of the lender fictitious or the amount due was left blank. "

It must be noted that it is only after a judicial finding that one or more of the matters set out in

section 2 (1) of the Money Lending Ordinance are satisfied that the court is enabled to re-open the account. Here the court of law is not disregarding the provisions of law or the terms of the contract in granting relief but enforcing the rights granted by the law in favour of the debtor.

It was also contended that the term "rights deemed to exist" must be construed as rights which are given under section 31B to the workman. Under section 31B of the Industrial Disputes Act there are no vested or contingent rights in the workman co-relating the reliefs that are set out. The relief being entirely discretionary, may be refused or granted. Therefore in granting of relief or redress under section 31B, the Tribunal is not deciding existing rights or rights deemed to exist and give relief as a court of law, but creates new rights which grants relief or redress provided it acts in a just and equitable manner.

Mr. Satyendra submitted that the functions of the Labour Tribunal in making an arbitral order is not judicial but legislative. It was however contended by counsel for the appellants that legislative function cannot be exercised in favour of a single individual. I am unable to accept this contention since there are a number of private Acts in the statute book which affect single individuals or corporations.

Reference was made to the provisions of the Companies Act (Cap. 145) and the Partnership Act (Cap. 83) under which Courts may dissolve Companies or Partnerships, as the case may be, among other grounds, on the ground that it is just and equitable to make such an order (*vide Davis vs. Brunswick (Australia) Ltd.*, (1936) 1 A.E.R. 299). These provisions were cited as instances to show that merely because a tribunal is empowered to act justly and equitably it does not cease to be a court. But it must be noted that when a court is empowered to wind up the company on specific grounds, one of them being that it is just and equitable, the court is exercising a judicial function and determining existing rights. But when the Labour Tribunal acts under section 31B(4) a discretion is given to the Tribunal to act justly and equitably *notwithstanding anything to the contrary in any contract of service between the employer and employee.* This subsection sets out the power of the Tribunal and not the ground of its decision.

Apart from the powers under section 31B of the Industrial Disputes Act, a Labour Tribunal may also be appointed as an arbitrator if the dispute is of a minor nature under section 4 of the Act. This provision again shows that it was never the intention of the legislature to regard a Labour Tribunal as a court of law. It is no part of a function of a court of law to act as an arbitrator.

Further it was contended that a right of appeal was given from the decisions of the Industrial Tribunal on a point of law and therefore this Tribunal is a court. But there are many administrative tribunals from the decisions of which a right of appeal is given to the Supreme Court, yet they are not courts of law. Thus if a right of appeal is given to a party who is dissatisfied by an order of the Registrar of Trade Marks under the Trade Marks Ordinance; by the Registrar of Patents under the Patents Ordinance; by a person who is dissatisfied with an order under the Workmen's Compensation Ordinance etc., yet these officials or Tribunals are not courts.

Mr. Jayawardena also contended that by an order of the Labour Tribunal instant liability is imposed on the employer to either pay wages or compensation etc. He therefore urged that it was a court of law and relied on the ruling in *The Waterside Workers' Federation of Australia vs. Alexander Ltd.*, (25 C.L.R. 434), for his proposition. The case relied on is from Australia where there is clear severability of judicial, execvtive and legislative power. In Australia where the judicial power is vested in the courts, instant liability cannot be created by a tribunal which is not a court by creating the right and enforcing it. A tribunal cannot adjudicate upon a right that has been brought into existence by its action and grant relief in countries where there is no separation of powers and there is nothing repugnant to the provisions of our constitution for the Legislature, by a simple majority, to create a body which could not only create rights but also could give relief or remedy on the footing that the rights created binds the party so long as there is no direct or indirect attempt to erode the jurisdiction of the established courts.

In enacting the Industrial Disputes Act, the Parliament of Ceylon was no doubt concerned to bring about industrial peace for the welfare of the nation. Both the employer and employee were benefitted by the Industrial Disputes Act. A serious responsibility is cast on the Court to declare invalid a statute passed by the Parliament for the

welfare of the nation. The views expressed by Isaac J. in the *Federal Commissioner of Taxation vs. Munro* (1926) 38 C.L.R. at 180, are equally applicable to Ceylon. In this context he said : " It is always a serious and responsible duty to declare invalid, regardless of consequences, what the National Parliament representing the people of Australia, has considered necessary or desirable for the public welfare. "

For these reasons I am of the view that the Labour Tribunal does not exercise judicial power. The orders in S.C.9/'62, S.C.18-23/'62, S.C.144/'64 and S.C.158/'64 are not null and void for the reason that the person who presided over these tribunals were not appointed by the Judicial Service Commission. In view of the fact that the other points taken up in the petitions of appeal have not been argued, I would remit these cases to a Bench of two Judges to hear these matters.

I shall now deal with applications Nos. 158 of 1964 and 144 of 1964. In S.C. application 144 of 1964 a writ of certiorari has been asked for to quash the orders of the Industrial Court. In this case the Hon. Minister of Labour and Nationalised Services, by his order dated 16th November, 1964 has referred an alleged industrial dispute between the petitioner and the second respondent union to an Industrial Court for settlement. The question the Industrial Court has to decide was whether the non-employment of a number of workers set out was justified and what relief they are entitled to. The Industrial Court held that the Company was justified in retrenching the workers but their not being paid any compensation was not justified. Therefore it awarded in respect of each of these workers a sum representing three months' salary to be paid as retrenching relief.

In S.C. No. 158 of 1964 also a writ of certiorari is asked to quash the proceedings of the Industrial Court. In this case the alleged Industrial Dispute is whether notice of discontinuance of four persons set out in the petition was insufficient and whether they are entitled to any compensation. The Industrial Court held that the notice was insufficient and they should have been given at least two months' notice before retrenchment and ordered that each of them be paid Rs. 200/- as compensation. One of the points relied on in both these applications is that the Industrial Courts in these two cases were not appointed by the Judicial Service Commission and since they exercised judicial power their orders are null and void. This was the only point argued before the Court.

Section 4(2) of the Act provides that a Minister may by an order in writing refer any Industrial Dispute to an Industrial Court for settlement. Thus, the very purpose for which the matter is referred to an Industrial Court is for settlement and not adjudication. Section 22(1) of the Act provides for the constitution of the court. Every order of the Minister referring a case to an Industrial Court should be accompanied by a statement prepared by the Commissioner setting out each of the matters which to his knowledge is in dispute (*vide* section 23). The duties and powers of the Industrial Court is set out in section 24(1) which enacts :

> " 24(1). It shall be the duty of an Industrial Court to which any dispute, application or question or other matter is referred or made under this Act, as soon as may be, to make all such inquiries and hear all such evidence, as it may consider necessary, and thereafter to take such decision or make such award as may appear to the Court just and equitable. "

It is significant to note that the Industrial Court is only empowered to make an award and not deliver a judgment. Section 25 provides for the publication of the award on a date from which it comes into force.

The effect of an award is set out in section 26 which enacts that every award of an industrial court or tribunal, for the purpose of this Act shall be binding on the parties, trade unions or workman referred to in the award in accordance with the provisions of section 24(3) and *the terms of the award shall be the implied terms of the contract of employment between the employers and workman bound by the award.*

Under section 25(2) the award of an Industrial Court is made effective from the date of the dispute. Thus the effect of an award is not to give a judgment which would be enforced but to introduce terms which become implied terms of the contract.

Provision is also made for reconsidering an award by an Industrial Court. After hearing, an Industrial Court to which an application is made, may in its decision (a) confirm the award, (b) set aside the award, (c) set aside the award and make a new award in place thereof, or (d) vary or modify the award in such a manner as may be necessary (*vide* section 27 of Cap. 131). Section 30(1) gives out the effect of such a decision. It

enacts that " every award which is set aside by a decision of an Industrial Court under section 28(1) (b) shall cease to have effect on the date of that decision or on such later date as may be specified in the decision. "

Section 30(2) enacts that every award which is varied or modified on an application made under section 27 by a decision of an industrial court shall, on and after the date of such decision or on or after such other date, if any, as may be specified in that decision, not being earlier than the date of such application, have effect and continue in force as so varied or modified.

It is clear therefore, from these provisions that the effect of an award is merely to make the terms of the award, implied terms of the contract from the date the award comes into force and the award may be repudiated later. It was conceded by Mr. H. V. Perera in the course of the argument that if the effect of the award is merely to create future rights, then it will be an arbitral tribunal, but he urged that if it imposes instant liabilities on rights created, then it exercises judicial power. I see no reason why such a limited interpretation should be given to the provisions of the Industrial Disputes Act, in a country where there is no separation of legislative, executive and judicial powers. Further, the reasons given by me to differentiate a Labour Tribunal from a Court equally apply to an Industrial Court.

For these reasons I hold that the Industrial Court in these cases did not exercise judicial power. Therefore these cases should be sent before a Bench of two Judges for adjudication on the other points raised in the appeal.

In S.C. Application 319/'63 a writ of certiorari is asked for to quash the order of the arbitrator appointed by the Hon. Minister of Labour and Nationalised Services under section 4(1) of the Industrial Disputes Act (Cap. 131). In S.C. 37/'65 an application for a writ of certiorari is made to quash the order of an arbitrator appointed by consent of parties under section 3(1)(d) of the Industrial Disputes Act. The only point argued before us was whether the arbitrator should have been appointed by the Judicial Service Commission. I am of the view that the arbitrators appointed in both these cases are not judicial officers within the meaning of the Constitution. Therefore their appointment is valid.

Where a matter is referred to for settlement by an arbitrator, the duties and powers of an arbitrator are set out in section 17 of the Industrial Disputes Act. The effect of an award of an arbitrator is to make the terms of an award implied terms of the contract entered into by the employer and employee bound by the award (*vide* section 19).

Any party, trade union, employer or workman bound by an award made by an arbitrator under the Industrial Disputes Act may repudiate the award by a written notice in the prescribed form sent to the Commissioner and every other party bound by the award subject to the provisions set out in the proviso to section 20 (1). It is enacted that where a valid notice of repudiation of an award is received by the Commissioner, subject to the proviso to section 20 (a) the award to which such notice relates shall cease to have effect upon the expiration of three months immediately succeeding the month in which the notice is so received by the Commissioner or upon the expiration of twelve months from the date on which the award came into force as provided in section 18(2) whichever is the later, and (b) the Commissioner shall cause such notice to be published in the gazette together with the declaration as to the time at which the award shall cease to have effect as provided in paragraph (a).

I have already given my reasons for holding that an officer presiding over an Industrial Court or Tribunal is not a judicial officer and therefore need not be appointed by the Judicial Service Commission. Where the effect of an award is to make the terms of the award implied terms of the contract which may be repudiated later, I fail to see how it could be said that an arbitrator is exercising judicial power and acting as a judge and determining the rights of parties.

In S.C. Application 37 of 1965 the arbitrator was appointed by consent of parties. If it is held that such an arbitrator holds a judicial office by the same process of reasoning an arbitrator appointed under the provisions of the Civil Procedure Code should also be appointed by the Judicial Service Commission. When a party consents to refer a matter to an arbitrator, such party waives the jurisdiction of the court and agrees to abide by the decisions of the arbitrator. The reasons given by me for holding that an Industrial Court or Tribunal is not a Court of law apply with greater emphasis when an arbitrator's functions are examined.

The learned Solicitor-General adumberated that orders made by Judges who act under colour of office are valid. He developed the doctrine which gives validity to acts of officers, whatever defects there may be in the legality of their appointment. In support of his contention he cited the dictum in the case of *Norton vs. Shelby County* (United States Supreme Court Reports, Book 30, page 178 at 186). Although I am attracted by this submission it is unnecessary to decide this point in view of the orders I have made in these cases.

For these reasons it cannot be said that the arbitrators in these two cases were acting as judicial officers within the meaning of the Constitution. Therefore I hold that this application should not be allowed on the ground that since the arbitrator was not appointed by the Judicial Service Commission, the orders are null and void.

These two applications shall be remitted for hearing before a Bench of two judges on the other points raised in the petitions.

The costs will abide the event in all these cases.

SRI SKANDA RAJAH, J.

Careful consideration of the arguments of Counsel for the appellants and the petitioners and the judgments of My Lord the Chief Justice and H. N. G. Fernando, SPJ, has not persuaded me to change the view that I expressed in *Ceylon Transport Board vs. Samasta Lanka Motor Sevaka Samitiya* (1963) 65 N.L.R. 185, *viz.*, that the Labour Tribunal need not be appointed by the Judicial Service Commission. On the other hand, the arguments of Counsel for the Respondents and the Judgment of my brother Tambiah confirm me in that view.

I agree with Tambiah, J., that appeals No. 9/1962 and Nos. 18—23/62 should be set down for hearing in due course. Also, I agree with H. N. G. Fernando and Tambiah, JJ. that applications Nos. 319/63, 144/64, 158/64 and 37/65 should be set down for hearing in due course.

In each of these appeals and applications costs will abide the event.

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

K. V. KIRIGORIS AND TWO OTHERS *vs.* S. J. A. EDDINHAMY *

S.C. 374 (*Final of* 1964)—*D.C. Tangalle L*/921

Argued on: 20th October, 1965.
Decided on: 27th October, 1965.

Minors—Donation by father to children—Acceptance by one donee on behalf of minor donees—Is such acceptance valid ?

Held: That in the case of a donation made by a parent, acceptance of the donation by a brother of the minor donees is good for the reason that the donor has allowed such acceptance to be made on behalf of the minor children.

Followed: *Abeyewardene* v. *West*, (1957) 58 N.L.R. 313; LIV C.L.W. 33
Nagaratnam v. *John*, (1958) 60 N.L.R. 113

Not followed : *Packirmuhaiyadeen* v. *Asiaumma*, (1956) 57 N.L.R.

G.T. Samarawickreme, Q. C., with *N.R.M. Daluwatte* and *W. S. Weerasooriya*, for the plaintiffs-appellants.

E.A.G. de Silva, for the defendant-respondent.

* For Sinhala translation, see Sinhala section, Vol. 11 part 4, p. 13.

T. S. FERNANDO, J.

The main dispute at the trial of this action which was filed by the plaintiffs seeking a declaration of title to two lots A and B in plan No. 1874 of 23rd November 1962 and ejectment of the defendant therefrom was whether P 4, deed of donation No. 19825 of the 8th June 1946, had been validly accepted. P4 was executed by the father of the three plaintiffs about 2 years before he married the defendant who is the step-mother of the plaintiffs. It would appear from the evidence that the 1st plaintiff, Kirigoris, had just reached the age of majority at the time of the execution of P4, but that the 2nd and 3rd plaintiffs, his sister and step-sister respectively, were minors. Their father, reserving to himself a life interest, gifted the two lots subject, however, to a fidei-commissum. P4 contained an acceptance clause in the following terms:—

> "And I the first named (1st plaintiff) the said donee do hereby thankfully accept the foregoing gift subject to the life-interest of the donor hereof and to the restriction aforementioned on my behalf and on behalf of the second and third named donees (2nd and 3rd plaintiffs) who are minors."

At the trial the first plaintiff, in giving evidence, stated that he was about 21 years of age at the time of the execution of P4. His father died in 1954. A witness to the deed who was 65 years old at the time of the trial (in 1963) thought at one stage of his evidence that the 1st plaintiff was about 15 years old but later thought he might have been older. It is noteworthy that in the acceptance clause the 2nd and 3rd plaintiffs are referred to expressly as minors; the implication therefore is that the 1st plaintiff was not a minor. The trial judge did not himself reach any finding as to the age of the 1st plaintiff at the time of the execution of P4. He dealt with the issue before him as if the 1st plaintiff had reached majority at the relevant time. The issue in regard to valid acceptance of P4 was not raised until after the 1st plaintiff had concluded his evidence in chief. Deed P4 had been expressly pleaded in the plaint. We did not find ourselves able to accept the argument of defendant's counsel before us that we should now find that it was not proved that the 1st plaintiff had reached the age of majority in 1946.

In regard to the main dispute, whether P4 had been validly accepted, the learned trial judge purported to follow a judgment of this court in the case of *Packirmuhaiyadeen* v. *Asiaumma*, (1956) 57 N.L.R. at 450 in the course of which the present Chief Justice had stated "it is clear that the major brother was neither the natural nor the legal guardian of his minor brother." The trial judge was apparently unaware of the fact that the Chief Justice himself, in the later case of *Nagaratnam* v. *John* (1958) 60 N.L.R. at 115, expressly stated that his earlier judgment could "no longer be considered correct" for a reason to be found in the Privy Council decision in *Abeyewardene* v. *West* (1959) 58 N.L.R. at 319 that the donor had allowed the acceptance to be made by the grandfather on behalf of his (the donor's) minor child. To use the Chief Justice's own words—see page 116—"However, it is now clear from *Abeyewardene* v. *West* that in the case of a donation made by parents, acceptance of the donation by the brother-in-law and the brothers of the minor donee is good, for the reason that the donors have allowed such acceptance to be made on behalf of the minor child."

We are convinced that, had the judgment in *Abeyewardene v. West* (supra) or that in *Nagaratnam v. John* (supra) been brought to the notice of the trial judge, his decision of this case would have been different. The other relevant issues have all been answered at the trial against the defendant. I would, therefore, set aside the judgment and decree appealed against and direct that judgment be entered as prayed for by the plaintiffs with costs here and below.

ALLES, J.
I agree.

Appeal allowed.

Present : **Alles, J.**

CORNELIS SINGHO *vs.* JAYATILAKE, (S.I. POLICE) ATURUGIRIYA

S.C. Case No. 803/1965—*Chief M.C. Colombo No.* 43516/*C.*

Argued and Decided on : 10th November, 1965.

Criminal Procedure Code, section 418—*Order for restoration of possession—Should show of criminal force be shown to the complainant himself.*

On a writ issued for delivery of possession of a house and land by the District Court in a *rei vindicatio* action against the accused (the defendant in that case) the belongings of the accused and his family were thrown out by the Fiscal and possession was delivered to C, the husband of the plaintiff. Within a few hours of being ejected, the accused and his family re-occupied the house forcibly.

The accused was charged with criminal trespass in this case and on his pleading guilty to the charge he was given three months' time to leave the land. A further extension of time was given and on his failure to quit the land even by that time, he was sentenced to three months' rigorous imprisonment for not fulfilling his undertaking to quit. The accused appealed and his family continued to occupy the house.

After the dismissal of the appeal, on an application by the complainant, the magistrate made order for the restoration of property under section 418 of the Criminal Procedure Code.

Held : (1) That the Magistrate was justified in making the order in this case under section 418 of the Criminal Procedure Code.

(2) That it is unnecessary that there should be any show of criminal force to the complainant himself. It is sufficient if threats were made to the complainant's servants or his agents, which caused them to leave the premises and seek refuge under the law.

Cases referred to : *Sheriff* v. *Pitche Umma*, (1924) 26 N.L.R. 353
Henry de Silva v. *Seneviratne*, (1925) 3 Times L.R. 126
John v. *Richard Peiris*, (1939) XV C.L.W. 156
Abraham Singho v. *Elias*, (1956) 60 N.L.R. 332

Prins Rajasuriya, for the accused-appellant.

Cecil Goonewardene, Crown Counsel, for the Attorney-General.

ALLES, J.

The accused in this case has appealed from an order of the Magistrate under section 418 of the Criminal Procedure Code directing the restoration of possession of a land called Alubogahalanda and the house standing thereon to the complainant-Charles Silva; it was alleged that he was dispossessed of this property by the accused. The facts as accepted by the Magistrate and unchallenged by Counsel for the accused-appellant are to the following effect:—Charles Silva's wife, Ceciliyana Perera, instituted an action in the District Court of Colombo for a declaration of title to the land and house in question. The accused was a defendant in the case and after trial, Ceciliyana Perera obtained judgment. Writ was taken out on 1.7.63 and the Fiscal's officer proceeded to the land and delivered possession of the house and land to Charles Silva on behalf of his wife; the belongings of the accused and his family were thrown out by the Fiscal and they were ejected from the premises. Charles Silva took possession of the premises at about 4 or 4.30 p.m., and immediately afterwards placed V. P. Karunaratne and two others in possession and went away asking them to look after the property. That same evening, the accused and several others came back to the land—one of them armed with a knife—and threatened to

kill Karunaratne and the others who were in occupation. The accused and his party ordered Karunaratne and the others to leave the land and Karunaratne then left and made a complaint to the Police. Thus it will be seen that within a few hours of being ejected by the Fiscal by due process of law, the accused and his family forcibly re-occupied the house. Subsequently, the accused appealed against the judgment of the District Court and his appeal has been dismissed. The judgment of the District Court declaring Charles Silva's wife to be entitled to the land and premises in question has thus been affirmed by the Supreme Court. On Karunaratne's complaint against the accused on 1.7.63, the Police charged the accused with criminal trespass in the present case, and on 24.12.63, the accused pleaded guilty to the charge and asked for three months time to leave the land. This application was granted. He was given a further extension up to 13.7.64, and on that day he was sentenced to three months rigorous imprisonment for not fulfilling his undertaking to leave the land. On the same day, the complainant moved for an order for the restoration of possession of his property under section 418 and the case was put off for further evidence for 20.7.64. On the same day that he pleaded guilty to the charge of criminal trespass, the accused appealed against his conviction and sentence and in view of his appeal, the application under section 418 was not proceeded with, pending the decision of the Supreme Court. On 10.12.64, the Supreme Court rejected the accused's appeal and the accused was duly committed to jail for three months on 27.2.65. While he was serving his term in jail, his family continued to be in occupation of the land and after his release from jail, the accused too returned and occupied the house. The evidence clearly demonstrates that the accused, by adopting all kinds of dilatory tactics has set at naught and rendered futile the decrees of the Supreme Court and the District Court of Colombo. I therefore entirely agree with the Magistrate that this was an appropriate case under which an order under section 418 should be made.

Counsel for the accused-appellant however submits that an order under section 418 is not warranted in this case because there was no show of criminal force employed to the person of the complainant and he cites in support the judgment of Jayawardene, A. J. in *Sheriff vs. Pitche Umma*, 26 N.L.R. 353, and the judgment of Maartensz, J in *Henry de Silva vs. Seneviratne*, 3 Times L.R. 126. In the former case at p. 459, Jayawardene, A. J. stated that—

> " Where an accused is convicted of criminal trespass, unless such trespass was attended by criminal force or the complainant was dispossessed by such force, an order under section 418 cannot be made. "

The learned Judge then draws attention to a case where no force or violence was used to an individual, but the complainant was dispossessed by having the padlock on a gate broken. The case of *Sheriff vs. Pitche Umma* was considered by Dalton, J. in the unreported case of *Mudiyanse* vs. *de Alwis*, and by Nihill, J in *John vs. Richard Peiris*, 15 C.L.W. 156. In both cases the facts in *Sheriff vs. Pitche Umma* were distinguished; in the former case, Dalton, J emphasised that threats of violence and murder which cause people to go away from land could rightly be said to amount to a show of criminal force. In *John vs. Richard Peiris*, the threats were made to the servants of the complainant which caused them to leave their work and run away and in consequence of which the accused entered into possession of the land. This same view has been followed by T. S. Fernando, J in *Abraham Singho vs. Elisa* 60 N.L.R. at 332.

It is therefore unnecessary that the show of criminal force should be to the complainant himself; nor do the cases relied on by Counsel for the appellant support this proposition. It is sufficient if threats were made to the complainant's servants or his agents which caused them to leave the premises and seek refuge under the law. This is what has happened in the present case, and in the circumstances, the Magistrate was amply justified in making an order under section 418 of the Criminal Procedure Code.

The appeal is therefore dismissed.

Appeal dismissed.

ELECTION PETITION, No. 4 OF 1965.

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

BALAPITIYA—ELECTORAL DISTRICT, NO. 118.

L. E. de SILVA *vs.* L. C. de SILVA & OTHERS*

Argued on: 12th November, 1965.
Order delivered on: 26th November, 1965.

Election Petition—Allegations of publishing false statements of fact and that respondent was disqualified for election as Member of Parliament as he directly or indirectly held contract with Government—Third allegation that the election was not conducted in accordance with the provisions of Ceylon (Parliamentary Elections) Order in Council 1946 *— Security deposited for three charges.*

Motion for dismissal of petition on the ground that petition did not comply with Rules 4(1)(*b*) *and* 4(*iv*) (3) *of the Parliamentary Election Petition Rules — Adequacy of security and number of charges in petition — Ceylon (Parliamentary Elections) Order-in-Council,* 1946, *sections* 42(2), 58, 77(*b*) *and* (*e*), *and* 86(2)—*Ceylon (Constitution) Order-in-Council* 1946, *section* 13(3) *c.*

The petition challenging the election of the 1st respondent alleged:—

(1) That the election was null and void as the 1st respondent by himself or his agents and/or other persons acting with his knowledge and consent made or published before or during the said election, false statements of fact in relation to the personal character and/or conduct of his rival candidate for the purpose of affecting his return at the said election and thereby committed a corrupt practice within the meaning of Section 58 of the Ceylon (Parliamentary Elections) Order-in-Council, 1946.

(2) That the 1st respondent was at the time of his election a person disqualified for election as a Member of Parliament in that, in contravention of Section 13 of the Ceylon (Constitution) Order-in-Council he directly or indirectly by himself and/or by other persons on his behalf and/or for his use and benefit held and/or enjoyed a right or benefit under a contract with the Government.

(3) That non-compliance with the provisions of Section 42(2) of the Ceylon (Parliamentary Elections) Order-in-Council, 1946, affected the election as many ballot papers delivered to the voters. were not stamped or perforated with the official mark, with the result that a large number of votes given in favour of the rival candidate were not counted as votes for him.

The 1st respondent moved for the dismissal of the petition on the following ground:—

(*a*) that the petition did not comply with the requirements of Rule 4 (1)(b) and 4(iv)(3) of the Parliamentary Election Rules 1946 (Schedule 3).

(*b*) that the security of Rs. 5000/- tendered was inadequate and not in accordance with the provisions of Rule 12 of the said Parliamentary Election Rules.

In respect of the 1st ground in the petition, it was argued on behalf of the 1st respondent—

(*a*) that the petition only set out the grounds, but failed to set out some facts in addition to the grounds, and thereby the petitioner has failed to comply with Rule 4(1)(b).

(*b*) that Rule 5 of the Parliamentary Election Rules, 1946 could not be used as a substitute for Rule 4 (1)(b).

(*c*) that when the charge went on to refer to the 1st respondent and/or other persons acting with his knowledge etc., it was not an allegation of fact at all in view of the uncertainty as to who committed the offence.

Held: (1) That having regard to Rule 5 which states that evidence need not be stated in the petition, but the Judge may on application by the respondent, order such particulars as may be necessary to prevent surprise and unnecessary expense etc., the facts set out in the petition are sufficient to comply with Rule 4(1)(b).

(2) That "the facts and grounds" referred to in Rule 4(1)(b) will not include the further particulars contemplated by Rule 5. This is implicit in the very existence of Rule 5. If the legislature intended that such particulars should be furnished under Rule 4(1)(b) then Rule 5 would be redundant.

* For Sinhala translation, see Sinhala section, Vol. 11 part 4, p. 15.

(3) That as was held in the Pelmadulla Election Case (*Rupasinghe vs. Karunasena*, 69 C.L.W. 49) the statement in the petition is a concise way of expressing several offences of the same species. Further the form of the charge is substantially the same as has been used in England in similar cases and sanctioned by Section 86(2) of Ceylon (Parliamentary Elections) Order-in-Council, 1946, there being no particular form prescribed in our Rules.

In respect of the 2nd ground stated in the petition it was argued:

(*a*) that at best it was mere reproduction of Section 13(III)(c) of the Ceylon (Constitution) Order-in-Council, 1946 as subsequently amended and does not constitute a charge at all.

(*b*) that as there are numerous contracts with the Government which do not disqualify a person's candidature to a seat in Parliament such as a contract one enters into everyday when one buys a ticket to travel by train, the failure to specify the contract rendered the charge a bad one.

(*c*) that if this charge is allowed to remain in the existing form the petitioner could lead evidence of acts by the respondent, acts by his agents, and acts by persons acting with his knowledge and consent, thus distinguishing the decision in *Tilakawardena vs. Obeysekere* (33 N.L.R. 65), which dealt with several instances of corrupt practice by the candidate himself.

Held: (1) That the 2nd allegation as stated falls within the grounds set out in Section 77 (though it is not specifically mentioned) and the facts necessary to constitute the charge have been set out. To state further facts in the petition relative to this charge would be to do something which Rule 5 does not require a petitioner to do.

(2) That the reference to Section 13 of the Ceylon (Constitution) Order-in-Council, 1946 seems to furnish sufficient material to the respondent that it is the type of contract contemplated by this Section that the petitioner is alleging against him. If further particulars are required, the machinery for the purpose is made available by Rule 5.

(3) That as the charge refers to the ground of disqualification provided in Section 77(e) as well as the ingredients of a disqualification falling under only one of the categories listed under Section 13 (3) viz. (c) of the Ceylon (Constitution) Order in Council it seems that whoever may be responsible for the acts complained of, all the acts resulted in one disqualification of the candidate.

(4) That even if the allegation was that the respondent directly or indirectly enjoyed rights and benefits under more than one contract with the Crown, the complaint would refer to one species of charges and must therefore be considered to form only one charge for the purpose of an election petition.

Held further: That in the circumstances, the petition contained only three charges and therefore the security tendered was sufficient.

Per G. P. A. Silva, J.—"In considering preliminary objections of this nature it is essential to remember that the free exercise of the franchise and the purity of elections are assets of the greatest value to the State. In safeguarding those assets it is the duty of the courts to see that an election petition, which is the instrument for setting in motion the machinery to ensure the continued existence of those assets, should not be baulked or hampered at its very inception by objections of a technical flavour which are lacking in real substance. Not only is it of the utmost importance to the public that serious allegations in respect of an election should be fully inquired into, but it is also vitally necessary for an elected representative that he should be exonerated from such allegations if they happen to be unfounded."

Cases referred to: *Tillekewardene* vs. *Obeysekera*, (1931) 33 N.L.R. 65 ; 1 C.L.W. 12
The Westminster Election Petition, 19 L.T. (N.S.) 565 ; (1869) L.R. 4 C.P. 145 ; 38 L.J.C.P. 145
Rupasinghe v. *Karunasena*, (1965) LXIX C.L.W. 49

R. A. Kannangara with *A. H. de Silva, M. L. de Silva, S. C. Crosette Tambiah* and *R. D. C. de Silva*, for the petitioner.

Dr. Colvin R. de Silva with *K. Shinya, Hannan Ismail, Miss Manouri de Silva, V. Nanayakkara* and *V. Gunaratna* for the 1st respondent.

M. Kanagasunderam, Crown Counsel, for the 2nd respondent.

G. P. A. Silva, J.

The petitioner in this case was a voter at the election for the Balapitiya Electoral District held on the 22nd March, 1965, and the 1st respondent Lokuge Chandradasa de Silva, was the duly elected Member for the said Electoral District at the election. The petitioner, by his petition dated 9th April, 1965, challenges this election on the following grounds :—

(i) that the return of the 1st respondent as Member at the said election was null and void on the ground of the commission of a corrupt practice within the meaning o.

section 58 of the Ceylon (Parliamentary Elections) Order-in-Council, 1946; in that the said 1st respondent by himself or his agents and/or other persons acting with his knowledge or consent, made or published before or during the said election, false statements of fact in relation to the personal character and/or conduct of Ruwanpura Lakshman de Silva for the purpose of affecting his return at the said election ;

(ii) that the 1st respondent was at the time of his election a person disqualified for election as a Member of Parliament in that in contravention of section 13 of the Ceylon (Constitution) Order-in Council, 1946, he directly or indirectly by himself and/or by other persons on his behalf and/or for his use or benefit, held and/or enjoyed a right or benefit under a contract or contracts made by or on behalf of the Crown in respect of the Government of Ceylon ;

(iii) that by reason of non-compliance with the provisions of the Ceylon (Parliamentary Elections) Order-in-Council, 1946, the said election was not conducted in accordance with the principles laid down in such provisions, and that such non-compliance affected the result of the election. The non-compliance complained of is that many ballot papers delivered to the voters were not stamped or perforated with the official mark as required by section 42 (2) of the said Order-in-Council; and that in the result a large number of votes given in favour of Ruwanpura Lakshman de Silva were not counted as votes for him.

By a motion filed on the 23rd of September, 1965, supported by an affidavit of the 1st respondent, he moved that the above election petition be dismissed with costs on the ground that the petition did not comply with the requirements of Rules 4 (1) (b) and 4 (iv) (3) of the Parliamentary Election Petition Rules of 1946. On the 14th of October, 1965, the 1st respondent supported his prayer for a dismissal of the petition by a further motion stating that the security of Rs. 5,000 tendered was inadequate and not in accordance with the provisions of Rule 12 of the Rules contained in the 3rd Schedule to the Parlimentary Elections Order-in-Council, 1946.

In support of the first objection Dr. de Silva urged that, according to Rule 4 (1) (b), an election petition should contain briefly the facts and grounds relied on to sustain the prayer and that, in the present case, so far as the first two grounds were concerned, no facts within the meaning of this Rule were stated in the petition. In his submission, while section 77 of the Order-in-Council sets out the grounds on proof of which an election petition may be avoided, Rule 4 (i) (b) requires the petition to state some facts in addition to the grounds. In other words, a petition will not be in compliance with the provisions of Rule 4 if it only stated one of the grounds enumerated in section 77. He submitted for instance, that a petition which urged an avoidance of an election on the ground of non-compliance with the provisions of the Order-in-Council relating to elections, (which is ground (b) of section 77) would not conform to the requirements of Rule 4 (1) (b). If the petition in the instant case was drafted in that way I would have had little difficulty in agreeing with Dr. de Silva's contention. I would even go further and say that, if an election petition merely stated that the respondent had committed a corrupt practice or an illegal practice, it would be possible to contend that the petition did not comply with Rule 4 (1) (b) as it stated only a ground but not the facts which supported the ground. On a strict interpretation of Rule 4 (1) (b) there would be justification in holding in such a case that there is no compliance with that Rule as such a complaint in a petition would be no more than a statement by way of reproduction of one of the limbs of section 77 which sets out the grounds for avoiding an election. So far as the present petition is concerned, however, I do not see that there is room for such a submission to be made. For, in regard to the first charge, the petitioner has stated that the first respondent committed a corrupt practice within the meaning of section 58 of the Ceylon (Parliamentary Elections) Order-in-Council, 1946, in that the said 1st respondent by himself or his agents and/or other persons acting with his knowledge or consent, made or published before or during the said election, false statements of fact in relation to the personal character and/or conduct of Ruwanpura Lakshman de Silva for the purpose of affecting his return at the said election. In doing so, the petitioner has :—

(i) stated the ground for avoiding the election in terms of section 77 even though the section itself is not mentioned—presumably, for the reason that there is no legal requirement to do so;

(ii) specified section 58 within the meaning of which the corrupt practice complained of falls;

(iii) particularised the brief facts relating to the corrupt practice on which he relies, namely, the making or publishing before or during the election false statements of fact in relation to the personal character and/or conduct of Ruwanpura Lakshman de Silva, a candidate at the said election.

I think this is a sufficient compliance with the provisions of Rule 4 (1) (b) in respect of the charge of the commission of a corrupt practice, having regard to the provisions of Rule 5 that evidence need not be stated in the petition and that it is open to a respondent to make an application to this court for such particulars as may be necessary to prevent surprise or unnecessary expense. Dr. de Silva's contention according to which there must be a modicum of fact independent of the mere ground which would form a charge would, therefore, appear to have been satisfied by the petitioner in respect of the aforesaid charge relating to a corrupt practice. In this connection it was also urged by counsel for the respondent that Rule 5 could not be used as a substitute for Rule 4 (i) (b) and that it was not open to the petitioner merely to state the ground on which he based his prayer to avoid the election and to give particulars of the charge if he was ordered to do so by court later. This argument would have some force in the abstract but in view of the material set out in the charge I cannot say that such an argument can prevail in this case. If one were to express the proposition in a very concise way, one may say that a charge should generally go beyond a ground but not necessarily to the extent of giving particulars which are contemplated in Rule 5. To my mind, implicit in the very existence of Rule 5 is the conclusion that the facts and grounds referred to in Rule 4 (1) (b) will not generally include the fuller particulars contemplated by Rule 5. If the legislature intended that such particulars should be furnished under Rule 4 (1) (b), Rule 5 would be redundant. Quite apart from the charge having complied with Rule 4 (1) (b) the provisions of Rule 5 appear to me to militate against a successful attack on this charge on the ground of a deficiency of facts stated therein.

In passing Dr. de Silva also took objection to the form of this charge in that it stated that the 1st respondent by himself or his agents and/or other person acting with his knowledge or consent made or published, etc. His submission was that when a charge went on to say that the respondent and/or other persons acting with his knowledge, etc., it was not an allegation of a fact at all in view of the uncertainty as to who committed this election offence. As I have already expressed my views on this matter fully in my Order on the objections raised in Election Petition No. 8 of 1965, Electoral District No. 140—Pelmadulla,* it is unnecessary for me to repeat myself. Suffice it to say that I cannot accept this contention as being sound. I would add that the form of the charge is substantially one that has been used in England in similar cases and sanctioned by section 86 (2) of the Ceylon (Parliamentary Elections) Order-in-Council, there being no particular form prescribed in our Rules—(*vide Tillekewardene vs. Obeysekera*, 33 New Law Reports, page 65 at 67).

I shall now proceed to consider the counsel's complaint in respect of the charge contained in paragraph 6 in the petition relating to the alleged disqualification of the 1st respondent. This charge has been assailed on several grounds. In the submission of Dr. de Silva this paragraph is at best a mere reproduction of section 13 (3) (c) of the Ceylon (Constitution) Order-in-Council, 1946, as subsequently amended and does not constitute a charge at all. As in the case of the first charge of making and publishing false statements, at this preliminary stage one has only to consider whether this charge falls within the grounds set out in section 77 and contains the brief facts that support the ground. One of the grounds for avoiding an election provided for by section 77 (c) is that a candidate was, at the time of the election, a person disqualified for election as a Member. Paragraph 6 of the petition proceeds to state this ground and sets out briefly the fact that the respondent directly or indirectly by himself and/or by other persons on his behalf and/or for his use or benefit, held and/or enjoyed a right or benefit under a contract or contracts made by or on behalf of the Crown in respect of the Government of Ceylon. It further refers to the disqualification as being one which is covered by the disqualifications enumerated in section 13 (3) (c) of the Ceylon (Constitution) Order-in-Council, 1946. There are in section 13 sub-section (iii) eleven categories of disqualifications for a Senator or any Member of Parliament of which one is the enjoyment of a right or benefit under a contract made on behalf of the Crown in respect of the Government of Ceylon. In paragraph 6, while the actual instances of the contracts held directly

* See 69 C.L.W. 49

or indirectly for the candidate's benefit have not been enumerated, the facts necessary to constitute the charge have been briefly set out. To state further facts in the petition relative to this charge would be to do something which according to Rule 5 it is not necessary for a petitioner to do. It is only necessary to give further particulars if the respondent requires it and obtains an order of court for the purpose.

Dr. de Silva observed that there are numerous contracts with the Government which do not disqualify a person's candidature to a seat in Parliament such as a contract that one enters into on every day on which he buys a ticket to travel by train. The respondent in this case, he argued, had no notice as to what the contract was that was urged as a disqualification in paragraph 6 and that the failure to specify the contract rendered the charge in paragraph 6 a bad one. This argument too has to be examined in the background of what is stated in this paragraph. The reference in this paragraph to section 13 of the Ceylon (Constitution) Order-in-Council seems to me to furnish sufficient material to the respondent that it is the type of contract contemplated by this section that the petitioner is alleging against him. It is reasonable to think, therefore, that the respondent had sufficient notice of the nature of the allegation and if he requires further particulars as to the actual contract, the machinery for the purpose is made available to him by Rule 5.

His next submission was that even under section 13 (3) there can be numerous types of contract by the candidate, his agents and others with his knowledge which would constitute separate charges and further, that, if the charge in paragraph 6 was allowed to remain in the existing form, the petitioner could lead evidence of acts by the respondent, acts by his agents and acts by persons acting with his knowledge or consent. He sought to distinguish the point he was making from the decision of Drieberg, J., in *Tillekewardene vs. Obeysekera*, reported in 33 New Law Reports, page 65, in that, while that decision dealt with several instances of corrupt practices by the candidate himself, his complaint concerned acts by different persons, namely, the candidate, his agents and others with the knowledge of the candidate. The answer of Mr. Kannangara, counsel for the petitioner, to this submission is that whoever may be responsible for the acts complained of, all the acts resulted in one disqualification of the candidate. I am inclined to accept Mr. Kannangara's contention. Paragraph 6 refers to the ground of disqualification provided for in section 77 (e) as well as to the ingredients that result in the disqualification which, incidentally, are set out in section 13. Even though it does not specify the particular sub-section of section 13, the facts contained in the paragraph to base the complaint are only to be found in section 13 (3) (c). While the petitioner could, of course, have been more specific in giving particulars of the contract he has in mind, I cannot say that the words employed in the paragraph vitiate the charge. If, for instance, in a particular case, a petitioner had stated in one paragraph that the respondent was disqualified, in that he was a public officer and that he was enjoying a benefit under a contract with the Crown and he had, within seven years of the election, been serving a period of six months imprsonment, etc., which would comprise various categories of disqualifications falling within section 13 of the Ceylon (Constitution) Order-in-Council, the contention of the learned counsel for the respondent might have savoured of some substance, although it may not have succeeded even then. But when the petitioner has urged a disqualification falling under only one of the categories listed under section 13, this contention, in my judgment, must necessarily fail. Even if the allegation, therefore, was that the respondent directly or indirectly enjoyed rights and benefits under more than one contract with the Crown, as I have held in my earlier Order in Election Petition No. 8 of 1965, Electoral District No. 140—Pelmadulla, the complaint would refer to one species of charges and must, therefore, be considered to form only one charge for the purpose of an election petition.

It seems apposite here to quote the following words of Bovill, C. J., in the Westminster Election Petition (L. T. Volume XIX—N.S.—565) : " It was never intended to make an election petition a document of great length and, in consequence of the Judge's discretionary power to order particulars, no injustice could result from its brevity. " While expressing my respectful concurrence with this observation, I would add that most of the arguments which assail the brevity of the petition appear to me to ignore the existence of Rule 5 which, by implication, tantamounts to a requirement that a petition should be brief and confirms the direction already given in Rule 4 (1) (b) that the petition shall briefly state the facts and grounds relied on to sustain the prayer.

In considering preliminary objections of this nature it is essential to remember that the free exercise of the franchise and the purity of elections are assets of the greatest value to the State. In safeguarding those assets it is the duty of the courts to see that an election petition, which is the instrument for setting in motion the machinery to ensure the continued existence of those assets, should not be baulked or hampered at its very inception by objections of a technical flavour which are lacking in real substance. Not only is it of the utmost importance to the public that serious allegations in respect of an election should be fully inquired into but it is also vitally necessary for an elected representative that he should be exonerated from such allegations if they happen to be unfounded.

In view of my conclusion that paragraphs 5 and 6 each refer to one charge, it is not necessary for me to decide the further question of law as to whether there is a distinction between " grounds " and " charges " for the purpose of an election petition, or the question whether the complaint made in paragraph 7 constitutes a charge. Even if paragraph 7 contains a charge there would only be three charges in the petition and the security of Rs. 5,000 deposited is sufficient to satisfy the requirement of Rule 12.

The objections raised by the respondent, therefore, fail. I accordingly dismiss the motion with costs.

Motion dismissed.

IN THE COURT OF CRIMINAL APPEAL

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

THE QUEEN *vs.* DUWAGE CORNELIS & 3 OTHERS

Application Nos. 109 *to* 112 *of* 1965
S.C. No. 42/'65 *M.C. Matugama* 47154

Argued and decided on : 15th November, 1965.
Reasons on : 14th December, 1965

Court of Criminal Appeal—Misdirection—Matters favourable to defence not referred to in summing up—Misdirection of fact on material point—Explanations not founded on evidence—Unreasonable verdict in consequence—Suggestions based on conjecture—Inherent credibility of defence version, not put to Jury—Injuries on accused not put to Jury as supporting defence but explained away to support prosecution—Evidence not fairly presented to Jury—Miscarriage of Justice.

Held : (1) That even if it was permissible for a trial judge to suggest to the jury explanations not founded on evidence, it was also necessary for him to point also to matters which weaken or invalidate such explanations.

In this case, the prosecution version as to how the incident in the course of which the deceased died commenced came into sharp conflict with the defence version. The prosecution case was that the deceased man was forcibly seized by the four accused, when he got down from a bus at 7.30 p.m., at a junction, and was removed by them to the Estate, in which the first accused was a watcher, three hundred yards away and had there been beaten to death. The defence version was that the deceased had come to the Estate about 8.30 p.m., on a marauding expedition to cut rubber trees, and had there engaged in an encounter with the first and fourth accused, in the course of which the first accused had assaulted him several times with a battle-axe.

A Police Constable testified that at 9.30 p.m., he found the deceased lying fallen at the Estate, injured and groaning, but unable to speak. When taken to the hospital, he was found to be dead.

The Doctor was of opinion that at the outside, the deceased must have had a meal of rice within the two hours preceding his death (which must have taken place at or after 9.30 p.m.).

The medical evidence, read with the evidence of the Police Constable, belied the prosecution version of the alleged incident at the bus-stop and also supported the defence position that the deceased must have returned peacefully to his home after the bus journey, and had later come to the Estate of his own accord.

In dealing with this matter, the Commissioner recommended to the jury very favourably a suggestion of the Crown Counsel that the deceased may have had a meal of rice at the bazaar before he got into the bus.

Held : (2) (*a*) That the place and time at which the deceased had his last meal were of the utmost materiality as a test of the truth of the principal witness for the prosecution, E, and it was unfair to support her credibility with an explanation which had no foundation in the evidence ;

(*b*) That the explanation itself was in the teeth of the undisputed medical and police testimony; and

(*c*) That by this test alone, any verdict based on the acceptance of E's evidence would have been unreasonable and against the weight of evidence.

(3) The summing-up also contained the following further short-comings:—

(*a*) Material facts on which the defence justifiably relied in support of their version, were utilised in the summing-up to the disadvantage of the defence in support of a conjecture that the four accused had decided to lie in wait for the deceased, because of his previous conduct.

(*b*) Favourable inferences arising from proved facts have been discounted by favouring prosecution suggestions, in no way supported by evidence.

(*c*) No reference was made to the inherent credibility of the version of the first accused who was the watcher on the Estate and to the evidence of the creeper on the Estate which supported him.

(*d*) The defence version was disparaged without heed to relevant considerations, including the injuries on the 4th accused, which supported the defence, but were used in the summing-up to support the prosecution case.

(*e*) There were misdirections as to the indisputable evidence and of conjectural and unreasonable explanations of facts which favoured the defence.

(*f*) The evidence was not fairly presented to the jury in the summing-up and a miscarriage of justice resulted in consequences.

Case referred to: *Queen* v. *Jayasinghe*, (1965) LXVIII C.L.W. 81

E. R. S. R. Coomarasamy, with *Anil Obeysekera*, *Nihal Jayawickreme*, *Kumar Amarasekera* and *K. Viknarajah* (assigned), for the appellants.

N. Tittawela, *Crown Counsel*, for the Crown.

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

According to the version for the prosecution in this case, the transaction in the course of which the deceased man Somapala met with his death commenced immediately after he and his wife (the witness Emis Nona) and their two little children alighted from a bus at the road junction in their village on 11th April 1964. The family was returning from an afternoon shopping expedition. The time at which they alighted from the bus was fixed with near certainly at 7.30 p.m., by the bus conductor. By the light from the bus Emis Nona saw the four accused, a father and his three sons respectively, seated on a culvert near the junction. The four men seized Somapala and took him away forcibly, and the fourth accused hit him on his head with a battle-axe. Emis Nona then saw Somapala being pulled or dragged away along the road in the direction of an estate in the vicinity, at which the first accused was employed as watcher.

Police Constable 2862, Dhanapala, had been on Police patrol in Aboyne Estate, where at 9.30 p.m., he found Somapala lying fallen and injured, the first accused also being present at the spot. Somapala was groaning, but unable to speak, and was taken to Pimbura Hospital in a car by the Constable. At the hospital he was found to be dead.

The post-mortem revealed that the deceased man had sustained a number of severe injuries, including fractures of the skull, two of which caused his death.

The prosecution case in brief was, that the deceased man was forcibly seized, and removed from the bus-stop by the four accused to the Estate some three-hundred yards away, and had there been beaten to death.

The post-mortem examination showed that the deceased's stomach contained undigested rice; and the District Medical Officer was of opinion that at the outside the deceased must have had a meal of rice within the two hours preceding his death. Since the deceased was found to be groaning (and therefore alive) at 9.30 p.m., the earliest time at which he could have had the meal was 7.30 p.m., and the latest about 9 p.m.

The defence denied the alleged incident at the junction at 7.30 p.m. Their case was that the deceased had come to Aboyne Estate about 8.30 p.m., and had there engaged in an encounter with the first and fourth accused, in the course of which the first accused had assaulted him several times with a battle-axe.

The choice between these two versions should have depended very heavily on the fact, established on the medical evidence, that the deceased had a meal of rice at or after 7.30 p.m. He could have had that meal only after alighting from the bus and in all probability at his home not far from the bus stop. This fact strongly belied Emis Nona's version of the alleged incident at the bus-stop, after which according to her she never saw her husband alive. It also supported the defence position that the deceased must have returned peacefully to his home after the bus journey, and had later come to Aboyne Estate of his own accord on what the defence claimed was a marauding visit to the Estate.

In dealing with this matter, the learned Commissioner recommended to the jury very favourably a suggestion of the Crown Counsel that the deceased man may have had a meal of rice at the bazaar before he resumed his journey to the village. The place and time at which the deceased had his last meal were of the utmost materiability as a test of the truth of Emis Nona's evidence of the alleged seizure at the bus stop, and it was unfair to support her credibility with an explanation which had no foundation in the evidence. Had Emis Nona been questioned by Crown Counsel on this matter, she might well have rejected the suggestion that her husband would have had an evening meal of rice in daylight, and that he would have thus satisfied his own hunger with no thought of giving his two small children a meal. What is worse, the explanation that the deceased had a meal at the bazaar was in the teeth of the undisputed medical and police testimony : the deceased could not have had a meal of rice before 7.30 p.m., and therefore he could not in fact have had that meal in the bazaar, from which the bus had departed at 7.10 p.m.

By this test alone, any verdict based on the acceptance of Emis Nona's evidence would have been unreasonable and against the weight of evidence. But this ground of appeal has been reinforced by several other short-comings in the summing-up, to which counsel for the appellants referred in his able and concise address. We must draw attention to some of these short-comings.

According to the evidence, the deceased man, an I.R.C., had damaged the rubber plants on the Estate on the previous occasions and charges of mischief were pending against him on this account. Much earlier in 1954, the deceased had shot at the first accused and had been bound over on that charge. There was other evidence to prove that he was a person of thoroughly bad character. The defence naturally relied on these matters in support of their version that, on this occasion also, the deceased had wrongfully intruded on the Estate at night and damaged rubber plants, and that the first accused assaulted him in the course of a fight arising in those circumstances. But these very matters were utilised in the summing-up to the disadvantage of the defence, in support of a conjuncture that because of the deceased's former misconduct the first accused and his sons must have decided to lie in wait at the junction to seize the deceased and to thrash him.

When Constable Dhanapala came to the scene, the first accused showed him eleven damaged rubber plants, presumably in proof of his version that the deceased had on the very night caused that damage. The favourable inference arising from this fact was again discounted, when the learned Commissioner favoured a prosecution suggestion, in no way supported by evidence, that the deceased had damaged those plants on the previous night. It was further suggested that this recent suggested mis-conduct of the accused prompted the four accused to decide "to deal with" the deceased on the night of the incident.

Suggestions in support of the version that the accused lay in wait to thrash the deceased were frequently put to the jury. But no reference was made to the inherent credibility of the version of the first accused, the Estate watcher, that he had got involved in this incident in the course of his duties as such, nor to the evidence of the "creeper" on the Estate that the fourth accused usually accompanied his Father on watch duty.

The first accused's version was that on realising the presence of intruders on the Estate, the fourth accused gave chase to one of them and succeeded in collaring that one, who turned out to be the deceased. The latter stabbed the fourth accused with a knife, and the first accused came up and then assaulted the deceased with a battle-axe and felled him to the ground. The version of this successful chase of the deceased man by the fourth accused was disparaged by the Commissioner, but without heed to such relevant considerations as the respective ages of the two men and their fleetness of foot, the lie of the land which was perhaps "home ground" to the fourth accused, and the possibility that the deceased stumbled in his fight.

The first accused handed to Police Constable Dhanapala at the spot his own battle-axe, and also a knife with which (according to him) the deceased had stabbed the fourth accused. This matter which formed part of the defence evidence as to the injuries actually found on the loin of the fourth accused, was used in the summing-up to support the prosecution case. The learned Commissioner suggested to the jury that, when the deceased was being dragged away from the bus-stop by the four accused, he may have used his knife to defence himself; this suggestion was not supported by any evidence to indicate that it was customary for the deceased to carry his knife when accompanying his wife and two children to the market of an afternoon. Was it not at least likely, having regard to the available evidence, that he brought the knife to be used to damage rubber plants on the estate?

Even if it be permissible for a trial judge to suggest to the jury explanations not founded on evidence, it is surely necessary for him to point also to matters which weaken or invalidate such explanations. The defence has no opportunity, after a summing-up, to criticise such explanations, even if it be thought prudent to make such criticisms of the Judge's opinions.

With regret, we have to express the concern of this Court that, as in the case of *Queen vs. Jayasinghe* (68 C.L.W. 81), the evidence in this case was not fairly presented to the jury in the summing-up, and that a miscarriage of justice resulted in consequence. No reasonable jury, properly directed, could have overcome the difficulty which arose from the testimony which established that the accused must have had a meal of rice after he alighted from the bus, and which in consequence established the falsity of the evidence of Emis Nona. In our opinion, that difficulty was overcome only because of misdirections as to the indisputable evidence and of conjectural and unreasonable explanations of facts which favoured the defence case.

In appeal, learned Crown Counsel did not contend that any unfavourable verdict could have been returned once the prosecution's version had to be rejected.

For these reasons, we made order at the conclusion of the arguments directing the acquittal of all the accused on the charge of grievous hurt of which they had been convicted.

Accused acquitted.

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

W. A. DAYALATHA *vs.* A. T. GUNADASA

S.C. No. 229 *of* 1964—*M.C. Matara,* 974.

Argued and decided on : May 8, 1964.

Maintenance Ordinance, section 6—Nature of corroborative evidence required—Test to be applied by Court.

Section 6 of the Maintenance Ordinance states as follows:—" No order shall be made on any such application as aforesaid on the evidence of the mother of such child unless corroborated in some material particular by the evidence to the satisfaction of the Magistrate. "

Held : That the test of corroboration is whether the facts given in evidence show a probability that the evidence of the mother is true.

Case cited : *Simpson* v. *Collinson,* (1964) 2 W.L.R. 387; (1964) 1 A.E.R. 262

Nihal Jayawickrama, for the applicant-appellant.

No appearance for the respondent-respondent.

SRI SKANDA RAJAH, J.

This is an application for maintenance of an illegitimate child. Section 6 of the Maintenance Ordinance states that " No order shall be made on any such application as aforesaid on the evidence of the mother of such child unless corroborated in some material particular by the evidence to the satisfaction of the Magistrate. "

In this case there was the evidence of both the mother of the applicant and that of her witness, a woman named Hinnihamy, about the intimacy between the defendant and the applicant during the period of the intimacy and during which period conception could have taken place.

The Affiliation Proceedings Act, 1951, (in England), section 4 (2) reads as follows :—

" If the evidence of the mother is corroborated in some material particular by other evidence to the Court's satisfaction, the Court may adjudge the defendant to be the putative father of the child."

It will be seen that the words quoted above from section 6 of our Maintenance Ordinance are practically identical with the corresponding English provision which I have just quoted.

The test is whether the facts given in evidence show a probability that the evidence of the mother is true.

In this case there is the evidence of Hinnihamy against whom no allegation was made by the defendant. In those circumstances I would hold that the applicant's evidence was corroborated in material particulars.

I may mention that in the case of *Simpson* v. *Collinson,* (1964) 2 Weekly Law Reports 387, the Court of Appeal held that the admission of the putative father that there was sexual intimacy sometime anterior to the conception was sufficient corroboration.

I would set aside the order of the Magistrate and hold that the defendant is the father of this child. Return the record to the Magistrate to hold an inquiry as to the means of the defendant and to fix the amount of maintenance for this child. The applicant will have her costs both here and in the Court below.

Appeal allowed.

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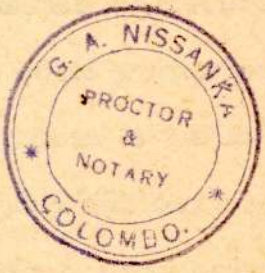

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ශ්‍රේෂ්ඨාධිකරණයේ අධිනීතිඥ
(කතීෘ)

බී. ජී. පීරිස් එල්.එල්.බී. (ලන්ඩන්)
වී. රත්නසභාපති බී.ඒ.(ලංකා), එල්.එල්.බී.(ලන්ඩන්)
ඩබ්. ජේ. එස්. පෙරේරා එම්.ඒ.(ලන්ඩන්)
එන්. එච්. එස්. ජයවික්‍රම එල්.එල්.බී.(ලංකා)
එම්. එච්. එම්. නසීනමරික්කාර් බී.ඒ., එල්.එල්.බී., (කැන්ටැබ්)
එස්. එස්. බස්නායක බී.ඒ., බී.සී.එල්. (ඔක්ස්ෆර්ඩ්)
එන්. එස්. ඒ. ගුණතිලක එල්.එල්.බී. (ලංකා)
වරුණ බස්නායක

ශ්‍රේෂ්ඨාධිකරණයේ අධිනීතිඥවරු
සහකාර කතීෘවරු

1966.

පිටපත් ලබාගත හැක්කේ නො: 50/3, සිරිපා පාර, හැවිලොක් ටවුම—කොළඹ 5.

පාර්ශවකාරයින්ගේ නාම

අපරාධ සංවිධාන සංශුද්ධය

අපරාධ නඩු විධාන සංග්‍රහය, 418 ඡේදය — එය යටතේ භුක්තිය ආපසු ලබා දීමට නියෝගයක් — පැමිණිලි කරුට ම සාපරාධ ලෙස බලාත්කාරකම් කිරීමේ දර්ශනයක් තිබිය යුතු ද යන්න.

එක් ගෙයක සහ ඉඩමක භුක්තිය හාරදීම පිණිස දිස්ත්‍රික් උසාවිය විසින් අයිතිය ඔප්පු කිරීමේ නඩුවක් (Rei vindicatio action) අවසානයේ දී එම නඩුවේ විත්තිකරු වූ මෙම නඩුවෙහි චෝදිතයාට විරුඬව ඔහු පිටමන් කිරීමට ආඥා පත්‍රයක් නිකුත් කරන ලදී. පිස්කල් නිලධාරි තැන මෙම නඩුවෙහි චෝදිතයාට සහ ඔහුගේ පවුලට අයත් සියලු බඩු මුට්ටු පිටට විසිකොට, පැමිණිලි කාරියගේ සභාමීපුරුෂයා වන 'සී' නමැත්තාට භුක්තිය හාර දුන්නේ ය. පිට කළ පැය කිපයකින් නැවතත් ගෙයි පදිංචි වූහ.

එම නිසා මේ නඩුවෙහි සාපරාධී ලෙස බලාත් කාරයෙන් ගෙට ඇතුල්වීමේ චෝදනාව යටතේ නඩු දමන ලද චෝදිතයා ඒ චෝදනාවට තමා වැරදිකරු යයි කියා සිටියෙන් ඔහුට එම ඉඩමෙන් පිටවී යාමට තුන් මාසයක් කල් දෙන ලදී. ඉක්බිති මෙම කාල සීමාව තව දුරටත් දික් කරන ලද නමුත් ඔහු ඉඩමෙන් පිටවී යාමට ඒ කාල සීමාව අතර තුර දී අපොහොසත් වූ නියාත් එසේ පිටවී යන බවට දුන් පොරොන්දුව ඉටු නොකිරීම නියාත් ඔහු බරපතල වැඩ ඇතුව තුන් මාසයකට සිර ගෙට යවනු ලැබී ය. චෝදිතයා ඉදිරිපත් කළ ඇපැල් පෙත්සම ද නිෂ්ප්‍රභා වූ පසු පැමිණිලිකාරිය විසින් කරන ලද ඉල්ලීමකට අනුව අපරාධ නඩු විධාන සංග්‍රහයේ 418 වන ඡේදය යටතේ මහේස්ත්‍රාත් වරයා නැවතත් භුක්තිය ඇයට පවරා දුන්නේය.

තීන්දුව: (1) අපරාධ නඩු විධාන සංග්‍රහයේ 418 ඡේදය අනුව මෙ නඩුවේ එබඳු නියෝගයක් මහේස්ත්‍රාත්වරයා විසින් කිරීම යුක්තියුක්තය.

(2) පැමිණිලිකරුවකුටම සාපරාධ ලෙස බලහත්කාරකම කිරීමේ සිද්ධියක් තිබීම එවැනි නියෝගයකට අවශ්‍ය නැත. පැමිණිලිකරුගේ සේවකයන්ට හෝ ඔහුගේ නියෝජිතයන්ට ඉඩමෙන් පිටවී නීතියේ සරණ සෙවීමට හේතු වන ලයුරු තර්ජනයක් එල්ල වුවොත් එය ප්‍රමාණය.

කොර්නේලිස් සිඤ්ඤෝ එ. ජයකිලක (පොලිස් පරීක්ෂක අතුරුගිරිය) 22

ගෙවල් කුලී පාලන පණත

1961කේ අංක 10 වෙනි පණතෙන් සංශෝධිත වූ 1948වේ අංක 29 දරණ ගෙවල් කුලී පාලන පණත, 6 වෙනි සහ 13(1)(ඒ) වෙනි ඡේදය — මාස තුනකට වඩා කාලයක් ගෙවල් කුලී නොගෙවා සිටීම — ගෙවල් හිමියා විසින් 1961.5.25 වෙනි දින දරණ ලියවිල්ලකින් ගෙයින් අස්වී 1961.6.30 වෙනි දින භුක්තිය හාරදීමට නිවේදනයක් යැවීම — එම නිවේදනය වලංගු ද යන බව සහ 13(1)(ඒ) වෙනි ඡේදය නිසා මාස තුනක නිවේදනයක් දිය යුතුද යන්න.

විත්තිකරු 1960 ජූනි මාසයේ සිට ගෙවල් කුලී ගෙවවේ නැත. මාස්පතා කුලී ගෙවන බද්දක් වශයෙන් සලකා ගෙවල් හිමියා 1961.5.25 වෙනි දිනමින් විත්තිකරුට 1961.6.30 වෙනි දින ගෙයින් අස්වී භුක්තිය හාරදෙන ලෙස ඉල්ලා නිවේදනයක් යැවිවේ ය. එසේ අස් වී නොගිය නිසා ගෙවල් හිමියා නඩුවක් පවරණ ලදී.

නඩු විභාගයේ දී කරුණු දෙකක් පමණක් මූලික ප්‍රශ්න වශයෙන් විසඳන ලදී. ඒවා මෙසේයි. (අ) ඉහත කී අස්වීමේ නිවේදනය නීත්‍යානුකූල ද (ආ) 1961 කේ අංක 10 වෙනි පනතින් සංශෝධිත ගෙවල් කුලී පාලන පනතේ 13(1)(ඒ) වෙනි ඡේදය අනුව මාස තුනක නිවේදනයක් දිය යුතු ද යන්නයි.

උගත් දිස්ත්‍රික් විනිශ්චයකාරතුමා විත්තිකරුගේ වාසියට යට කී ප්‍රශ්න දෙකම විසඳා පැමිණිලිකරුගේ පැමිණිල්ල නිෂ්ප්‍රභා කළේ ය.

තීන්දුව: (1) පැමිණිලිකරු විසින් දෙන ලද යට කී නිවේදනය නීත්‍යානුකූලයි. (එඩ්වඩ් එ. ධම්සේන න.නි.වා. අංක 66–525 පිට, 67 ල.ස.නී. 47 පිට අනුගමනය කරමින්)

(2) සංශෝධිත පණතේ 6 වෙනි ඡේදය බලපවත්වන්නේ මාසයක කුලිය හිඟ හිටපු අවස්ථා වලදීය. මාස තුනක කුලිය හිඟ හිටපු අයට එම සැතසිල්ල නොලැබේ. එම නිසා මාස තුනක නිවේදනයක් මේ නඩුවේ දී උවමනා නැත.

සෙල්ලදෙරේ එ. ඩබ්ලිව්. ඒ. ප්‍රනාන්දු මහත්මිය ... 2

නැගී දීමනා

බාල වයස්කරුවෝ — පියෙකු විසින් තම දරුවන්ට දෙන ලද නැගී ඔප්පුවක් — සමහර නැගී ලැබුම් කාරයෝ බාල වයස්කරුවෝ වීම — බාල

වයස්කාර ලැබුම් කාරයන් වෙනුවෙන් ඔවුන්ගේ සහෝදරයෙකු තැග්ග භාර ගැනීම — එය වලංගු ද?

තීන්දුව: පියෙකු හෝ මවක විසින් තම දරුවන්ට දෙන තැගි ඔප්පුවක්, එම දරුවන් අතරේ බාල වයස්කාරයින් ඇත්නම්, ඔවුන් වෙනුවෙන් ඔවුන්ගේ සහෝදරයෙකුට භාර ගත හැක. එසේ කළ හැක්කේ ත්‍යාග ප්‍රදයකයා ඊට ඉඩ දෙන අවස්ථාවකය.

කේ. වී. කිරිගෝරිස් සහ තවත් දෙදෙනෙක් එ. ඇස්. ජේ. ඒ. ඇඩ්ඩින් හාමි 13

ත්‍යාගදයකයාගේ ප්‍රාණ භක්තියට යටත්කර ඇති දීමනාවක් — ගරුක අකෘතඥවේදී කමේ හේතුවෙන් එම දීමනාව අවලංගු කිරීමට ඉල්ලමින් දැමූ නඩුවක් සහ ත්‍යාග ලාභියා පිටමං කර අලාභය ලබා ගැනීමට කරන ලද යාඥාවක් — අකෘතඥ වේදිකම පිළිබඳ චෝදනාව හෝ වෙනත් ඊට සමාන හෝ ඊට වඩා ගරුක හේතුවක් තහවුරු කිරීමට තිබිය යුතු සාක්ෂිවල ප්‍රමාණවත් බව — පිටමං කිරීමට කරන ලද යාඥාවට ඉඩ දීම.

වර්ෂ 1959 දී ලද ඔප්පුවකින් ඔවුන් පදිංචිව සිටි ගෙය සහ එහි පිහිටා ඇති ඉඩම් කොටස පැමිණිලිකරු විසින් තමාගේ හදගත් සොහොයුරිය වන විත්තිකාරියට තැගි කොට දී තිබේ. ඔහු විසින් මෙම නඩුව දමන ලද්දේ ගරුක අකෘතඥවේදී බවේ හේතුවෙන් එම දීමනාව අවලංගු කිරීමටය. එහි ත්‍යාග ලාභියා පිටමං කිරීමට සහ අලාභ අය කර ගැනීමට යාඥාවක් ද තිබිණි. පැමිණිලිකරු සාක්ෂි දෙමින් කියේ;

(ඒ) විත්තිකාරිය — තමාගේ සවාමිපුරුෂයා බැහැර වී සිටින අවස්ථාවල මෙහෙකරුවෙක් සමග අනාචාරයේ හැසිරෙන බව තමාට විශ්වාස ගත හැකි අන්දමට ඒත්තු ගොස් තිබෙන බව

(බී) තමා ඉල්ලා සිටියදීත් විත්තිකාරිය එම මෙහෙකරුවා පිට කර යැවීමට කැමති නොවූ නමුත් සවාමි පුරුෂයා ආපසු පැමිණිවිට මෙහෙකරුවා පිට කර යැවූ නමුත් පසු අවස්ථාවක දී ආපසු ගෙන්වා ගන්නා ලද බව සහ

(සී) විත්තිකාරිය පැමිණිලිකරුට නොසලකා සිටි බවත් වරක් ඇගේ සවාමිපුරුෂයා තමාට පහර ගැසීමට යැයි පෙළඹ වූ බවත් ය.

(ආපසු පැමිණි දින සිට සවාමිපුරුෂයා පැමිණිලිකරු සමග කතාබහ කරන තත්ත්වයක් ඇති වී නැත.)

තීන්දුව: (1) f පුටි නමැති ග්‍රන්ථ කර්තෘවරයා විසින් දක්වා ඇති කරුණු පහෙන් එකක්වත් මෙම ඉඩම් දීමනාව අවලංගු කිරීම පිණිස තහවුරු කිරීමට පැමිණිලිකරුට නොපිළිවන් විය. f පුටි ග්‍රන්ථ කර්තෘවරයා විසින් "එයට සමාන හෝ එයට වඩා ගරුක අනිත් හේතූන්" යැයි දක්වන ලද හේතුවකට අයත් කරුණු ද ඔප්පු වී නැත. (f පුටි ග්‍රන්ථ, 39-5-22; ගේන් මහතාගේ පරිවර්තනය බලන්න.)

(2) තමාට ප්‍රාණ භක්තිය තබා ගෙන ඇති බැවින් විත්තිකාරිය භූමියෙන් පිටමං කිරීමේ නියෝගයක් ලැබීමට පැමිණිලිකරු සුදුස්සෙකි.

ලියනගේ එ. පෙරේරා 6

නඟර සභා ආඥා පණත

184 වෙනි ඡේදය ඍර්ටියොරේරයි ආඥා යටතේ බලනු. 9

පාර්ලිමේන්තු මැතිවරණ පෙන්සම්කරු මාලාව 1946

3 වෙනි උපග්‍රන්ථය 4 (1)බී, 4(3)5,12, රීති 15

බාල වයස් කාරයෝ

තැගි දීමනා යටතේ බලනු 13

බෞද්ධ විහාර දේවාල ගම් පණත

බෞද්ධ දේපල පිළිබඳ නීතිය — පන්සලක විහාරාධිපති යයි එහි දේපල පිළිබඳව ද ප්‍රකාශයක් ලබා ගැනීමේ නඩුවක් — එය නිෂ්ප්‍රභා කිරීම නිසා මතු වූ අභියාචනයක් — අභියාචන තීරණයට පෙර පැමිණිලිකරු දිවංගතවීම — ඒ වෙනුවට එම තනතුරට පත් නැනැත්තා ඇතුලු කිරීම — බෞද්ධ විහාර දේවාලගම් පණත — සිවිල් නඩු විධාන සංග්‍රහයේ 404 ඡේදය.

තීන්දුව: විහාරයක අධිපතිකම පිළිබඳව හා එහි දේපල පිළිබඳව තමාට වාසියට ප්‍රකාශයක් ලබා ගැනීම සඳහා නඩුවක් දමා පරාජිතවූ පැමිණිලිකරුවෙක් එම තීරණයට විරුද්ධව අභියාචනයක් ඉදිරිපත් කොට එහි තීරණයට කලින් දිවංගත විය. මෙහිදී ඔහුගේ තත්ත්වයට නීත්‍යානුකූල පත්-

මැතිවරණ පෙත්සමක්

මැතිවරණ පෙත්සමක් — අසත්‍ය කරුණු ප්‍රචාරය කිරීම සහ වගඋත්තරකරු නියම වශයෙන් හෝ අනියම් වශයෙන් රජය සමග කොන්ත්‍රාත්තු වලට බැඳී සිටීම නිසා පාර්ලිමේන්තු මන්ත්‍රීවරයකු ලෙස තෝරනු ලැබීමට සුදුසු නැඩයක නොසිටි බව චෝදනා මුඛයෙන් කියා පෑම — ලංකා (පාර්ලිමේන්තු මැතිවරණ) රාජ ආඥා පණතේ පැණවීම්වලට අනුකූලව මැතිවරණය නොපවත්වන ලදැයි චෝදනා මුඛයෙන් කියා පෑ තුන්වන කරුණ — චෝදනා තුනකට තැන්පත් කළ ඇප මුදල.

මැතිවරණ පෙත්සම පාර්ලිමේන්තු මැතිවරණ පෙත්සම් රීති මාලාවේ 4(1)(බී) සහ (4)(3) යන රීතිවලට එකඟ නොවී ඇති නිසා එය නිෂ්ප්‍රභා කිරීමට කරන ලද ආයාචනයක් — ඇප මුදලේ ප්‍රමාණාත්මය සහ පෙත්සමේ ඇති චෝදනා සංඛ්‍යාව — 1946 (පාර්ලිමේන්තු මැතිවරණ) රාජාඥා පණත — 42(2), 58, 77(බී) සහ (සී), සහ 86(2) දරණ ඡේද — වර්ෂ 1946 ලංකා (පාලන සංස්ථා) රාජාඥාව, 13 සහ 13(3)(සී) යන ඡේද.

පළමු වන වගඋත්තරකරු තෝරනු ලැබීමට අභියෝග කෙරෙන මැතිවරණ පෙත්සමෙන් පහත යඳහන් දේ චෝදනා මුඛයෙන් ඉදිරිපත් කරන ලදී.

(1) ලංකා (පාර්ලිමේන්තු මැතිවරණ) රාජාඥා පණතේ 33 වන ඡේදයේ තේරුම අනුව පළමු වන වග උත්තරකරු තමා විසින් ම හෝ ඔහුගේ නියෝජිතවරුන් සහ හෝ වෙනත් අයවලුන් විසින් ඔහුගේ දැනීම හෝ අනුමැතිය ඇතිව එම මැතිවරණ වකවානුවේ දී හෝ එයට පෙර එම මැතිවරණයේ දී තමාගේ ප්‍රතිපාක්ෂිකයා තේරී පත්වීම වැළකෙන ලෙස බල පැවැත්වෙන හැටියට ඔහුගේ පුද්ගලික චරිතය සහ හෝ පැවතීම් පිළිබඳව අයත්‍ය ප්‍රකාශ යන් කිරීමේ හෝ පළ කිරීමේ හේතුවෙන් දූෂිත ක්‍රියාවක් කරන ලද නිසා යථොක්ත මැතිවරණයෙන් පළමු වන වගඋත්තරකරු මන්ත්‍රීවරයා ලෙස තේරී පත්වීම නීති විරෝධ බල ශූන්‍ය දෙයක් වීම.

(2) ලංකා (පාලන සංස්ථා) රාජාඥා පණතේ 13 වැනි ඡේදය උල්ලංඝනය වන අයුරින් නියම ලෙස හෝ අනියම් ලෙස ඔහු විසින් සහ හෝ ඔහුගේ වාසියට අනිත් අයවලුන් විසින් සහ හෝ ඔහුගේ ප්‍රයෝජනයට හෝ ප්‍රතිලාභයට රජය විසින් ලංකා ආණ්ඩුව වෙනුවෙන් කරන ලද හෝ ඇතුළත් කෙරෙන ලද කොන්ත්‍රාත්තුවක් දැරීමෙන් සහ හෝ ඒ මගින් පලප්‍රයෝජන භුක්ති විඳීමෙන් පළමු වන වගඋත්තරකරු තමා තෝරා පත් කරන ලද කාලයේ නියෝජිත මන්ත්‍රීවරයෙකු ලෙස තේරී පත්වීමට නුසුදුසු නැඩයක සිටි බව.

(3) ඡන්දදායකයන්ට දෙන ලද ඡන්ද පත්‍රිකා විශාල සංඛ්‍යාවක් මුද්‍රාව නොතබා හෝ කාර්යාලීය යලකුණු කැපෙන සේ සිදුරු නොකර හෝ නිවුණු නිසා එහි ප්‍රතිඵලය වූයේ ප්‍රතිපාක්ෂික අපේක්ෂකයාගේ වාසියට දෙන ලද ඡන්ද බොහෝ ගණනක් ඔහුට දෙන ලද ඡන්ද හැටියට ගණන් නොකර හැරිය බැවින් එසේ ලංකා (පාර්ලිමේන්තු මැතිවරණ) රාජාඥා පණතේ 42(2) ඡේදයේ පැණවීම්වලට එකඟව මැතිවරණය නොපැවැත්වීමෙන් එය මන්ත්‍රීවරයෙකු තෝරා පත් කිරීමේ දී බල පැවැත් වුනු බව.

පහත සඳහන් හේතූන් උඩ පළමුවැනි වගඋත්තරකරු මැතිවරණ පෙත්සම නිෂ්ප්‍රභා කිරීමට ඉල්ලා සිටියේ ය.

(ඒ) එම මැතිවරණ පෙත්සම වර්ෂ 1946 පාර්ලිමේන්තු රීති මාලාවේ (3 වන උප ග්‍රන්ථය) 4(1)(බී) සහ 4(4)(3) දරණ රීතිවල ඇති විධානයන්ට අනුකූලව ලියා නොතිබීම.

(බී) තබන ලද රු. 5,000ක ඇප මුදල එකී පාර්ලිමේන්තු මැතිවරණ රීති මාලාවේ 12 වන රීතියේ පැණවීම්වලට එකඟ නොවීම හා එම මුදල ප්‍රමාණවත් නොවීම.

මැතිවරණ පෙත්සමේ ඇති පළමු වන හේතුව පිළිබඳව පළමු වන වග උත්තරකරු වෙනුවෙන් පහත සඳහන් පරිදි තර්ක ඉදිරිපත් කරන ලදහ:

(ඒ) පෙත්සමේ සඳහන් කොට ඇත්තේ මැතිවරණය නිෂ්ප්‍රභා කිරීමට හේතූන් මිස එයට අතිරේකව තව සංක්ෂේපයෙන් කරුණු සුළුපයක් නැති නිසා එය 4(1)(බී) දරණ රීතියට අනුකූල නොවීම.

(බී) වර්ෂ 1946 පාර්ලිමේන්තු මැතිවරණ රීති වල 5 වන රීතිය, 4(1)(බී) දරණ රීතිය වෙනුවට යොදු ගැනීමට ඉඩ නැති බව.

(සී) පළමුවන වගඋත්තරකරු සහ-හෝ අනිත් අයවලුන් ඔහුගේ දැනීම ඇතිව යනාදි වචන චෝදනාවේ ඇතුළත්වී තිබීමෙන් මෙම වරද කා විසින් කරන ලදද යන්න ගැන ඇති අස්ථීර භාවය නිසා එය යම් කිසි කරුණක් සම්බන්ධයෙන් චෝදනා මුබයෙන් සඳහන් කෙරෙන්නක් නොවන බව.

පෙත්සමේ ඇති දෙවන හේතුව පිළිබඳ තර්ක ඉදිරිපත් කරන ලද්දේ පහත පෙනෙන පරිදිය:

(ඒ) දෙවන හේතුව ඉහාම ඉහළින් සලකා බැලුවත් එය තදනන්තරව සංශෝධිත ලංකා (පාලන සංස්ථා) රාජ ආඥ පණතේ 13(3) (සී) ඡේදය උපුටා දැක්වීමක් පමණකි. මේ නිසා කිසිසේත් මෙහි චෝදනාවක් ඇතුළත් නොවේ.

(බී) දුම්රියෙන් ගමන් කිරීමට ප්‍රවේශ පත්‍රයක් මිලදී ගන්නා විට සැමදම කෙනෙකු රජය සමග ඇතුළත් වන කොන්ත්‍රාත්තුව වැනි කෙනෙකු පාර්ලිමේන්තු ආඥනයක අපේක්ෂකත්වයට නුසුදුසු නොකරණ නොයෙක් විධියේ කොන්ත්‍රාත්තු ඇති නිසා මෙහිදී කොන්ත්‍රාත්තුව කුමක්දැයි වෙසෙසා දැක්වීමට නොහැකි වීමෙන් චෝදනාව නරක චෝදනාවක් බවට පෙරලී නිබේ.

(සී) දැනට පවතින ආකාරයටම චෝදනාව තිබෙන්නට ඉඩ හැරියොත් පෙත්සම් කරුට වගඋත්තරකරුගේ ක්‍රියා ගැනද, ඔහුගේ නියෝජිතයන්ගේ ක්‍රියා ගැනද, ඔහුගේ දැනීම හා කැමැත්ත ඇතුව අනිත් අයවලුන් කරන ක්‍රියා ගැනද සාක්ෂි ඉදිරිපත් කිරීමට හැකි වීමෙන් (33 නව නිති වාර්තා 65 සඳහන්) නිලකවර්ධන එ. ඔබේසේකර යන නඩුවේ තීන්දුවට වෙනස් වන ලෙස සාක්ෂි ඉදිරිපත් කළ හැකිවනු ඇත. එම නඩුවේ පරීක්ෂණයට භාජනය වන්නේ අපේක්ෂකයා විසින්ම කරන ලද දූෂිත ක්‍රියා පිළිබඳ සිද්ධීන් ගණනාවක් ගැනය.

මේ නියායෙන් කරුණු සලකා බලන කල පෙත්සමේ ඇත්තේ චෝදනා කුනක් බව ඒ නිසා ඉදිරිපත් කොට ඇති ඇප මුදල ප්‍රමාණවත් බවත් මේ සමහම තීන්දු විය.

ජී. ජී. ඒ. සිල්වා විනිශ්චයකාරතුමා විසින්:

''මේ ආකාරයෙන් ඉදිරිපත්වී ඇති මූලික විරෝධයන් ගැන කල්පනා කිරීමේදී නිදහස් මහජන ඡන්දය පාවිච්චි කිරීම සහ පිරිසිදු ලෙස මැතිවරණ පැවැත්වීම රජයකට ඇති ඉතා වටිනා දයාද බව මතක තබා ගැනීම අවශ්‍ය වේ. එබඳු දයාදයක් ආරක්ෂා කිරීමේදී ඒ අගනා දයාද සඳහටම පැවතීම සහතික කරන යන්ත්‍ර සූත්‍රය ක්‍රියාකරවන උපකරණය ලෙස ගිණිය හැකි මැතිවරණ පෙත්සමක් නියම සාරාංශයෙන් නොර රීති විරුද්ධත්වයක සියුම් රසය පමණක් සලකා ආරම්භයේදීම තළා පෙළා අබල දුබල නොකරන ලෙස වග බලා ගැනීම උසාවිය පිට පැවරී ඇති යුතුකමකි. යම්කිසි මැතිවරණයකට එල්ලව ඇති චෝදනා මුබයෙන් කිව හැකි ගරුක කියමන් ගැන සම්පූර්ණ විභාගයක් පැවැත්වීම මහාජනතාවට ඉතාම වැදගත් දෙයක් වන අතර තෝරා පත් කරන ලද නියෝජිතයෙකුට එල්ල කරන ලද චෝදනාවකට කුඩු දෙන ක්‍රියාවන් ප්‍රතිඡ්‍යා විරහිත නම් ඒ බරින් ඔහු මිදවීම ද ඔහුට නිරායාසයෙන්ම අවශ්‍යය.''

තීන්දුව: (1) 5 වන රීතිය ගැන සලකා බැලීමේදී එහි ඇති පරිදි සාක්ෂි සටහන් කිරීම අනවශ්‍ය බැවි සහ වගඋත්තරකරු ඉල්ලා සිටි විටක ඔහුට බලාපොරොත්තු නැති කරුණු හදිසියෙන් ඉදිරිපත් කිරීමෙන් ඇති විය හැකි නත්වය හා දුරිමට සිදුවන අනවශ්‍ය වියදම් වැළැක්වීම ආදි දෙයෙහි පරමාර්ථයෙන් අවශ්‍ය විස්තර සැපයීමට යයි විනිසුරුතුමාට නියෝගයක් දීමට හැකි නිසා මෙම පෙත්සමේ යඳහන් වී ඇති කරුණු 4(1)(බී) දරණ රීතියට එකහත්වය ඇති බව පෙනී යේ.

(2) 4(1)(බී) රීතියෙන් අපේක්ෂා කරන ''කරුණු සහ හේතු'' වලට 5 වන රීතියෙන් බලාපොරොත්තුවන වැඩිමනත් කරුණු ඇතුළත් නොවන්නේය. 5 වන රීතිය එහි විද්‍යමාන වීමෙන්

ම මෙය හැඟීයන බව සලකා ගත හැක. 4(1)(බී) රීතියෙන් එබඳු විස්තර කරුණු නීති සම්පාදක මණ්ඩලය බලාපොරොත්තු වීනි නම් 5 වන රීතිය අමතර (අනවශ්‍ය) රීතියක් ලෙස සැලකේ.

(3) පැල්මඩුල්ලේ මැතිවරණ පෙත්සම් නඩුවෙහි (රූපසිංහ එ. කරුණාසේන 69 ලංකා යතිපතා නීති සංග්‍රහය 49 පිට) නිගමනය කළ පරිද්දෙන් මෙම පෙත්සමේ ඇති ප්‍රකාශය එකම විශේෂයක වෝදනා කිපයක් කෙටියෙන් සඳහන් කිරීමේ විධියකි. වෝදනාවේ මේ ආකාරය මෙබඳු නඩුවලදී ඒංගලන්තයේද භාවිතා කෙරෙන්නක් වන අතර ම වර්ෂ 1946 ලංකා (පාර්ලිමේන්තු මැතිවරණ) රාජාඥ පණතේ 86(2) ඡේදයෙන් ද මෙය අනුමත වී තිබෙන්නක් ලෙස සැලකීමට සිදුවන්නේ අපේ රීතිවල නියමිත විශේෂ ආකාරයක් නැති බැවිනි.

කින්දුව: (1) වෝදනා මුඛයෙන් කියන ලද ඉහත සඳහන් දෙවැන්න 77 වන ඡේදයෙහි ඇති හේතූන්ගේ ගණයටම වැටේ. (මෙම ඡේදය මෙහි විශේෂයෙන් සඳහන් කර නැති බව සැබෑය.) එහි වෝදනාව සංයුක්ත වීමට වුවමනා කරුණු සඳහන් වී තිබේ. මෙම වෝදනාවට සම්බන්ධ තව අතිරේක කරුණු පෙත්සමේ සඳහන් කිරීම වූකලී පෙත්සම් කරුවකු විසින් තමාට 5 වන රීතියෙන් කිරීමට නියමිත දෙයට වඩා වැඩිමනත් දෙයක් කිරීමකි.

(2) වර්ෂ 1946 ලංකා (පාලන සංස්ථා) රාජාඥ පණතේ 13 වන ඡේදය ගැන සඳහන් කිරීමෙන් වගඋත්තරකරුට තමාට විරුද්ධව පෙත්සම්කරු වෝදනා එල්ල කරන්නේ එහි සඳහන් කොන්ත්‍රාත්තුවකට සමාන කොන්ත්‍රාත්තුවකට යයි සලකා ගැනීමට තරම් ප්‍රමාණවත් කරුණු ඇති බව පෙනෙනසේ ය. වැඩි විස්තර උවමනා නම් එය ලබා ගන්නා උපක්‍රමය 5 වන රීතියෙහි ගැබ්වී තිබේ.

(3) රාජාඥ පණතේ 77(ඊ) ඡේදයෙන් පැණ වී ඇති නුසුදුසුකමේ හේතුව ගැන මෙන්ම පාලන සංස්ථාවේ (Constitution) 13(3)(සී) ඡේදයෙහි නම් කොට ඇති එක් ගණයකට සමණක් ඇතුළත් වන නුසුදුසුකමක සමණක් බාධක ගැන ද වෝදනාවේ සඳහන්වී ඇති නිසා පැමිණිලි කර ඇති ක්‍රියාවලට කවරෙකු වගකිය යුතු වුවත් ඒ සියලුම ක්‍රියාවල ප්‍රතිඵලය වන්නේ අපේක්ෂකයාගේ එක නුසුදුසු කමකි.

(4) වෝදනා මුඛයෙන් කියා ඇත්තේ වග උත්තරකරු නියම ලෙසින් හෝ අනියම් ලෙසින් රජය සමග ඇතුළත් වී ඇති කොන්ත්‍රාත්තු එකකට වැඩි ගණනකින් අයිතිවාසිකම් හා ප්‍රයෝජන ලබා ඇති බව නමුත් පැමිණිල්ලෙන් සඳහන් කරන සේ හැඟෙන්නේ එකම විශේෂයක වෝදනා බැවින් මැතිවරණ පෙත්සමක පරමාර්ථය අනුව එයින් එක වෝදනාවක් පමණක් සැලෙන බව සිතාගත යුතුය.

ලුවිස්දුරේ එදිරික් ද සිල්වා එ. ලොකුගේ චන්ද්‍රදස ද සිල්වා සහ තවත් අය 15

ලංකා (පාර්ලිමේන්තු) මැතිවරණ රාජාඥ පණත 1946

ඡේද 33, 42, (2), 58, 77, (සී) සහ (සී) 86 (2) ... 15

ලංකා (පාලන සංස්ථා) රාජාඥ පණත 1946

13 සහ 13 (සී) යන ඡේද 15

සර්ටියෝරේරයි ආඥා

සර්ටියෝරේරයි ආඥාවක් — නගර සභා ආඥා පනතේ 184 වෙනි ඡේදය යටතේ නගර සභාපති වරයෙකු නිලයෙන් පහ කරමින් දෙන ලද නියෝගයක් — එබඳු නියෝගයක ප්‍රතිඵලය — ඡන්දය පාවිච්චි කිරීමේ අයිතිය පහ කරන ලද සභාපති වරයාට අහිමි වීම — මෙය විනිශ්චයාත්මක නියෝගයක්ද, පරිපාලන නියෝගයක්ද යන වග — පරීක්ෂණය පිළිබඳ නිවේදනයේ ප්‍රමාණවත් භාවය සහ ඔහුගේ නිදහසට කරුණු කීමට සලසා දුන් අවස්ථාවේ ප්‍රමාණවත් කම — පෙත්සම්කරු විසින් කරන ලද කරුණු පැහැදිලි කිරීම ගැන එකඟ නොවීමට ඇමතිවරයාට ඇති බලය — ප්‍රාදේශික බල මණ්ඩල (ඡන්ද විමසීම්) ආඥා පනතේ 9(3)(සී) දරණ ඡේදය.

මෙම ආයාචනයෙන් පෙත්සම්කරුවා පළාත් පාලන ඇමතිතුමා විසින් නගර සභා ආඥා පනතේ 184 වන ඡේදය යටතේ තමා නගර සභාවක සභාපති පදවියෙන් ඉවත් කරමින් දෙන ලද නියෝගයක් අවලංගු කෙරෙන ලෙස සර්ටියෝරේරයි ආඥාවක් ලබා ගැනීම පිණිස යාඥා කර සිටියේය.

පෙත්සම්කරුගේ වාසියට කරුණු දක්වමින් තර්ක කරන ලද්දේ යටොක්ත නියෝගයෙහි ප්‍රතිඵලයක් වශයෙන් නිලයෙන් පහ කරන ලද සභාපතිවරයාට ප්‍රාදේශීය බල මණ්ඩල (ඡන්ද විමසීම්) ආඥා පනතේ 9(3)(සී) දරණ ඡේදය යටතේ උත්තර මන්ත්‍රීවරයෙකු ලෙස හෝ නියෝජිත මන්ත්‍රීවරයෙකු ලෙස හෝ ප්‍රාදේශීය පාලක මණ්ඩලයක උපදේශක වරයෙකු ලෙස හෝ පත්වීමට හෝ එබඳු අයෙකු තෝරන මැතිවරණයකදී ඡන්දය දීමට හෝ ඇති සුදුසුකම් අහිමි වන නිසා මෙම නියෝගය ඒ අනුව සලකන විට විනිශ්චයාත්මක බලයක් ක්‍රියාවේ යොදවමින් කළයුතු නියෝගයක් වන හෙයින් එවකට මෙබඳුම ප්‍රශ්නයක් පස් දෙනෙකුගෙන් යුත් විනිශ්චය මණ්ඩලයක අවධානයට යොමුවී ඇති බැවින් එහි තීරණය ලැබෙන තුරු මෙම ආයාචනයේ තීරණය ද කල් දැමිය යුතු බව කියා පෑවිනි.

තව දුරටත් පෙත්සම්කරුගේ වාසිය පිණිස තර්ක කරන ලද්දේ:

(ඒ) ඇමතිවරයාගේ එම නියෝගයට හේතු වූ පෙත්සම්කරුට වර්ෂ 1964, අප්‍රෙල් මස 28 වන දින එනම්, පසුවදු ආරම්භ වන ඔහු විසින් කරන ලදයි කියන ඔහුගේ අයථා පාලනය පිළිබඳව පැවැත්වුණු පරීක්ෂණය ගැන ඔහුට දුන් නිවේදනය වර්ෂ 1964.4.27 වන දින බාර දී ඇති නිසා ඔහුට ප්‍රමාණවත් නිවේදනයක් නොලැබුණු බව සැල කරමිනි.

(බී) පරීක්ෂක නිලධාරිය විසින් පවත්වන ලද එම පරීක්ෂණය මූලික පරීක්ෂණයක්යැයි ඔහු කියා ඇති බැවින් පෙත්සම්කරු ඉන් පසු කෙරෙන තවත් පරීක්ෂණයක් ඇතැයි සිතූ නිසා තමාගේ ආරක්ෂාවට කරුණු කීමට පෙත්සම්කරුට සාධාරණ අවස්ථාවක් නොලැබුණු බව කියා පාමිනි.

(සී) ඇමතිවරයා විසින් පෙත්සම්කරු නිලයෙන් පහකිරීමට විරුඬව කරුණු පෙන්වීමට යයි ඔහුට ඇනවූ විට ඒ පිළිබඳව ඔහුට සැහෙන අවස්ථාවක් නොතිබුණේ යයිද පෙත්සම්කරු විසින් පැහැදිලි කරන ලද කරුණු ඇමතිවරයාගේ කල්පනාවට භාජන නොවීයයිද පෙන්වා දෙමිනි.

(ඩී) පෙත්සම්කරුට තමාගේ නිදහස පතා නගර සභාවට අයත් ලිපි ගොනු ඉදිරිපත් කිරීමට ඇමතිවරයා විසින් අවස්ථාවක් සලසා දී නොමැති බවද අනාවරණය කරමිනි.

තීන්දුව: මෙම නියෝගයන්හි ප්‍රතිඵලය වශයෙන් නිරායාසයෙන්ම සභාපතිවරයා නිලයෙන් බැහැර වන නිසා යටොක්ත පාඳු පනතේ 184 වන ඡේදය යටතේ මෙය හුදෙක්ම පරිපාලන නියෝගයක් ලෙස ගැනෙන බැවින් ඇමතිවරයාට එම ඡේදය යටතේ මෙම නියෝගය දීමට බලය තිබේ. නිලයෙන් පහ වන සභාපති වරයාගේ මැතිවරණ අයිතිවාසිකම් සහ ඡන්දය දීමේ අයිතිවාසිකම් වලට ද මෙයින් බලපැවැත්වෙන බැවින් ඒ පිළිබඳව ඔහුට ලැබෙන අවවාද අනුව යම්කිසි පියවරක් ගැනීමට ඉඩ තිබේ.

තීන්දුව: (1) පෙත්සම්කරුට විරුද්ධව තිබුණු පෙත්සම් දෙක ගැන රජෝර්තුවක් කලින් ඔහුට යවන ලද නිසාත් මෙම පරීක්ෂණය ඇරඹුණු පසු එය අප්‍රෙල් මස 29 වන දින, මැයි මස 8 වන දින, මැයි මස 13 වන දින සහ මැයි මස 16 වන දින ද පැවැත්වී ගෙන ගිය බව පරීක්ෂණ වාර්තාවලින් පැහැදිලි වන නිසාත් එම පරීක්ෂණය නිමාවට යෑමට පෙර ඔහුට තමාගේ කරුණු ඉදිරිපත් කිරීමට සැහෙන අවස්ථාවක් ලැබී තිබේ.

(2) පරීක්ෂක නිලධාරියාගේ නිර්භාය චේතනාව පිළිබඳව සැක කිරීමට කිසිදු හේතුවක් නොපෙනෙන බැවින් මෙම පරීක්ෂණයෙහි පරමාර්ථය වූයේ තමාට විරුද්ධව ඇති චෝදනා ලෙස සලකා ගත හැකි කරුණුවල සත්‍යාසත්‍යය දැන ගැනීමට බව පෙත්සම්කරු දැන සිටියාක් මෙන්ම ඔහුට කළ හැකි යම්කිසි කරුණු පැහැදිලි කිරීමක් ඇත්නම් එසේ කළ විට එය සකසා පිළිගෙන ඒ සම්බන්ධයෙන් කල්පනා කරන බව ද අවශ්‍යයෙන්ම දැන සිටි බවද පරීක්ෂණ වාර්තාවලින් පෙනේ. පරීක්ෂණයෙහි යම යම් අවස්ථාවන්හිදී පෙත්සම්කරු සමහර ප්‍රකාශයන් කර ඇති බවද සාක්ෂිකරුවන්ගෙන් ප්‍රශ්න අසන ලද බවද, පරීක්ෂණ වාර්තාව පෙන්වා දෙන අතර ඔහු වෙනුවෙන් කරුණු නියෝජනය කිරීමට නීති වේදියකු තබා ගැනීමට ඔහු ඉල්ලීමක් කර නැති බවද පෙනී යේ.

(3) මෙසේ නිලයෙන් පහ කිරීමට හේතුභූත වූ කරුණු සවිස්තරව බහා ලන ලද ඇමතිවරයාගේ ලියමනට පිළිතුරු වශයෙන් පෙත්සම්කරු විසින් කළ කරුණු පැහැදිලි කිරීමට එකහ නොවී සිටීමට ඇමතිවරයාට බලය තිබේ. එම නිසා නිලයෙන් පහ කිරීමේ නියෝගය දීමට පෙර එසේ කරුණු පැහැදිලි කර තිබීම ගැන ඇමතිවරයාගේ අවධානය යොමු නොවී ඇති බව අධිකරණය විසින් සලකා ගැනීම යුක්ති යුක්ත නොවේ.

(4) නගර සභාවේ නිලධාරීන්ගේ කටයුතු ගැන ප්‍රමාණවත් පරිපාලන ක්‍රමයක් තබා ගැනීම පැහැර හැරීමේ හේතුවෙන් පෙත්සම්කරු අයථා පාලනයට වැරදිකරුවෙකු යයි පිළිගැනීමට ඇමතිවරයාට බලය තිබේ නම් අයථා පාලනය පිළිබඳව ඇති මෙම චෝදනාව නිෂේධයට පත් කිරීමට කිසිම දෙයක් නගර සභාවේ ලිපි ගොනුවලින් ලබාගත නොහේ. වැඩිදුරටත් බලන කල මෙසේ ලිපිගොනු ඉදිරිපත් කිරීමෙන් පෙත්සම්කරුට යම්කිසි පිළිසරණක් ලැබීමට හැකිවී තිබිනි නම් පරීක්ෂණය පැවැත්වීගෙන යන අවස්ථාවෙහි එබඳු ලිපිගොනු ඉදිරිපත් කිරීමට ඔහුට සැහෙන තරම් ඉඩ ප්‍රස්ථාව සැලසී තිබේ.

විත්තුර සිල්වාගේ ගුණදස සිල්වා එ. ඒ. පී. ජයසූරිය සහ තව කෙනෙක් 9

නඩුල්කරුවෝ

භුක්ති නඩු තීන්දුවක් — නඩුල් ඉඩම්කරුවකුට භුක්ති නඩු තීන්දු ප්‍රකාශයක් ලබා ගත හැකි ද?

තීන්දුව: නඩුල් ඉඩමක වැවිලි රෝපනය කිරීම නිසා හෝ ගෙයක් ඉදි කිරීම නිසා හෝ එම කොටස තම වසඟයේ තබා ගැනීමට අයිතියක් ඇති කලක සිට නඩුල් ඉඩම්කරුවකුට තමාගේ භුක්තිය සාමාන්‍යයෙන් නොකෙරෙන නිසා තවත් නඩුල් ඉඩම්කරුවකුට විරුඬව තම වාසියට භුක්ති නඩුවක තීන්දු ප්‍රකාශයක් ලබා ගත නොහේ.

එලාරිස් එ. කුරුප්පු 5

ගරු එච්. ඇන්. ජී. ප්‍රනාන්දු විනිශ්චයකාරතුමා සහ ගරු අබේසුන්දර විනිශ්චයකාරතුමා ඉදිරිපිට

පඤ්ඤානන්ද ස්ථවිර එ. සුමඞ්ගල ස්ථවිර*

ඝ. ඵ. අංකය 196/64 (අතුරු ඇපෑල) කුරුණෑගල දි. ඵ. අංකය 152/ඇල්.

වාද කළ සහ තීන්දු කළ දිනය: 1965. 8. 27

බෞද්ධ දේපල පිළිබඳ නීතිය—පන්සලක විහාරාධිපති යයි එහි දේපල පිළිබඳව ද ප්‍රකාශයක් ලබා ගැනීමේ නඩු-වක්—එය නිෂ්ප්‍රභා කිරීම නිසා මතු වූ අභියාචනයක්—අභියාචන තීරණයට පෙර පැමිණිලිකරු දිවංගතවීම—ඒ වෙනුවට එම තනතුරට පත් තැනැත්තා ඇතුලු කිරීම—බෞද්ධ විහාර දේවාලගම් පණත—සිවිල් නඩුවිධාන සංග්‍රහයේ 404 ඡේදය.

තීන්දුව : විහාරයක අධිපතිකම පිලිබඳව හා එහි දේපළ පිලිබඳව තමාට වාසියට ප්‍රකාශයක් ලබා ගැනීම සඳහා නඩුවක් දමා පරාජිත වූ පැමිණිලිකරුවෙක් එම තීරණයට විරුඬව අභියාචනයක් ඉදිරිපත් කොට එහි තීරණයට කලින් දිවංගත විය. මෙහිදී ඔහුගේ තත්වයට නීත්‍යානුකූල පත්වීමට බෞඬ විහාර දේවාල ගම් පණතට අනුව තමාට හැකි යයි කියන තැනැත්තෙකුට ඒ බව තහවුරු කළවිට ඒ තැනැත්තා ම දිවංගත තැනැත්තා වෙනුවට නඩුවට ඇතුල් වීමට සිවිල් නඩු විධාන සංග්‍රහයේ 404 වන ඡේදයට අනුව බලය තිබේ.

ගරු එච්. එන්. ජී. ප්‍රනාන්දු විනිශ්චයකාරතුමා

මෙම නඩුවේ පැමිණිලිකරුවූ ස්වාමීන්වහන්සේ, තමන් වහන්සේ විහාරයක නීත්‍යානුකූල විහාරාධිපතීන් වහන්සේ යයි ද, එම විහාරයට අයත් වස්තු සම්භාරයේ අයිතිය තමන්ට යයි ද කියා ප්‍රකාශයක් ලබාගැනීම සඳහාත්, එම විහාරයට අයත්යයි කියන ලද දේපොළ සංඛ්‍යාවක් තමන් වහන්සේගේ භුක්තියට ලබාගැනීම සඳහාත්, මෙම නඩුව දමා තිබේ.

මෙම නඩුවෙහි මූලික ආයාචනාදියෙන් පෙනී යන පරිදි පැමිණිලිකරු සහ විත්තිකරු අතර උද්ගත වී ඇති මූලික ප්‍රශ්නයට ප්‍රධාන වශයෙන් හේතු වී ඇත්තේ පන්සලට අයත් දේපලවල භුක්තිය ලබාගැනීම බව පැහැදිලි ය.

නඩුව විසඳීමෙන් පසුව උගත් විනිශ්චයකාරවරයා විසින් පැමිණිලිකරුගේ නඩුව නිෂ්ප්‍රභා කරන ලදී. ඊට විරුඬව මෙම අධිකරණයට අභියාචනයක් ඉදිරිපත් කොට තිබේ. මෙම නඩුව විභාගයට ගැනීමට පෙර පැමිණිලි කරු මිය ගියේය. එම නිසා දැන් සිටින පෙත්සම්කරු පැමිණිලිකරු වෙනුවෙන් ඇතුල් කිරීමට යයි මෙම උසාවියට පෙත්සමක් ඉදිරිපත් කරන ලද්දේ පෙත්සම් කරුට දැනට ඉදිරිපත් වී ඇති ඇපැල් නඩුව කියාගෙන යාමට සුදුසුකම් ලබාගන්නා අටියෙනි. එම ඉල්ලුම් පත්‍රය විනිශ්චයට භාජනය කිරීම සඳහා දිස්ත්‍රික් උසාවියට යවන ලදී. එහිදී තමන් වහන්සේ විහාරාධිපති වශයෙන් පැමිණිලිකරුගේ අභාවයෙන් පසු පත් වූ බව ඔප්පු කිරීමටත් ඒ කරුණ උඩ තමන් වහන්සේගේ නම මෙම නඩුවට ඇතුළු කිරීමටත් පෙත්සම්කරු පරිශ්‍රමයක් දරා තිබේ. කෙසේ වෙතත් උගත් විනිශ්චයකාරවරයා ලඝු නඩු විසඳීමක න්‍යායෙන් පෙත්සම්කරුට තමන්ගේ නම ඇතුළු කිරීමට ඉල්විය නොහැකි යයි ද එසේ කිරීමට නීතියෙන් යම්කිසි පැනවීමක් නොමැති යයි ද කියා එම ඉල්ලීම ප්‍රතික්ෂේප කළේය.

මගේ මතයේ හැටියට සිවිල් නඩු විධාන සංග්‍රහයේ 404 වන ඡේදයෙන් මෙම අපහසුව මගහරවා ගත හැක. විහාරයකට අයත් දේපළ එම විහාරයේ එවකට සිටින පාලක අධිපතිවරයා වෙත පැවරේ. (මේ පිළිබඳව විශේෂ අවස්ථාවලදී ව්‍යතිරේක (exceptions) කීපයක් ඇති බව සැබෑය.) එමනිසා අභාවප්‍රාප්ත ස්වාමීන්වහන්සේ මෙම විහාරයෙහි අධිපතීන් වහන්සේ හැටියට සලකා ගතහොත්

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 69 වෙනි කා., 8 වෙනි පිට බලනු.

උන්වහන්සේ දිවංගතවීමෙන් පසුව එම විහාරයෙහි දේපළවල අයිතිය උන්වහන්සේට පසුව ආධිපත්‍යයට පත්වන්නා වෙත පැවරේ. එසේ නම්, දැන් සිටින පෙත්සම්කරු පැමිණිලිකරු වෙනුවට නීත්‍යානුකූලව පත්වන තැනැත්තා නම්, මෙම නඩුවට හේතුභූත කරුණු වන දේපළ පිළිබඳ අයිතිය දැන් ඔහු පිට පැවරී නිබේ.

එම නිසා පෙත්සම්කරු මෙහිදී ගෙන තිබෙන තත්ත්වය නීතිය ක්‍රියාත්මක වීමෙන් මෙම නඩුවට අයිති ඉඩකඩම් පිළිබඳ හිමිකම උන්වහන්සේගේ වාසියට පරිවර්තනය වී හෝ නිමිණය වී ඇති බවකි. එබැවින් දිස්ත්‍රික් උසාවියට පිළිගත හැකි අයුරු එය උන්වහන්සේට ඔප්පු කළහැකි නම්—එයින් අදහස් කෙරෙන්නේ දිවංගත වූ පැමිණිලිකරු විහාරාධිපතීන් වහන්සේ යයි සලකා ගත් කල පෙත්සම්කරුට උන්වහන්සේගේ අයිතිය පැවරේ නම් ඉහත කී සිවිල් නඩු විධාන සංග්‍රහයේ 404 වන ඡේදය අනුව උන් වහන්සේ පැමිණිලිකරු වෙනුවට නඩුවට ඇතුළත් කිරීමට යෝග්‍ය නැනැත්තෙකි. එසේ සලකා ගැනීමේ සාවද්‍යතාවය හෝ නිරවද්‍යතාවය නෝරා ගත යුත්තේ ඉන්පසුව ඇතිවෙන ඇපැල් නඩු විභාගයෙනි.

ඇපැලට භාජනව තිබෙන කලින් දුන් තීන්දුව මෙයින් නිෂ්ප්‍රභා කෙරෙන අතර පෙත්සම්කරු බෞද්ධ ආගමික විහාර දේවාලගම් නීතියට අනුව දිවංගත හිමියන් සිටියා නම් සිටිය අයිපති කමෙහි එහි පාලනයට පත්වීමට යෝග්‍ය තත්ත්වයක සිටීදැයි නිශ්චය කිරීමට මෙම නඩුව දිස්ත්‍රික් විනිශ්චයකාරවරයා වෙත ආපසු යවනු ලැබේ. එම ප්‍රශ්නය පෙත්සම්කරුගේ වාසියට තීන්දු වුවහොත් මෙම උසාවියට ඇපැලක් ඉදිරිපත් කිරීමට අවකාශ තබා ඔහු නඩුවේ පාර්ශවකාරයකු හැටියට ඇතුළු කළයුතුය. දිස්ත්‍රික් උසාවියෙහි කලින් කියවුණු නඩුවෙහි ගාස්තුවද, මෙම ඇපැලට වියදම් වූ ගාස්තුව ද දිස්ත්‍රික් නඩුකාරවරයාගේ තීරණය මත රඳා පවතිනු ඇත. එම නිසා නොම්මර 55/61/*E* දරණ ඇපැල් නඩුව, මෙහි සඳහන් නියෝගය දිස්ත්‍රික් විනිශ්චයකාරවරයා විසින් ක්‍රියාවට යෙදවුවාට පසු, ලේඛනයට ඇතුළත් කළ යුතුය.

අබේසුන්දර විනිශ්චයකාරතුමා

මම එකඟ වෙමි.

තීන්දුව ඉවත දමා ආපසු යවන ලදී.

ජී. පී. ඒ. සිල්වා සහ අලස් විනිශ්චයකාරතුමන් ඉදිරිපිට දිය

සෙල්ලදෙරේ එ. ඩබ්ලිව්. ඒ. ප්‍රනාන්දු මහත්මිය*

ශ්‍රේෂ්ඨාධිකරණයේ අංකය: 140/1963 (*F*)—දිස්ත්‍රික් උසාවිය, කොළඹ අංකය 53974

විවාද කළ දිනය :—ජූනි 23, 1965
තීන්දු කළ දිනය :— ජූලි 9, 1965

1961කේ අංක 10 වෙනි පණතෙන් සංශෝධිත වූ 1948 ටේ අංක 29 දරණ ගෙවල් කුලී පාලන පණත, 6 වෙනි සහ 13 (1) (a) වෙනි ඡේදය—මාස තුනකට වඩා කාලයක් ගෙවල් කුලී නොගෙවා සිටීම—ගෙවල් හිමියා විසින් 1961–5–25 වෙනි දින දරණ ලියවිල්ලකින් ගෙයින් අස්වී 1961–6–30 වෙනි දින භුක්තිය භාරදීමට නිවේදනයක් යැවීම—එම නිවේදනය වලංගු ද යන බව සහ 13 (1) (a) වෙනි ඡේදය නිසා මාස තුනක නිවේදනයක් දිය යුතුද යන්න.

විත්තිකරු 1960 ජූනි මාසයේ සිට ගෙවල් කුලී ගෙවීමේ නැත. මාස්පතා කුලී ගෙවන බද්දක් වශයෙන් සලකා ගෙවල් හිමියා 1961–5–25 වෙනි දිනමින් විත්තිකරුට 1961–6–30 වෙනි දින ගෙයින් අස්වී භුක්තිය භාරදෙන ලෙස ඉල්ලා නිවේදනයක් යැවීවේ-ය. එසේ අස් වී නොගිය නිසා ගෙවල් හිමියා නඩුවක් පවරණ ලදී.

නඩු විභාගයේ දී කරුණු දෙකක් පමණක් මූලික ප්‍රශ්න වශයෙන් විසඳන ලදී. ඒවා මෙසේ යි. (අ) ඉහත කී අස්වීමේ නිවේදනය නීත්‍යානුකූල ද (ආ) 1961 තේ අංක 10 වෙනි පනතින් සංශෝධිත ගෙවල් කුලී පාලන පනතේ 13 (1) (a) වෙනි ඡේදය අනුව මාසතුනක නිවේදනයක් දිය යුතුද යන්නයි.

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* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 69 වෙනි කා.. 14 වෙනි පිට බලනු.

උගත් දිස්ත්‍රික් විනිශ්චයකාරතුමා චිත්තිකරුගේ වාසියට යට කී ප්‍රශ්න දෙකම විසඳා පැමිණිලිකරුගේ පැමිණිල්ල නිෂ්ප්‍රභා කළේ ය.

තීන්දුව : (1) **පැමිණිලිකරු විසින් දෙන ලද යට කී නිවේදනය නීත්‍යානුකූලයි. (එඩ්වඩ් එ. ධම්මේන 11.11.වා. අංක 66-525 පිට, 67 ල.ස.නි. 47 පිට අනුගමනය කරමින්)**

(2) **සංශොධිත පණතේ 6 වෙනි ඡේදය බල පවත්වන්නේ මාසයක කුලිය හිඟ හිටපු අවස්ථාවලදීය. මාසතුනක කුලිය හිඟ හිටපු අයට එම සැනසිල්ල නොලැබේ. එම නිසා මාස තුනක නිවේදනයක් මේ නඩුවේ දී උවමනා නැත.**

නීතිඥවරු : **ඇස්. සර්වානන්ද මහතා පැමිණිලිකාර ඇපැල්කරු වෙනුවෙන්.**
මාක් ප්‍රනාන්දු මහතා චිත්තිකාර වගඋත්තර කරු වෙනුවෙන්.

ගරු අලස් විනිශ්චයකාරතුමා

තුන්මසකට අධික කාලයක් ගෙවල් කුලිය හිඟ හිටීමෙන් වර්ෂ 1961 අංක 10 දරණ ගෙවල් කුලී පාලන (සංශෝධන) පණතේ 13 වන ඡේදයෙහි පැනවීම උල්ලංඝනය වීම නිසා හිඟ ගෙවල් කුලි සහ එසේ හිඟ හිටීමෙන් තමාට වූ අලාභය අයකරගෙන කොළඹ වුල්ෆැන්ඩල් පාරේ අංක 33 දරණ ස්ථානයෙන් චිත්තිකරු පිටමන් කිරීමේ අදහසින් මෙම නඩුව පැමිණිලිකරු විසින් පවරා තිබේ.

නඩුව විමසන දිනයෙහි මෙම නඩුවේ විමසිය යුතු කරුණු අංක 10 සහ 11 මත නඩුවේ විනිශ්චය රදා තිබෙන බැවින් එම කරුණු දෙක උඩ නඩුව විසඳීගෙන යා යුතු යයි දෙපාර්ශ්වයම සම්මුතියකට බැස ගත්තා ලදී. විසඳිය යුතු එම කරුණු දෙක පහත පෙනෙ පරිදිය—

(i) පැමිණිල්ලේ 4 වන ඡේදයේ සඳහන්ව ඇති පරිදි ගෙය අත්හැර යාමට යවා ඇති නිවේදනය නීතියට අනුව අයෝග්‍යද ?

(ii) වර්ෂ 1961 අංක 10 දරණ ගෙවල් කුලී පාලන පණතේ සංශෝධිත වූ වර්ෂ 1948 අංක 29 දරණ ගෙවල් කුලී පාලන පණතේ 13 (1) (*a*) ඡේදයෙන් පණවා ඇති පරිදි පැමිණිලිකරු විසින් චිත්තිකරුට තුන් මාසයක් කල්දීම පැමිණිලිකරු විසින් පැහැර හැර තිබේ ද?

උගත් දිස්ත්‍රික් විනිශ්චයකාර මහතා මේ ප්‍රශ්න දෙකටම එසේ යැයි අස්ථානීයෙන් පිළිතුරු දී පැමිණිලිකරුගේ නඩුව නිෂ්ප්‍රභා කොට තිබේ.

පැමිණිලිකරු කියන පරිදි වර්ෂ 1960 මැයි මස අග දක්වා ගෙවිය යුතු ගෙවල් කුලිය සම්පූර්ණයෙන් ගෙවා තිබේ. වර්ෂ 1961 මැයි මාසයේ 25 වන දින පැමිණිලිකරු විසින් චිත්තිකරුට වර්ෂ 1961 ජූනි මස 30 වන දින ගෙය අත්හැර එය තමාට බාරදෙන ලෙස නිවේදනයක් යැවිය, පැමිණිලිකරුගේ තත්වය මෙය මාස් කුලී ගෙවන ගෙයක පදිංචියක් නිසා දියයුතු නිවේදනය මසකට සීමා විය යුතුය යන්නයි.

63 සතිපතා ලංකා නීති සංග්‍රහයේ 23 වන පිටේ වාර්තා වී ඇති **අබේවික්‍රම එ. කරුණාරත්න** නඩුවෙහි ශ්‍රී ස්කන්ධරාජා විනිශ්චයකාරතුමා විසින් දෙන ලද තීන්දුව අනුගමනය කරමින් පැමිණිලිකරුගේ නඩුව ඉහත සඳහන් මූලික ප්‍රශ්නයෙහිදී ම නිෂ්ප්‍රභා කළ උගත් දිස්ත්‍රික් විනිශ්චයකාර වරයා වර්ෂ 1961 ජූනි මස 30 වන දින ගෙය අත්හැර තමාට භාරදිය යුතුයයි පැමිණිලිකරු විසින් වර්ෂ 1961 මැයි මස 25 වන දින චිත්තිකරුට යවන ලද නිවේදනය නීති යුක්ත නොවන බව පිළිගත්තේය. දිස්ත්‍රික් විනිශ්චයකාර වරයා ශ්‍රී ස්කන්ධරාජා විනිශ්චයකාරතුමාගේ තීන්දුව අනුගමනය කරද්දී 66 ත.නී.වා. 525 වන පිටේ වාර්තා වී ඇති **එඩ්වඩ් එ. ධම්මේන** යන නඩුවේ එතුමාගේ එම අදහස වෙනස්කර ඇති බව දැනගැනීමේ අවස්ථාව ළඟ නැත. මෙම නඩුවේදී එතුමා කලින් ගත් තීරණය සංශෝධනය කොට තිබේ. **එඩ්වඩ් එ. ධම්මේන** යන නඩුවේ දී මෙම උසාවිය ළඟුන තීරණයට එකඟ වන අපි පැමිණිලිකරු විසින් දෙන ලද මාසයකට සීමාවුනු නිවේදනය නීති යුක්ත නිවේදනයක් සේ පිළිගනිමු.

උගත් දිස්ත්‍රික් විනිශ්චයකාරවරයා පැමිණිලිකරුගේ නඩුව ඉවත දැමීමට හේතු වූ අනික් කරුණ නම් පැමිණිලි

කරු ගෙවල් කුලී පාලන පණතේ සංශෝධිත 6 වන ඡේදයෙන් සංශෝධනය වී ඇති 13 (1) (ඒ) ඡේදයට අනුව **තුන්මාසයක නිවේදනයක්** නොයවා තිබීමය. පැමිණිලිකාර ඇපැල්කරු වෙනුවෙන් පෙනී සිටින නීතිවේදියා සැළකර සිටින්නේ සංශෝධිත පණතේ 6 වන ඡේදයේ කරුණු මෙම නඩුවට යෙදවීමෙන් උගත් දිස්ත්‍රික් විනිශ්චයකාර මහතා නීතිය වරදවා තේරුම් ගෙන ඇති බවය. ඔහුගේ කරුණු සැලකිරීමට අනුව මෙයට අදළ වන්නේ සංශෝධිත පණතේ 13 වන ඡේදය පමණකි. මෙම නඩුව දමා ඇත්තේ සංශෝධිත පණත් ක්‍රියාත්මක වන කාල සීමාව ඇතුළතදී බව පිළිගත යුතුව තිබේ. වර්ෂ 1961 සැප්තැම්බර් මස 23 වන දින පැමිණිල්ල ඉදිරිපත් කරන විට විත්තිකරු තුන්මසකට අධික කාලයක් ගෙවල් කුලී හිඟ හිටවා තිබිණි. නමුත් කෙසේ හෝ වේවා සංශෝධිත පණතේ 13 (ඒ) ඡේදයට අනුව යැවිය යුතුයයි සැලකෙන නිවේදනය තුන්මාසයක් කුලිය හිඟ ඇති නඩුවකට අදළ වේද යන ප්‍රශ්නය මෙහිදී පැනනගී. **අබ්දුල් රහුමන්** එ, **අබ්දුල් කාදර්** 67 න.නී.වා. 86 දරණ නඩුවේ 88 වන පිටේ එච්. ඇන්. ජී. ප්‍රනාන්දු විනිශ්චයකාරතුමා විසින් කී පරිදි 13 (1) (ඒ) යන ඡේදය වර්ෂ 1961 සංශෝධිත පණතේ 13 වන ඡේදයට අනුව ඉදිරිපත් වන නඩුවකට අදළ නොවේය යන ප්‍රකාශයට අපිදු එකඟ වෙමු. මෙම නඩුවෙහි පැමිණිලිකරු විසින් ගෙයි පදිංචිකරුගේ පදිංචිය නිම කිරීමට තුන්මසක කල්දීමක් නිවේදනය කර නැති බව පිළිගතයුතු වුවද අපේ මතය මෙය සංශෝධිත පණතේ අංක 6 දරණ ඡේදයට අයත් නඩුවක් නිසා එබඳු කල්දීමේ නිවේදනයක් අනවශ්‍ය බවය. ඒ ඡේදය අදළ වන්නේ ගෙවල් කුලිය මසකට වඩා හිඟහිටීමේ හේතුවෙන් ගෙන් පිටමං කිරීමට වුවමනා වූ කලෙක මිස මේ නඩුවේ මෙන් ගෙවල් කුලිය තුන්මසක් හිඟ හිටි අවස්ථාවක නොවේ.

විත්තිකාර වගඋත්තරකරු වෙනුවෙන් පෙනී සිටි නීතිවේදියා අප ඉදිරියේ තර්ක කළේ කෙසේ වෙතත් ඔහුගේ පාර්ශවකරුවාට යවන ලද නියෝගය නීතියට අනුව අයෝග්‍ය නිසා ඉහත සඳහන් අංක 10 දරණ විසඳිය යුතු කරුණට පැමිණිලිකරුට විරුඬව පිළිතුරු දීමේ දී විනිශ්චයකාරතුමා අතින් වරදක් සිදුවී නැති බවය. අංක 10 දරණ විසඳියයුතු ප්‍රශ්නයේදී පැමිණිල්ලේ 4 වන ඡේදය ගැන සඳහන්ව තිබේ. එම ඡේදයෙහි පැමිණිලිකරු විසින් විත්තිකරුට යැවූ නිවේදනය ගැන සඳහන්ව ඇති අතර මෙම නඩු තීන්දුවේ මුල්කොටසේදී ඒ ගැන සඳහන් විය. නීතිවේදියා සැළකර සිටින්නේ වර්ෂ 1961 ජූනි 30 දින විත්තිකරුට ගෙයි බුන්තිය භාරදීමටයැයි යවන ලද නිවේදනය පදිංචිය පටන්ගත්ද සිට ගණන් බලන විට ලින් මාසයක කල්දීමක් සිදුවිය යුතුය යි යන නීතියේ පැනවීමට එකඟ නොවන නිසා එය අයෝග්‍ය නිවේදනයක් බවය.

නමුත් පැමිණිලිකාර ඇපැල්කරුගේ නීතිවේදියා ඉහත සඳහන් පරිදි තම ප්‍රතිපාක්ෂිකයා විසින් කරුණු සැළකිරීමේ දී යම්කිසි සාරයක් ඇති බව පිළිගන්නා අතර මෙම කරුණට තමාට කලින් නොදනුවත්වම මුහුණ දීමට සිදුවූ බව කියා සිටින්නේ උගත් විනිශ්චයකාරවරයා එම නිවේදනය අයෝග්‍ය ලෙස සැලකුයේ මේ හේතුව උඩ නොවන බැවිනි. කෙසේ හෝ මෙම නඩුව යථා කාලයේදී නැවත විසඳීමට යයි ආපසු යැවීමට අප අදහස් කරන නිසා එම නඩු විභාගයේ දී මෙම කරුණ මතුකර තර්ක කිරීමට විත්තිකරුට අවස්ථාව ලැබී තිබේ.

එබැවින් උගත් විනිශ්චයකාරවරයා ඉහත සඳහන් විසඳිය යුතු කරුණු දෙක පැමිණිලිකාර ඇපැල්කරුට විරුඬව විසඳීමෙන් නීතිය වරදවා තේරුම් ගෙන ඇතැ යි යන්න අපේ මතය වන බැවින් එම කරුණු දෙකට අපි පිළිතුරු දෙන්නේ එසේ නොවේයැයි කියමිනි. නඩුව යථා කාලයේදී අසනු පිණිස ආපසු යවන්නෙමු. මෙම ඇපෑලේ නඩු ගාස්තුව පැමිණිලිකාර ඇපැල්කරුට අය කර ගත හැක.

ජී. පී. ඒ. සිල්වා විනිශ්චයකාරතුමා
මම එකඟවෙමි.

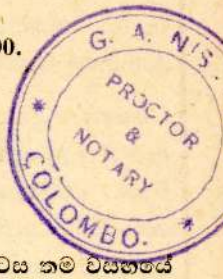
නීන්දුව ඉවත්කර
ආපසු යවන ලදී.

ගරු සන්සෝනි අග්‍රවිනිශ්චයකාරතුමා සහ සිරිමාන විනිශ්චයකාරතුමා ඉදිරිපිටදිය

එලාරිස් එ. කුරුප්පු*

ශ්‍රේෂ්ඨාධිකරණයේ අංකය: 472/63 (එෆ්ඒ)—පානදුරේ දිස්ත්‍රික් උසාවියේ අංකය: 7790.

විවාද කළ දිනය: 13 ඔක්තෝබර්, 1965.
නිකුතු කළ දිනය: 20 ඔක්තෝබර්, 1965.



භුක්ති නඩු තීන්දුවක්—හවුල් ඉඩම්කරුවකුට භුක්ති නඩු තීන්දු ප්‍රකාශයක් ලබා ගත හැකි ද?

තීන්දුව : හවුල් ඉඩමක වැවිලි රෝපනය කිරීම නිසා හෝ ගෙයක් ඉදි කිරීම නිසා හෝ එම කොටස තම වසහයේ තබා ගැනීමට අයිතියක් ඇති කලක මිය හවුල් ඉඩම්කරුවකුට තමාගේ භුක්තිය සාර්ථකයෙන් නො කෙරෙන නිසා තවත් හවුල් ඉඩම්කරුවකුට විරුද්ධ තම වාසියට භුක්ති නඩුවක තීන්දු ප්‍රකාශයක් ලබා ගත නොහේ.

නීතිවේදියෝ : රාජනීතිඥ එච්. ඩබ්ලිව්. ජයවර්ධන මහතා, ඇල්. සී. සෙනෙවිරත්න මහතා හා ඩී. ඇස්. විජේවර්ධන මහතා සමග, චින්තිකාර-ඇපැල්කරු වෙනුවෙන්.

ඩී. ටී. ඒ. ජෝසප් මහතා, පැමිණිලිකාර-වගඋත්තරකරු වෙනුවෙන්.

ගරු සන්සෝනි අග්‍රවිනිශ්චයකාරතුමා

ප්‍රමාණයෙන් අක්කර 1 රූඩ් 1 පාර්චස් 13 1/2 ක් ඇති නිදන්මුලවත්ත නමැති ඉඩමේ රූඩ් 3 ක ප්‍රමාණයක කොටසක භුක්තිය ලබා ගැනීම සඳහා දමන ලද මෙය වනාහී, භුක්ති නඩුවකි. පැමිණිලිකරු කියා සිටියේ තමා එක් අවුරුද්දකුත් දවසකට අධික කාලයක් එම ඉඩමෙහි අඛණ්ඩ භුක්තිය විඳිමින් සිටින අතර විත්තිකරු ඉන් කොටසකට කඩා වැදුණු බව යි. මෙයට උත්තර බදින විත්තිකරු කියා සිටියේ, මුළු ඉඩමෙන් නො බෙදූ පාර්චස් 34 ක ප්‍රමාණයක් තමාගේ භුක්තියෙහි තිබුණු බවත්, ඉඩමේ හවුල්කාරයකු වශයෙන් ඔහුට එම කොටස අයිති බවත්, හවුල්කරුවකුට ක්‍රියාවේ යෙදවිය හැකි නීතානුකූල අයිතිවාසිකම් අනුව ඉඩමේ නොබෙදූ ප්‍රමාණයක් ඔහු භුක්ති විඳින බවත්ය.

පැමිණිලිකරුට තමාගේ අයිතිවාසිකම් තම පිය උරුමයෙන් ලැබුණු බවත් පැමිණිලිකරුගේ සහෝදරයාටත් පැමිණිලිකරුට සමානම කොටසක් එසේ ලැබුණු බවත් යාක්ෂිවලින් අනාවරණය විය. තමාගේ දිවංගත සහෝදරයාගේ උරුමක්කාරයන් වෙනුවෙන් එම ඉඩම් තමා භුක්තිවිඳින බව පැමිණිලිකරු පිළිගත්තේ ය. මෙම ඉඩමට පැමිණිලිකරුගේ දියනියන් දෙදෙනා සහ ඩී. එෆ්. ජී. පෙරේරා නමැත්තෙකු ආදී වශයෙන් සැලකෙන තවත් හවුල්කරුවෝ ද සිටිති. මේ නයින් බලන කල ප්‍රමාණයෙන් අක්කර 1 රූඩ් 1 පාවර්ස් 13 1/2 ක් ඇති ඉඩමට බොහෝ හවුල්කාරයන් සිටින බව පෙනී යන අතර විත්තිකරු මෙම නඩුව දැමීමෙන් පරිශ්‍රමයක් දරා ඇත්තේ එසේ පිළිගත් එක් හවුල්කරුවකුට තමන් භුක්ති විඳින රූඩ් 3 ඉඩම ප්‍රමාණයෙන් කොටසක් භුක්ති විඳීම වැලැක් වීමට බව ද හොඳින් පෙනී යයි.

සෑම හවුල්කරුවකුටම මුළු ඉඩම සහ එහි සෑම කොටසක් ම භුක්තිවිඳීමට සහ ඉන් ඵල ප්‍රයෝජන ගැනීමට අයිතියක් ඇති බව දැන් තීරණය වූ නීති සම්ප්‍රදාය ය වේ. එම නිසා පැමිණිලිකරුගේ තත්ත්වයෙහි සිටින හවුල්කරුවකුට විත්තිකරුගේ තත්ත්වයෙහි සිටින තවත් හවුල්කරුවකු එම ඉඩමේ කොටසක් භුක්ති විඳීම සහ ඉන් ඵල ප්‍රයෝජන ගැනීම වැලැක්වීමට කිසිම විධියකින් පුළුවන්කමක් නැත.

යම් හෙයකින් හවුල් ඉඩමේ එක කොටසක වැවිලි වගා කිරීමක් කරන ලද හෝ ගොඩනැගිල්ලක් ඉදි කරන ලද හෝ හවුල්කරුවකු තවත් හවුල්කරුවකු විසින් පිටමං කරන ලද කලෙක එය ලබා ගැනීමට එසේ ඉඩම් සංවර්ධනය කළ හවුල්කරුවා ඉදිරිපත් කරන ලද නඩුවක් නොවේ, මෙය. එ බඳු අවස්ථාවකදී පමණක් එසේ සංවර්ධනය කරන ලද හවුල්කරුවාට එම කොටස තමාගේ වසහේ තබා ගැනීමට සහ කරන ලද එ බඳු සංවර්ධනයක් සේ ගිණිය හැකි යමක් ඇත්නම් භුක්ති නඩුවක් දමා තම වාසියට තීන්දුවක් ලබා ගැනීමට හැකි බව කියවෙන නඩු තීන්දු මෙම උසාවියේ නැත්තේ

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 69 වෙනි කා., 23 වෙනි පිට බලනු.

නොවේ. එ බඳු අවස්ථාවක් හැරුණු විට කිසිම හවුල් කරුවකුට තව හවුල්කරුවකුට විරුධව භුක්ති නඩුවක් දමා තීන්දුවක් ලබා ගත නො හැක. එයට හේතුව ඔහුගේ භුක්තිවිදීම සාමාන්‍යයෙන් කෙරෙන (ut dominus) භුක්ති විඳීමක් නො වෙන නිසා යි.

මෙසේ හවුල්කරුවකු වූ විත්තිකරුට රුඩ් 3 ප්‍රමාණයක් ඇති කැබැල්ලෙන් ද කොටසක් භුක්ති විඳීමට අයිතියක් නිබේ. අවසානයේදී ඔහුට නමා විසින් සාදන ලද මෙම ගෙය පිහිටා ඇති බිම කොටස පිරිනැමේ ද එසේ නැත හොත් ඒ වෙනුවට යම් කිසි වන්දියක් ලැබේ ද යන්න විසඳීම සඳහා නියම ලෙස සංයුක්ත වී ඉදිරිපත් වුණු බෙදුම් නඩුවක පිළිසරණ සෙවිය යුතු ය.

පැමිණිලිකරුට නමා විසින් ම භුක්ති විඳීමට බෙදා ලද කොටසක් ලබා ගැනීමට කැමැත්තක් ඇත් නම් ඔහුට ඇති එකම ප්‍රතිකර්මය බෙදුම් නඩුවක් දැමීම ය. ඔහු හවුල්කරුවකු වශයෙන් සිටිනතාක් ම මේ හවුල් ඉඩමේ බෙදා ලද කොටසක් තමන්ගේ ම භුක්තියට සවි කර ගැනීමට කිසියේත් ඉල්ලා සිටිය නො හැක.

මෙකී කරුණු අනුව පහල උසාවියෙන් ඔහු විසින් ලබා ලද භුක්ති නඩුවේ තීන්දු ප්‍රකාශය ඉවත හෙළිය යුතු ය. උසාවි දෙක්හිම නඩු ගාස්තුව ඔහු දිසින් ගෙවෙන යේ නියමකර මම මේ නඩුව නිෂ්ප්‍රභා කරමි.

ගරු සිරිමාන විනිශ්චයකාරතුමා

මම එකඟ වෙමි.

තීන්දුව ඉවත හෙලන ලදි.
නඩුවද නිෂ්ප්‍රභා විය.

ගරු සන්සෝනි අග්‍රවිනිශ්චයකාරතුමා සහ සිරිමාන විනිශ්චයකාරතුමා ඉදිරිපිට

ලියනගෙ එ. පෙරේරා*

සු: උ: අංකය 58/63 (එෆ්ජ්)—කොළඹ දිස්ත්‍රික් උසාවියේ අංකය 9602/ඇල්

විවාද කළ දිනය : 15 ඔක්තෝබර් 1965.
තීන්දු කළ දිනය : 22 ඔක්තෝබර් 1965.

ත්‍යාගදායකයාගේ ප්‍රාණ භුක්තියට යටත්කර ඇති දීමනාවක්—ගරුක අකෘතඥවේදී කමේ හේතුවෙන් එම දීමනාව අවලංගු කිරීමට ඉල්ලමින් දමූ නඩුවක් සහ ත්‍යාග ලාභියා පිටමං කර අලාභය ලබා ගැනීමට කරන ලද යාඥුවක්—අකෘතඥවේදිකම පිළිබඳ චෝදනාව හෝ වෙනත් ඊට සමාන හෝ ඊට වඩා ගරුක හේතුවක් තහවුරු කිරීමට තිබිය යුතු සාක්ෂිවල ප්‍රමාණවත් බව—පිටමං කිරීමට කරන ලද යාඥුවට ඉඩ දීම.

වර්ෂ 1959දී ලියන ලද ඔප්පුවකින් ඔවුන් පදිංචිව සිටි ගෙය සහ එහි පිහිටා ඇති ඉඩම් කොටස පැමිණිලිකරු විසින් තමාගේ හදගත් සොහොයුරිය වන විත්තිකාරියට තෑගි කොටදී තිබේ. ඔහු විසින් මෙම නඩුව දමන ලද්දේ ගරුක අකෘතඥවේදී බවේ හේතුවෙන් එම දීමනාව අවලංගු කිරීමටය. එහි ත්‍යාග ලාභියා පිටමං කිරීමට සහ අලාභ අයකර ගැනීමට යාඥුවක් ද තිබිණි. පැමිණිලිකරු සාක්ෂි දෙමින් කියේ :

(ඒ) විත්තිකාරිය තමාගේ ස්වාමිපුරුෂයා බැහැර වී සිටින අවස්ථාවල මෙහෙකරුවෙක් සමග අනාචාරයේ හැසිරෙන බව තමාට විශ්වාස ගත හැකි අන්දමට ඒත්තු ගොස් තිබෙන බව

(බී) තමා ඉල්ලා සිටියදීත් විත්තිකාරිය එම මෙහෙකරුවා පිට කර යැවීමට කැමති නොවූ නමුත් ස්වාමි පුරුෂයා ආපසු පැමිණි විට මෙහෙකරුවා පිට කර යැවූ නමුත් පසු අවස්ථාවක දී ආපසු ගෙන්වා ගන්නා ලද බව සහ

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* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 69 වෙනි කා., 37 වෙනි පිට බලනු.

(සි) විත්තිකාරිය පැමිණිලිකරුට නොසලකා සිටි බවත් වරක් ඇගේ ස්වාමිපුරුෂයා තමාට පහර ගැසීමට යැයි පෙළඹී වූ බවත් ය.

(ආපසු පැමිණි දින සිට ස්වාමිපුරුෂයා පැමිණිලිකරු සමග කතාබහ කරන තත්වයක් ඇති වී නැත).

තීන්දුව—: (1) fපුට් නැමති ග්‍රන්ථ කර්තෘවරයා විසින් දක්වා ඇති කරුණු 5 න් එකක්වත් මෙම ඉඩම් දීමනාව අවලංගු කිරීම පිණිස තහවුරු කිරීමට පැමිණිලිකරුට නොපිළිවන් විය. fපුට් ග්‍රන්ථ කර්තෘවරයා විසින් "එයට සමාන හෝ එයට වඩා ගරුක අනිත් හේතූන්" යැයි දක්වන ලද හේතුවකට අයත් කරුණු ද ඔප්පු වී නැත. (fපුට් ග්‍රන්ථ, 39–5–22; ගේන් මහතාගේ පරිවර්තනය බලන්න).

(2) තමාට ප්‍රාණ භක්තිය තබා ගෙන ඇති බැවින් විත්තිකාරිය භූමියෙන් පිටමං කිරීමේ නියෝගයක් ලැබීමට පැමිණිලිකරු සුදුස්සෙකි.

නීතිඥවරු:— රාජනීතිඥ එච්. ඩබ්ලිව්. ජයවර්ධන මහතා එව්. ඩබ්ලිව්. සේනානායක මහතා සමග විත්තිකාර-ඇපැල් කරු වෙනුවෙන්

රාජනීතිඥ ඇන්. ඊ. වීරසූරිය මහතා ඩබ්ලිව්. ඩී. ගුණසේකර මහතා සමග පැමිණිලිකාර-වගඋත්තර කරු වෙනුවෙන්.

ගරු සන්සෝනි අග්‍ර විනිශ්චයකාරතුමා

ඉඩමක් තැගි පිණිස දී එකම ගෙයි කාලයක් ප්‍රීතියෙන් වාසය කොට, ඉන් පසු ඉනාම සුළු කරුණකට කලහ කර ගත් එම ඉඩම දුන් තැනැත්තා සහ එය ලබන ලද තැනැත්තිය අතර සිදු වූ අභාග්‍ය සම්පන්න අරගලයක් නියා මෙම නඩුව ඇති වී තිබේ.

ඉඩම් දීමනාවෙහි දායකයා වන පැමිණිලිකරු අවිවාහකයෙකි. පැමිණිලිකරු වන ඔහු තමන්ගේ හදගත් නැගනිය වන විත්තිකාරියට ඔවුන් මෙතෙක් පදිංචිව සිටින ගෙය 1929 නොවැම්බර් මස 29 වෙනි දින දරණ තැගි කරයකින් ප්‍රදානය කොට තිබේ. කෙසේ වෙතත් ඔහු තමාට එම ඉඩමේ ජීවන භුක්තියක් ඉතිරි කර ගත්තේය.

ඔහු මෙම නඩුව ඉදිරිපත් කර ඇත්තේ ත්‍යාග ලාභියා තමාට බරපතල ලෙස අකෘතඥවේදී වූ හෙයින් එම තැගි ඔප්පුව අවලංගු කිරීමේ පරමාර්ථයෙනි. එමනුදු නොව, එම භූමි ස්ථානයෙන් විත්තිකාරිය පිටමං කරන ලෙස ද එහි අයථා භුක්තියක් විත්තිකාරිය විඳින නිසා ඇයගෙන් ඒ සඳහා අලාභය අය කර ගැනීම පිණිස ද මෙම නඩුවේ පැමිණිල්ලෙන් ආයාචනා කර සිටියේ ය. පැමිණිලිකරු තම සාක්ෂියෙන් කියා සිටියේ 1961 ජනවාරි මස එක් රාත්‍රියක ඔහු ගෙදර පැමිණි විට ගෙයි ලාම්පුවක් දැල්වෙනු දුටු බවත්, විත්තිකාරිය සහ පිරිමි මෙහෙකරුවෙක් කෑම කන ශාලාවෙහි පුටු දෙකක් මත වාඩි වී ඔවුනොවුන් කතා කරමින් සිටි බවත්ය. දැණහිස ලහට එන තෙක් සරම කැසපට ගසා සිටි මෙහෙකරුවාගේ තොලෙහි රුවා ගත් බීඩියක් ද විය. ඔහු, ඔවුන් දෙස බලා සිටියදීම විත්තිකාරිය මෙහෙකරුවා ලඟට ගොස් ඔහුට කොදුරා යමක් කී බවත්, ඊට පසු ඒ කෑම කන ශාලාවෙන් ඈ පිට වී ගිය බවත් වැඩිදුරටත් පැමිණිලිකරු කියා සිටියේය.

පසු ද උදැසන මෙම සිද්ධිය සම්බන්ධයෙන් පැමිණිලිකරු විත්තිකාරිය සමග කතා කළ විට ඈ කියා සිටියේ තමා මෙහෙකරු සමග කතා කරමින් සිටියා පමණක් බවය. එහෙත් එම මෙහෙකරුවා පිටත් කර යැවීමට යයි ඔහු ඇගෙන් කරන ලද ඉල්ලීම ඈ ඉටු කළේ නැත. මේ කාලයේ දී විත්තිකාරියගේ ස්වාමිපුරුෂයා සිටියේ විත්තිකාරියගෙන් බැහැරවය. පසු කලෙක ස්වාමිපුරුෂයා ද එම ගෙයිම පදිංචියට පැමිණි පසු ඉහත කී මෙහෙකරුවා පිටත් කර යවන ලද නමුත් නැවතත් කැඳවා ගන්නා ලද ඔහු මෙම නඩුව තිබුණු කාලයේ එම ගෙයි වැඩ කරමින් සිටියේය.

තමාට විත්තිකාරිය විසින් නින්ද කරන ලදුයි ද තමා ගැන නොසලකා හරින ලදුයි ද එක් වතාවක් විත්තිකාරිය ඇගේ ස්වාමි පුරුෂයා ලවා තමාට පහර දීමට ඔහු පෙළඹවී යයි ද පැමිණිලිකරු පැමිණිල්ලෙන් කියා සිටියේය. යථොක්ත තැගිකරය අවලංගු කිරීමට ඔහු උපයෝගී කර ගන්නා ලද්දේ මෙහි ඉහත දක්වන ලද හේතූන් ය.

සාක්ෂි දීමේදී පැමිණිලිකරු කියා සිටි අයුරු, මෙම කලහය තමා සහ විත්තිකාරිය අතර ඇති වූයේ මෙහෙකරුවා පිළිබඳවය. විත්තිකාරිය මෙහෙකරුවා සමග

නොමනා හැසිරීමක් ඇති කර ගෙන තිබේ යයි ඔහු වටහා ගෙන සිටින සේ පෙනේ. වර්ෂ 1961 මැයි මස 22 වෙනි දින එසේ හැඟෙන පරිදි ඔහු පොලිසියට පැමිණිල්ලක් ද කර තිබේ. සමහර විට එක් බොරු චෝදනාවකට තවත් බොරු චෝදනාවකින් මුහුණ දෙන අභිප්‍රායයෙන් විත්තිකාරිය තමාගේ සාක්ෂියෙහි තම ස්වාමි පුරුෂයා තමා සමග ජීවත් වීමට පැමිණෙන්නට පෙරාතුව විත්තිකරු අයථා අන්දමින් තමා ලහට ප්‍රවේශ වීමට සැරසුණු බව කියා සිටියාය.

සාක්ෂි අනුව බලන කල පැමිණිලිකරු කරන ලද චෝදනාව හෝ එයට ප්‍රතිවිරුද්ධව විත්තිකාරිය කරන ලද චෝදනාව ද යන දෙකම ප්‍රතිෂ්ඨා විරහිත බව පැහැදිලිව පෙනී යේ. නමුත් දෙපාර්ශ්වය අතර බලවත් විත්ත වේදනාවක් ඇති වී එය වගා වී තිබෙන බව සහ විත්තිකාරියගේ ස්වාමි පුරුෂයා පැමිණිලිකරුට 1961 ජූනි මස 2 වැනි දින පහර දෙන ලද බව ද මෙහිලා කිව යුතුය. මේ සම්බන්ධයෙන් පැමිණිලිකරු පොලිසියට ද පැමිණිල්ලක් කර තිබේ. එහෙත් විත්තිකාරියගේ ස්වාමි පුරුෂයා තම භාර්‍යාව සමග 1961 ජනවාරි මස අගදී පදිංචියට පැමිණි ද පටන්ම ඔහු හා පැමිණිලිකරු අතර කිසිම සල්ලාපයක් ඇති වී නැති බව සලකා ගත යුතුය. සාක්ෂිවල ස්වභාවය මෙසේ තිබීමෙන් පැන නගින ප්‍රශ්නය නම්, ඉහත සඳහන් නැගිකරය අවලංගු කිරීමට තරම් සැහෙන නඩුවක් පැමිණිලිකරු විසින් ඉදිරිපත් කර තිබේ ද යන්නයි. නැගි ඔප්පු අවලංගු කිරීම ගැන සාකච්ඡා වී තිබෙන විශාල නඩු සංඛ්‍යාවට තවත් එකක් එකතු කිරීමට මම නොකැමැත්තෙමි. එම සාකච්ඡාවල පදනම වී ඇත්තේ fපුට් ග්‍රන්ථ කර්තෘවරයාගේ ග්‍රන්ථයෙහි 39.5.22 දරණ ඡේදයෙහි සඳහන් කර ඇති පරිදි නැගි දීමනාවක් අවලංගු කිරීමට සුදුසු අකෘතඥවාදිකම් 5 ක් ඇති බව පිළිබිඹු වීමයි. එම ග්‍රන්ථ කර්තෘවරයා කියන්නේ මෙසේ ය :

''මෙම හේතු 5 නම් ත්‍යාග ලාභියා ත්‍යාග ප්‍රදායකයාට ශාරීරික හිංසා පීඩාදිය කිරීම, ඔහුට බරපතල අලාබයක් සිදු වන පරිදි නඩුවක් ඉදිරිපත් කිරීම, එසේ නැතහොත් ඔහුගේ පරිත්‍යාගය නිසා විශාල ආත්ම පූජාවක් ඇති වන පරිදි කටයුතු කිරීම, ඔහුගේ ජීවිතය විනාශ කිරීමට කුමන්ත්‍රණ කිරීම හෝ දීමනාවෙහි සඳහන් ප්‍රභූජනින් උල්ලංඝනය කිරීම යනුයි. මේ කරුණු නැගිකරයක් අවලංගු කිරීමට හේතු වෙයි.''

ඉන් පසුව ඔහු මෙසේ ද එම ග්‍රන්ථයෙහි කියා ඇත :

''මෙයට සමාන හෝ ඊටත් වඩා බරපතල හේතූන් සලකා ගෙන ද ත්‍යාග දීමනාවක් අවලංගු කිරීමට පුළුවන් වීම ගැන ද කිසිම සැකයක් ඇති බවක් නොපෙනේ.'' (ගේන් මහතාගේ පරිවර්තනයෙනි).

fපුට් ග්‍රන්ථ කර්තෘ තුමා විසින් සඳහන් කරන ලද හේතූන් 5 ට මෙම නඩුව ඇතුළත් කළ හැකි බව පෙනී යන පරිදි මෙහි සාක්ෂිවල කිසිම දෙයක් ගැබ් වී නැත. එමෙන්ම එයට සමාන හෝ එයට වඩා බරපතල හේතුවක් ද මෙයින් විද්‍යමාන නොවේ. මට පෙනී යන්නේ, මෙහිදී එක් නියමිත මෙහෙකරුවෙක් සේවයෙහි නිරත කළ යුතු ද නැද්ද යන්න ගැන පැන නගින ලද මතභෙදයක් උඩ පවුලේ ඇති වී තිබෙන කලහයක් පමණක් මෙයට හේතු භූත වී ඇති බව විනා ඊට වැඩි දෙයක් නොමැති බවයි. මේ කරුණු උඩ අධිකරණයෙන් ඉල්ලා සිටින පරිදි මෙම නැගි දීනොව ද වලංගු කළහොත් මා කලින් කියන ලද ඡේදයේ අවසාන කොටසේ fපුට් ග්‍රන්ථ කතුවරයා කියා ඇති පරිදි ''අකෘතඥවාදී පුද්ගලයන්ට විරුද්ධව නඩු දැමීම ඇරඹීමට සෑම අධිකරණයක් සහ සෑම විනිශ්චය ආසනයක්ම අප්‍රමාණවත් වේ.''

කෙසේ වෙතත් විත්තිකාරිය පදිංචි ස්ථානයෙන් පිටමං කළ යුතුය යන පැමිණිලිකරු විසින් කරන ලද ඉල්ලීම සාර්ථක විය යුතු සේ පෙනේ. වර්ෂ 1961 ජනවාරි මාසය තරම් ඈත කාලයක තමාට සහ පවුලට මෙම ගෙය අහිමි කර යාමට යයි ඉල්ලීමක් කර නිබුණු බව විත්තිකාරිය ද පිළිගත්තීය. පැමිණිලිකරුට ප්‍රාණ භූක්තියක් ඇති නිසා එබඳු ඉල්ලීමක් කිරීමට ඔහුට ඉඩ තිබේ. දිස්ත්‍රික් විනිශ්චය කාරවරයා විත්තිකරුගේ මෙම ඉල්ලීම ප්‍රතික්ෂේප කර තිබෙන්නේ විත්තිකාරිය විසින් චරිපනම් බදු ගෙවන ලද නිසාත් නිවාසයට යම් යම් අලුත්වැඩියා කිරීම සහ දියුණු කිරීම් කර ඇති නිසාත්ය.

එම නිසා මේ කරුණු තිබීමේ ප්‍රතිඵලයක් වශයෙන් මම විත්කාරිය ඉඩමෙන් සහ පැමිණිල්ලේ සඳහන් භූමි ප්‍රදේශයෙන් පිටමං කරන ලෙස අලුත් නීන්දු ප්‍රකාශයක් වාර්තා ගත කළ යුතු යයි නිර්දේශ දෙමින් ද පැමිණිලිකරුගේ අනිත් ඉල්ලීම් සහ විත්තිකාරිය විසින් පෙරළා කරන ලද ඉල්ලීම ද නිෂ්ප්‍රභා කරමින් ද මෙහි විනිශ්චය දෙමි.

උසාවි දෙකින් එකකවත් ගාස්තුව පිළිබඳව මම නියෝගයක් නොකරමි.

සිරිමාන විනිශ්චයකාරතුමා

මම එකඟ වෙමි.

නීන්දුව වෙනස්කර විත්තිකාරි පිටමං කිරීමට නියම කරන ලදී.

ගරු වැඩ බලන අග්‍ර විනිශ්චයකාර ධුරන්ධර එච්. ඇන්. ජී. ප්‍රනාන්දු විනිශ්චයකාරතුමා ඉදිරිපිට

වින්තුර සිල්වාගේ ගුණදාස සිල්වා එ. ඒ. පී. ජයසූරිය සහ තව කෙනෙක්*

සර්ටියෝරේරයි ආඥාවක්—වගී 1889 අංක 1 දරණ උසාවි පනතේ 42 වන ඡේදය යටතේ—ශ්‍රේෂ්ඨාධිකරණ ඉල්ලීම් අංක 191/65

විවාද කළේ : 26 අගෝස්තු 1965

තීන්දු කොට කරුණු කීයේ : 3 සැප්තැම්බර් 1965.

සර්ටියෝරේරයි ආඥාවක්—නගරසභා ආඥා පනතේ 184 වෙනි ඡේදය යටතේ නගර සභාපතිවරයෙකු නිලයෙන් පහ කරමින් දෙන ලද නියෝගයක් —එබඳු නියෝගයක ප්‍රතිඵලය—ඡන්දය පාවිච්චි කිරීමේ අයිතිය පහ කරන ලද සභාපතිවරයාට අහිමි වීම—මෙය විනිශ්චයාත්මක නියෝගයක්ද, පරිපාලන නියෝගයක්ද යන වග—පරීක්ෂණය පිළිබඳ නිවේදනයේ ප්‍රමාණවත් භාවය සහ ඔහුගේ නිදහසට කරුණු කීමට සලසා දුන් අවස්ථාවේ ප්‍රමාණවත් කම—පෙත්සම්කරු විසින් කරන ලද කරුණු පැහැදිලි කිරීම ගැන එකඟ නොවීමට ඇමතිවරයාට ඇති බලය—ප්‍රාදේශික බල මණ්ඩල (ඡන්ද විමසීම්) ආඥා පනතේ 9 (3) (සී) දරණ ඡේදය.

මෙම ආයාචනයෙන් පෙත්සම්කරුවා පලාත් පාලන ඇමතිතුමා විසින් නගරසභා ආඥා පනතේ 184 වන ඡේදය යටතේ තමා නගර සභාවක සභාපති පදවියෙන් ඉවත් කරමින් දෙන ලද නියෝගයක් අවලංගු කෙරෙන ලෙස සර්ටියෝරේරයි ආඥාවක් ලබා ගැනීම පිණිස යාඥා කර සිටියේය.

පෙත්සම්කරුගේ වාසියට කරුණු දක්වමින් තර්ක කරන ලද්දේ යථොක්ත නියෝගයෙහි ප්‍රතිඵලයක් වශයෙන් නිලයෙන් පහ කරන ලද සභාපතිවරයාට ප්‍රාදේශීය බල මණ්ඩල (ඡන්ද විමසීම්) ආඥා පනතේ 9 (3) (සී) දරණ ඡේදය යටතේ උත්තර මන්ත්‍රීවරයෙකු ලෙස හෝ නියෝජිත මන්ත්‍රී වරයෙකු ලෙස හෝ ප්‍රාදේශීය සභාවක මණ්ඩලයක උපදේශක වරයෙකු ලෙස තේරී පත්වීමට හෝ එබඳු අයෙකු තෝරන මැතිවරණයකදී ඡන්දය දීමට හෝ ඇති සුදුසුකම අහිමි වන නිසා මෙම නියෝගය ඒ අනුව සලකන විට විනිශ්චයාත්මක බලයක් ක්‍රියාවේ යොදවමින් කළයුතු නියෝගයක් වන හෙයින් එවකට මෙබඳුම ප්‍රශ්නයක් පස් දෙනෙකුගෙන් යුත් විනිශ්චය මණ්ඩලයක අවධානයට යොමුවී ඇති බැවින් එහි තීරණය ලැබෙනතුරු මෙම ආයාචනයේ තීරණයද කල් දැමිය යුතු බව කියා පෑමිනි.

තීන්දුව : මෙම නියෝගයන්හි ප්‍රතිඵලයක් වශයෙන් නිරායාසයෙන්ම සභාපතිවරයා නිලයෙන් බැහැර වන නිසා යථොක්ත ආඥා පනතේ 184 වන ඡේදය යටතේ මෙය හුදෙක්ම පරිපාලන නියෝගයක් ලෙස ගැනෙන බැවින් ඇමතිවරයාට එම ඡේදය යටතේ මෙම නියෝගය දීමට බලය තිබේ. නිලයෙන් පහ වන සභාපතිවරයාගේ මැතිවරණ අයිතිවාසිකම් සහ ඡන්දය දීමේ අයිතිවාසිකම් වලට ද මෙයින් බලපැවැත්වෙන බැවින් ඒ පිළිබඳව ඔහුට ලැබෙන අවවාද අනුව යම්කිසි පියවරක් ගැනීමට ඉඩ තිබේ.

තව දුරටත් පෙත්සම්කරුගේ වාසිය පිණිස තර්ක කරන ලද්දේ:

(ඒ) ඇමතිවරයාගේ එම නියෝගයට හේතු වූ පෙත්සම්කරුට වර්ෂ 1964 අප්‍රෙල් මස 28 වන දින එනම්, පසුවද ආරම්භ වන ඔහු විසින් කරන ලදැයි කියන ඔහුගේ අයථා පාලනය පිළිබඳව පැවැත්වුණු පරීක්ෂණය ගැන ඔහුට දුන් නිවේදනය වර්ෂ 1964. 4. 27 වන දින බාර දී ඇති නිසා ඔහුට ප්‍රමාණවත් නිවේදනයක් නොලැබුණු බව සැල කරමිනි.

(බී) පරීක්ෂක නිලධාරියා විසින් පවත්වන ලද එම පරීක්ෂණය මූලික පරීක්ෂණයක් යැයි ඔහු කියා ඇති බැවින් පෙත්සම්කරු ඉන්පසු කෙරෙන තවත් පරීක්ෂණයක් ඇතැයි සිතූ නිසා තමාගේ ආරක්ෂාවට කරුණු කීමට පෙත්සම්කරුට සාධාරණ අවස්ථාවක් නොලැබුණු බව කියා පෑමිනි.

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 69 වෙනි කා., 54 වෙනි පිට බලනු.

(සී) ඇමතිවරයා විසින් පෙත්සම්කරු නිලයෙන් පහකිරීමට විරුද්ධව කරුණු පෙන්වීමට යයි ඔහුට ඇතවූ විට ඒ පිළිබඳව ඔහුට සැහෙන අවස්ථාවක් නොතිබුණේ යයිද පෙත්සම්කරු විසින් පැහැදිලි කරනා ලද කරුණු ඇමතිවරයාගේ කල්පනාවට හාජන නොවියයිද පෙන්වා දෙමිනි.

(ඩී) පෙත්සම්කරුට තමාගේ නිදහස පතා නගර සභාවට අයත් ලිපි ගොනු ඉදිරිපත් කිරීමට ඇමැතිවරයා විසින් අවස්ථාවක් සලසා දී නොමැති බවද අනාවරණය කරමිනි.

තීන්දුව : (1) පෙත්සම්කරුට විරුද්ධව තිබුණු පෙත්සම් දෙක ගැන රපෝර්තුවක් කලින් ඔහුට යවන ලද නියාත් මෙම පරීක්ෂණය ඇරඹුණු පසු එය අප්‍රෙල් මස 29 වන දින, මැයි මස 8 වන දින, මැයි මස 13 වන දින සහ මැයි මස 16 වන දින ද පැවැත්වී ගෙන ගිය බව පරීක්ෂණ වාර්තාවලින් පැහැදිලිවන නිසාත් එම පරීක්ෂණය නිමාවට යෑමට පෙර ඔහුට තමාගේ කරුණු ඉදිරිපත් කිරීමට සැහෙන අවස්ථාවක් ලැබී තිබේ.

(2) පරීක්ෂක නිලධාරියාගේ නිර්ව්‍යාජ චේතනාව පිළිබඳව සැක කිරීමට කිසිදු හේතුවක් නොපෙනෙන බැවින් මෙම පරීක්ෂණයෙහි පරමාර්ථය වූයේ තමාට විරුද්ධව ඇති චෝදනා ලෙස සලකා ගත හැකි කරුණුවල සත්‍යාසත්‍යය දැන ගැනීමට බව පෙත්සම්කරු දැන සිටියාක් මෙන්ම ඔහුට කළ හැකි යම් කිසි කරුණු පැහැදිලි කිරීමක් ඇත්නම් එසේ කළ විට එය සකසා පිළිගෙන ඒ සම්බන්ධයෙන් කල්පනා කරන බව ද අවශ්‍යයෙන්ම දැන සිටි බවද පරීක්ෂණ වාර්තාවලින් පෙනේ. පරීක්ෂණයෙහි යම් යම් අවස්ථාවන්හිදී පෙත්සම්කරු සමහර ප්‍රකාශයන් කර ඇති බවද සාක්ෂිකරුවන්ගෙන් ප්‍රශ්න අසන ලද බවද, පරීක්ෂණ වාර්තාව පෙන්වා දෙන අතර ඔහු වෙනුවෙන් කරුණු නියෝජනය කිරීමට නීති වේදියකු තබා ගැනීමට ඔහු ඉල්ලීමක් කර නැති බවද පෙනී යේ.

(3) මෙසේ නිලයෙන් පහ කිරීමට හේතුභූත වූ කරුණු සවිස්තරව බහා ලන ලද ඇමතිවරයාගේ ලියමනට පිළිතුරු වශයෙන් පෙත්සම්කරු විසින් කළ කරුණු පැහැදිලි කිරීමට එකඟ නොවී සිටීමට ඇමතිවරයාට බලය තිබේ. එම නිසා නිලයෙන් පහ කිරීමේ නියෝගය දීමට පෙර එසේ කරුණු පැහැදිලි කර තිබීම ගැන ඇමතිවරයාගේ අවධානය යොමු නොවී ඇති බව අධිකරණය විසින් සලකා ගැනීම යුක්ති යුක්ත නොවේ.

(4) නගර සභාවේ නිලධාරීන්ගේ කටයුතු කිරීම ගැන ප්‍රමාණවත් පරිපාලන ක්‍රමයක් තබා ගැනීම පැහැර හැරීමේ හේතුවෙන් පෙත්සම්කරු අයථා පාලනයට වැරදිකරුවෙකු යයි පිළිගැනීමට ඇමතිවරයාට බලය තිබේ නම් අයථා පාලනය පිළිබඳව ඇති මෙම චෝදනාව නිෂේධයට පත් කිරීමට කිසිම දෙයක් නගර සභාවේ ලිපි ගොනුවලින් ලබාගත නොහේ. වැඩිදුරටත් බලන කල මෙසේ ලිපිගොනු ඉදිරිපත් කිරීමෙන් පෙත්සම්කරුට යම්කිසි පිළිසරණක් ලැබීමට හැකිවී තිබිනි නම් පරීක්ෂණය පැවැත්වීගෙන යන අවස්ථාවෙහි එබඳු ලිපිගොනු ඉදිරිපත් කිරීමට ඔහුට සැහෙන තරම් ඉඩ ප්‍රස්ථාව සැලසී තිබේ.

නීතිඥවරු රාජනීතිඥ එච්. ඩබ්ලිව්. ජයවර්ධන මහතා, ලක්ෂ්මන් කදිරගාමර් මහතා සමඟ, පෙත්සම්කරු වෙනුවෙන්.
නිමල් සේනානායක මහතා, පළමුවන වග උත්තරකරු වෙනුවෙන්.
ආර්. ඇස්. වනසුන්දර, රජයේ අධිනීතිඥ, දෙවන වග උත්තරකරු වෙනුවෙන්

ගරු එච්. ඇන්. ජී. ප්‍රනාන්දු වැඩ බලන අග්‍ර විනිශ්චයකාරතුමා

මෙම ඉල්ලීම වූකලී නගර සභා ආඥ පණතේ 184 වන ඡේදය යටතේ කල නියෝගයක් යයි කියා නගර සභාවක සභාපතිවරයකු එම පදවියෙන් ඉවත් කරමින් වර්ෂ 1965 පෙබරවාරි 12 වන දින ගැසට් පත්‍රයේ පළාත් පාලන ඇමතිවරයා විසින් පළ කරන ලද නියෝගයක් නිෂ්ප්‍රභා කිරීම පිණිස කරන ලද්දකි.

මෙම නියෝගයේ එක් ප්‍රතිඵලයක් වන්නේ පළාත් පාලන මණ්ඩල (මැතිවරණ) ආඥ පණතේ 9 (3) (සී) ඡේදය අනුව නිලයෙන් පහ කරන ලද සභාපතිවරයාට සෙනෙට් සභිකයකු හෝ පාර්ලිමේන්තු මන්ත්‍රීවරයකු හෝ තේරීමේදී හෝ පළාත් පාලන මණ්ඩලයක උප දේශකවරයකු තේරීමේදී හෝ ඒ සඳහා ඉදිරිපත් වීමට හෝ තමන්ගේ ඡන්දය පාවිච්චි කිරීමට හෝ නොහැකි වීමය. පෙත්සම්කරු වෙනුවෙන් පෙනී සිටි නීතිවේදියා, මෙවැනි සුදුසුකම් නැති වීමක් පෙත්සම්කරු පිට පැවරෙන

නිසා සභාපතිවරයාගේ පදවියෙන් ඔහු ඉවත් කිරීම විනිශ්චයාත්මක බලතල ක්‍රියාවේ යෙදවීමෙන් කළයුතු නියෝගයක් හෙයින් මෙම නඩුවෙහි තීරණය දීම මෙම උසාවියෙහි විනිශ්චයකාර වරුන් පස් දෙනකුගෙන් යුත් මණ්ඩලයක් දැනට තීරණයකට එළඹෙන තුරු කල් දැමීමට මගෙන් අයැද සිටියේය. එම මණ්ඩලයේ තීරණය අධිකරණ සේවා කොමිෂන් සභාවෙන් නොකළ යම් යම් තීරක මණ්ඩලවලින් දෙන ලද නියෝග පිළිබඳ නීතියුක්ත භාවය ගැන පරීක්ෂා කෙරෙන්නකි.

නමුත් ප්‍රතිඵලය ගැන නොසලකා ඉහත සඳහන් 184 වන ඡේදය යටතේ සාමාන්‍යයෙන් කෙරෙන නියෝගයක් පමණක්ම කල්පනාවට භාජන කළ විට එය හුදෙක් පිරිසිදු පරිපාලන නියෝගයක් බවත් එබඳු අවස්ථාවකදී පළාත් පාලන මණ්ඩලවල පරිපාලනය හා එම පරිපාලනය පරීක්ෂා කිරීමේදී උද්ගත වන ප්‍රශ්න පිළිබඳ විධායක බලයද සම්පූර්ණයෙන් ඇමතිතුමා වෙත පැවරෙන හැටියට අපේ ව්‍යවස්ථාදායක මණ්ඩලය අදහස් කොට ඇති බවත් පෙත්සම්කරුගේ නීතිවේදියා මා ඉදිරියෙහිදී පිළිගත්තේය. එබැවින් මගේ මතයේ හැටියට මෙය 184 වන ඡේදයෙහි ඇති ප්‍රධාන පරමාර්ථය අනුව කෙරෙන නියෝගයක් නිසා, අවශ්‍යයෙන්ම පරිපාලන නියෝගයක් වන අතර ඒ නිසාම මෙය ඇමතිවරයාගේ විධාන කර්තව්‍යයන්ට අයුතේ. ඒ අනුව පළාත් පාලන මණ්ඩල මැතිවරණ ආඥා පණතේ 9 (3) (සී) ඡේදයේ බලයෙන් ඇති වන නුසුදුසුකම පිළිබඳව බලන කල මෙම නියෝගය නීත්‍යානුකූලව දිය හැක්කේ විනිශ්චයකාරී නිලතලයක් උසුලමින් විනිශ්චයාසනයක වැජඹෙන කෙනෙකුට පමණක් වුවද, ඒ හේතුව නිසාම සභාපතිවරයා අස් කිරීමට දෙන ලද නියෝගය අවලංගු නොවේ. එබැවින් සභාපතිවරයා ඉවත් කිරීමට දෙන ලද නියෝගය ඒතාක් දුරට ඇමතිවරයාට දීමට බලය තිබෙන නියෝගයක් බව මම පිළිගනිමි.

පෙත්සම්කරු තමන්ගේ ඡන්ද බලය පාවිච්චි කිරීමේ අයිතිවාසිකම හා තමන්ගේ ඡන්ද කොට්ඨාශය පිළිබඳව තමන්ට හිමි අයිතිවාසිකම් මෙයින් මග හැරේයයි කල්පනා කරන්නේ නම් ඔහුට ලැබෙන නීතිය පිළිබඳ අවවාද උඩ ඔහුට ගතහැකි පියවරක් ගැනීමට පිළිවන.

දැන් අපි මෙම නඩුවෙහි කරුණු දෙස හැරී බලමු. නගර සභාවෙහි සභාපතිවරයා වශයෙන් පෙත්සම් කරුගේ අයථා පාලනය පිළිබඳව පළාත් පාලන කොමසාරිස් වරයාට පෙත්සම් ලැබී තිබේ. කාරණා කීම සඳහා මේ පෙත්සම් වර්ෂ 1964 අප්‍රෙල් මාසයේදී මෙම නඩුවේ පෙත්සම්කරු වෙත යැවීය. ඔහු ඊට කිය යුතු ලෙස කාරණා කීවේය. වර්ෂ 1964 අප්‍රෙල් මස 26 වන දින නිකුත් කරන ලද නියෝගයකින් පළාත් පාලන උප කොමසාරිස්වරයකුට මේ පෙත්සම්වල ඇති චෝදනා ලෙස ගිණිය හැකි දේ පිළිබඳව පරීක්ෂණයක් පැවැත්වීමට යයි පැවරී තිබෙන බව ලිපි ලේඛනවලින් පෙනී යයි. උප කොමසාරිස්වරයා තමන්ගේ පරීක්ෂණය වර්ෂ 1964 අප්‍රෙල් මස 28 වන ද ආරම්භ කිරීමට තීරණය කළේය. මේ විභාගය පිළිබඳව පෙත්සම්කරුට දැනුම් දෙන ලද දිනය පිළිබඳව නඩුවේ දිවුරුම් පෙත්සම්වල පරස්පර විරෝධයන් විද්‍යමාන වේ. එහෙත් පෙත්සම් කරු කියා සිටින පරිදි තමන්ට දැනුම් දෙන ලද්දේ අප්‍රෙල් 27 වන දය යන්න සත්‍ය වුවත් මෙම කරුණ මා සිතන හැටියට එතරම් වැදගත් කරුණක් නොවන්නේ එද පටන් ගත් පරීක්ෂණය අප්‍රෙල් මස 29 වන දත් මැයි මස 8 වන දත් මැයි මස 13 වන දත් මැයි මස 16 වනදත් කෙරී ගෙන ගිය නිසාය. මේ න්‍යායයෙන් බලන කල පෙත්සම්කරුට තමන්ගේ කරුණුවල පැත්ත ඉදිරිපත් කිරීමට පරීක්ෂණය අවසන් වීමට පෙර ඕනෑ තරම් අවස්ථා තිබුණු බව කිව යුතුය. අප්‍රෙල් මස 28 වන ද නමා සූදානම්ව නොසිටියත් ඉන් පසුව ඔහුට අවස්ථාව තිබුණි. පෙත්සම් දෙක පිළිබඳව ඔහුගේ වාර්තාව ඊට කලින් යැවී තිබුණු නිසා මේ සම්බන්ධයෙන් තමන් වෙත එල්ල වී ඇති දුසමාන චෝදනා පිළිබඳව ඔහු නොදන සිටියා යයි මට පිළිගත නොහැකි බව මෙහි ලා කිව යුතුය.

වර්ෂ 1964 අප්‍රෙල් මස 28 වන ද පළාත් පාලන උප කොමසාරිස්වරයා තම විභාගය දෙවරුවෙම පැවැත්වීය. උදය වරුවේ පරීක්ෂණය ආරම්භයේදී එක් පෙත්සමක තිබුණු ''චෝදනා'' පිළිබඳව සටහනක් ඔහු විසින් කරන ලදී. අපර භාගයේ පරීක්ෂණය ආරම්භයේදී ඔහු විසින් අනික් පෙත්සමේ තිබුණු චෝදනා යයි සිතිය හැකි දේ ගැන සටහනක් කරන ලදී. මේ අවස්ථා දෙක්හිම කල්පනාවට භාජන වූ ඒ ඒ පෙත්සමේ අත්සන්කරුවෝද සභාපතිවරයාද පැමිණ සිටියහ. උප කොමසාරිස්වරයා විසින් දෙන ලද දිවුරුම් පෙත්සමේ පෙත්සම්කරුට එල්ල වී තිබුණු චෝදනා සහ චෝදනා යයි සැලකිය හැකි කරුණු පිළිබඳව ඔහුට දැනුම් දීමක් කළ බවක් සඳහන් වී නැත. එහෙත් එයට විරුද්ධව ද කිසිවක් සඳහන් වී නැති නිසා පරීක්ෂක නිලධාරියා චෝදනා ලැබ සිටින අයට එල්ල වී ඇති චෝදනා පිළිබඳව, අඩු වශයෙන් පරීක්ෂණයට භාජන වී ඇති කරුණු මේවා වූ බැවින් චෝදකයන්ගේ ප්‍රයෝජනය තකා හෝ නිවේදනයක් කරන්නට ඇතැයි සලකා ගැනීම යුක්ති යුක්ත යයි සිතමි. මෙම පරීක්ෂණය පවත්වන ලද්දේ ඔහුගේ අයථා පාලනය පිළිබඳව කිනම් විශේෂ කරුණු උඩදැයි මෙම පෙත්සම්කරුට දැනගැනීමට අවස්ථාව මේ නිසා ඔහුට දුන් බවට මට කිසි සැකයක් නැත.

පෙත්සම්කරුගේ නීති වේදියා වෙගවත් ලෙස කරුණු දක්වූයේ පරීක්ෂක නිලධාරියා එම පරීක්ෂණය මූලික පරීක්ෂණයක් යයි තමන්ට කියා තිබීම ගැන පෙත්සම්

කරු විසින් තම පෙත්සමේ කර තිබුණු සඳහනක් ගැනය. පරීක්ෂක නිලධාරියාද තමා එබඳු ප්‍රකාශයක් කරන්නට ඇතැයි යන්න තම දිවුරුම් පෙත්සමේදී පිළිගනී. මේ හේතුවෙන් නීති වේදියා තර්ක කරන්නේ පෙත්සම්කරුට පරීක්ෂණයේදී තමන්ගේ පරීක්ෂණය සඳහා කරුණු කීමට අවස්ථාවක් ලැබුණු නමුත් පෙත්සම්කරුට මතුවටත් පරීක්ෂණයකට මුහුණ දීමට තිබේදැයි ඔහු සලකා ගන්ට ඇති නිසා ඒ ලත් අවස්ථාව සාධාරණ අවස්ථාවක් නොවේ යයි කියමිනි. මෙම තර්කය මා සිත තුළත් යම්කිසි කණස්සල්ලක් ඇති කළ නමුත් මෙහි පහත සඳහන් කිරීමට මා අදහස් කරන ලද කරුණු ඒ කණස්සල්ල බොහෝ දුරටම මගේ සිතින් දුරු කළේය.

වර්ෂ 1964 මැයි මස 8 වන දින කරන ලද විභාගයෙහි වාර්තාව ආරම්භ වන්නේ පෙත්සම්කරු විසින් පරීක්ෂක නිලධාරියාගෙන් අසන ලද ප්‍රශ්නයකිනි. එම ප්‍රශ්නයට පිළිතුරු වශයෙන් පරීක්ෂක නිලධාරියා කියා සිටියේ එම පරීක්ෂණයෙහි පරමාර්ථය වූයේ පෙත්සම්කරුට විරුද්ධව නගා ඇති චෝදනා බදු කරුණුවල යම් කිසි සත්‍යයක් ඇද්දැයි යන්න පරීක්ෂා කිරීම සහ අයථා පාලනය පිළිබඳව තවත් යම් යම් සිද්ධීන් ඇද්දැයි පරීක්ෂා කිරීමද වෙය යන්නය. මෙම සටහන අනුව පරීක්ෂක නිලධාරියා කලින් අවස්ථාවකදීද පෙත්සම්කරුට මේ සඳහා කියා තිබෙන බව පෙනේ. පරීක්ෂක නිලධාරියාගේ නිර්ව්‍යාජ චේතනාව ගැන සැක කිරීමට මට කිසිම හේතුවක් නැත. ඔහු තමන්ගේ උපරිම නිලධාරියාගේ උපදෙස් පිට පරීක්ෂණය පවත්වාගෙන ගියේය. පරීක්ෂණය පිළිබඳව ප්‍රවේසමෙන් සටහන් කර ගත් වාර්තාවක් ඔහු තමා ළඟ තබා ගති. ඒ අනුව ඉන් පසු ඔහු ඉතාම කිට්ටුවෙන් ටයිප් ගසන ලද පිටු 15 ක වාර්තාවක් ඉදිරිපත් කරන ලදී. මා පිළිගන්නා හැටියට පරීක්ෂණයෙහි පරමාර්ථය වූයේ තමාට විරුද්ධව කරන ලද චෝදනා වැනි කරුණු පිළිබඳව සත්‍යය දැන ගැනීම නම් (ඇත්ත වශයෙන්ම එසේ නොවේ නම් මෙම පරීක්ෂණය පරමාර්ථයෙන් නොරය)—තමා විසින් ඉදිරිපත් කළයුතු යම් කිසි කරුණක් වෙනෙත් ඒ කරුණ හාර ගන්නා බවත් එය කල්පනාවට භාජනය වන බවත් යුක්ති යුක්ත ලෙස පෙත්සම්කරු දැන සිටිය යුතුය. දෙදෙනෙකු හැර අනික් සියලු සාක්ෂිකරුවන්ගෙන්ම හරස් ප්‍රශ්න ඇසීමට පෙත්සම්කරුට අයිතිවාසිකමක් තිබුණු බව පරීක්ෂණ නිලධාරියාගේ වාර්තාවෙන් පෙනී යේ. එමතු නොව නොයෙක් අවස්ථාවල පෙත්සම්කරු යම් යම් ප්‍රකාශයන් කළ බවත් සාක්ෂි කරුවන්ගෙන් ප්‍රශ්න කළ බවත්, ලිපි ගොණු පෙරළා බැලූ බවත් වැඩි දුරටත් වාර්තාවෙහි සඳහන් වේ. පෙත්සම්කරු වෙනුවෙන් නීතිඥයෙක් පෙනී නොසිටි බව කියමින් ඔහුගේ නීති වේදියා තර්ක කළ නමුත් මේ සඳහා පෙත්සම්කරු විසින් නීතිඥයෙක් තමා වෙනුවෙන් පෙනී සිටීමට අවශ්‍ය යයි ඉල්ලීමක් කර නැති නිසා එය එතරම් ශක්තිමත් තර්කයක් නොවේ. සාමාන්‍ය ස්වාභාවික යුක්තියට අදල වන පරිදි කල්පනා කළ යුත්තේ පෙත්සම්කරුට තමාගේ නිදහසට කරුණු කීමට අවස්ථාවක් ලැබිණි ද නැද්ද යන්නයි. ඉතාම උච්චස්ථානයක ලා මෙම පරීක්ෂණය ගැන ඔහුගේ තත්ත්වය කල්පනා කළත් ඔහුට ඇති වූ යම් කිසි වැරදි හැඟීමකින් ඇත්ත වශයෙන්ම ඔහු ලත් අවස්ථාවෙන් ඔහු සම්පූර්ණ ප්‍රයෝජනය නොගත් බව පමණක් පෙනී යනු ඇත.

1964 දෙසැම්බර් මස 9 වන ද ඇමතිතුමා විසින් එවන ලද ලියමනෙන් පෙත්සම්කරු තමාගේ පදවියෙන් ඉවත් නොකිරීමට හේතු දක්වන ලෙස ඔහුට දන්වා තිබේ. මෙසේ එම පදවියෙන් ඉවත් කිරීමට හේතු සම්පූර්ණයෙන් එහි දක්වා තිබුණි. මෙම කරුණුවලින් අඩු වශයෙන් කරුණු දෙකක් ගැන අයථා පාලනයකට තුඩු දෙන ලෙස තමා අතින් පැහැර හැරී ගිය කායර්‍ය ගැන ඇමතිතුමාට තමා විසින් යවන ලද පිළිතුරෙහි පෙත්සම්කරු එසේ වූයේ නැතැයි කියා නැත. එහෙත් ඔහු ඒ ගැන පැහැදිලි කළේ එබඳු පැහැර හැරීම්වලට සභාපතිවරයා වග කිව යුතු නැතැයි කියමිනි. ඊට හේතුව, ඔහු කියන හැටියට එම ප්‍රමාද සිදු වී ඇත්තේ නගර සභාවේ නිලධාරීන් අතිනි. මෙසේ කරුණු පැහැදිලි කිරීම ගැන ඇමතිවරයා එකඟ නොවූ බව සලකා ගත හැක. මගේ අදහසේ හැටියටද එසේ එකඟ නොවීමට ඇමතිවරයාට බලය තිබේ.

ඇමතිවරයාට පෙත්සම්කරු විසින් යවන ලද දෙසැම්බර් 9 වන දින දරණ පිළිතුරෙහි ඇමතිතුමා විසින් පෙත්සම්කරු නිලයෙන් පහ කිරීමට හේතුභූත වූ කරුණු හැටියට සඳහන් කරන ලද බොහෝ කරුණු කියා තිබේ. වර්ෂ 1965 පෙබරවාරි මස 12, වන දින පෙත්සම්කරු නිලයෙන් පහ කිරීමට කරන ලද නියෝගයට කලින් මේ කරුණු පිළිබඳව ඇමතිවරයා තමන්ගේ කල්පනාව යොමු නොකළේ යයි මා විසින් සිතා ගැනීම යුක්තියෙන් තොරය. ඒ නියා මෙහිදී නැවතත් වරක් පෙත්සම්කරුට තමන්ගේ නිදහසට කරුණු කීමට පදවියෙන් පහ කිරීමේ නියෝගය දීමට කලින් අවස්ථාවක් සලසා දී තිබේ.

අවසාන වශයෙන් සඳහන් කළයුත්තේ ඇමතිතුමාට යවන ලද ලියමනෙහි පෙත්සම්කරු නගර සභාවේ ලිපි ගොණු තමාගේ නිදහස පතා පෙන්වීමට අවස්ථාවක් ඉල්ලූ නමුත් එම අවස්ථාව නොලැබුණු බව කියමින් මෙම පෙත්සම් විභාගයේදී කරුණු දක්වා සිටි බවය. මට හැඟී යන්නේ පෙත්සම්කරු පදවියෙන් පහ කිරීමට හේතු වූ සමහර කරුණු ගැන සලකා බලන විට ප්‍රතිපත්තියට අයත් හේතූන් උඩ සභාපතිවරයා තම සභාවේ නිලධාරීන්ගේ කටයුතු කිරීම පිළිබඳව නියම පරිපාලනයක් නොකිරීමේ හේතුවෙන් ඇමතිවරයාට ඔහු අයථා පාලනයට වරදකරුවෙකැයි තීරණය කිරීමට බලය තිබුණි නම්—(මා සිතන්නේ ඇමතිවරයාට බලය තිබෙන බවය)—ලිපි ගොණු පෙන්වීමෙන් හෝ ඒ ලිපිගොණුවක ඇති කිසිම දේකින් හෝ අයථා පරිපාලනයේ චෝදනාවෙන් සභාපතිවරයාට නිදහස් වීමට කිසිම පිළිසරණක් නොලැබෙන බවයි. තව දුරටත් බලන විට නගර සභාවට අයත් ලිපි ගොණු ඉදිරිපත් කිරීමෙන් පෙත්සම්කරුට උපකාරයක් ලැබෙන්නේ නම් දවස් 5ක් පැවැත්වුණු මෙම පරීක්ෂණයේදී එම ලිපිගොණු ඉදිරිපත් කිරීමට ඔහුට සැහෙන ඉඩ ප්‍රස්ථාවක් තිබුණේය. පළමුවන වග උත්තරකරුට ගාස්තුව රුපියල් 315ක් ගෙවන සේ නියෝග කරමින් මෙම ඉල්ලීම නිෂ්ප්‍රභා කෙරේ.

ඉල්ලීම නිෂ්ප්‍රභා කරන ලදී.

ගරු ටී. ඇස්. ප්‍රනාන්දු විනිශ්චයකාර තුමා සහ අලස් විනිශ්චයකාර තුමා ඉදිරිපිට

කේ. වී. කිරිගෝරිස් සහ තවත් දෙදෙනෙක් එ. ඇස්. ජේ. ඒ. ඇඩිසින්හාමි*

සු: උ: අංක 374/64 (එෆ්ජ්) තන්ගල්ල දිස්ත්‍රික් උසාවියේ අංක ඇල්/921

විවාද කළ දිනය: 1965 10. 20.
තීන්දු කළ දිනය: 1965 10. 27.

බාල වයස් කරුවෝ—පියෙකු විසින් තම දරුවන්ට දෙන ලද තැගි ඔප්පුවක්—සමහර තැගි ලැබීම් කාරයෝ බාල වයස් කරුවෝ වීම—බාල වයස්කාර ලැබුම් කාරයන් වෙනුවෙන් ඔවුන්ගේ සහෝදරයෙකු තැග්ග භාර ගැනීම—එය වලංගු ද?

තීන්දුව: පියෙකු හෝ මවක විසින් තම දරුවන්ට දෙන තැගි ඔප්පුවක්, එම දරුවන් අතරේ බාල වයස් කාරයින් ඇත්නම්, ඔවුන් වෙනුවෙන් ඔවුන්ගේ සහෝදරයෙකුට භාර ගත හැක. එසේ කළ හැක්කේ ත්‍යාග ප්‍රදයකයා ඊට ඉඩ දෙන අවස්ථාවකය.

නීතිඥවරු:— රාජනීතිඥ ජී. ටී. සමරවික්‍රම මහතා, ඇන්. ආර්. ඇම්. දලුවත්ත මහතා සහ ඩබ්ලිව් ඇස්. විරසූරිය මහතා සමග පැමිණිලිකාර-ඇපැල්කරු වෙනුවෙන්.

ඊ. ඒ. ජී. ද සිල්වා මහතා වගඋත්තරකරු වෙනුවෙන්.

ගරු ටී. එස්. ප්‍රනාන්දු විනිශ්චයකාරතුමා

වර්ෂ 1962 කේ නොවැම්බර් මස 23 වෙනි දින දරණ අංක 1874 සහිත සැලැස්මෙහි 'ඒ' සහ 'බී' දමා ලකුණු කරන ලද ඉඩම් කොටස් දෙකක් පිළිබඳ හිමිකම සම්බන්ධයෙන් ප්‍රකාශයක් ලබා ගැනීමේ අදහසින් සහ විත්තිකාරිය එම ස්ථානයෙන් පිටමං කිරීමේ අදහසින් පැමිණිලිකරුවන් විසින් ඉදිරිපත් කරන ලද මෙම නඩුවෙහි ප්‍රධාන අරගලය වූයේ පී 4 දමා ලකුණු කරන ලද අංක 19825 සහ 1946. 6. 8. වන දරණ තැගි ඔප්පුව නීතියට අනුව පිළිගෙන තිබේද යන්නයි. පී 4 දරණ ඔප්පුව මෙම නඩුවෙහි පැමිණිලි කරුවන් තිදෙනාගේ පියා විසින් ලියවා අත්සන් තබන ලද්දේ ඔහු විසින් පැමිණිලිකරුවන්ගේ කුඩම්මා වන විත්තිකාරිය කසාද බැඳීමට අවුරුදු දෙකකට පමණ කලිනි. මෙම ඔප්පුව ලියන අවදියේ කිරිගෝරිස් නමැති පළමුවෙනි පැමිණිලිකරුට නිසි වයස් පිරුණා පමණක් වන අතර දෙවන තුන්වන පැමිණිලිකරුවෝ එනම් පිළිවෙලින් ඔහුගේ සොහොයුරිය සහ සුලු නැගණිය ඒ කාලයේ බාල වයස් කරුවෝ වූහ. ඔවුන්ගේ පියා තමාට ප්‍රාණ බුක්තියක් තබාගෙන ඉහත සඳහන් ඉඩම් කොටස් දෙක දෙන ලද්දේ පීත කොමිසමකට යටත් කොට තබමිනි. පී 4 දරණ ඔප්පුවෙහි එම දීමනාව පිලිගැනීමේ ඡේදය සඳහන්ව ඇත්තේ පහත සඳහන් පරිදිය.

''ඉවද පළමු නම සඳහන්ව ඇති ඉහත සඳහන් ත්‍යාග ලාභියා වන මම (පළමුවන පැමිණිලිකරු) ත්‍යාග ප්‍රදයකයාගේ ප්‍රාණ භුක්තියට යටත් කොට ඇති පරිද්දෙන් ද ඉහත සඳහන් සීමා කිරීමට යටත් වන පරිද්දෙන් ද මා වෙනුවෙනුත් බාලවයස්කරුවන් වූ දෙවන සහ තුන්වන ත්‍යාග ලාභීන් (දෙවන හා තුන්වන පැමිණිලි කරුවන්) වෙනුවෙන් ඉහත සඳහන් දීමනාව ස්තුති පූර්වකව මෙයින් පිළිගන්ට යෙදුනා ඇත.''

පී 4 ලකුණු කරන ලද ඔප්පුව ලියා අත්සන් කරන කාලයේ තමා අවුරුදු 21 ක් පමණ වයසැති කෙනෙකු බව මෙම නඩුවේදී සාක්ෂි දෙමින් පළමු වන පැමිණිලිකාරයා ප්‍රකාශ කෙළේය. ඔහුගේ පියා මියගියේ වර්ෂ 1954 දී ය. මෙම නඩුව ඇසෙන කාලයේ (වර්ෂ 1963) එම ඔප්පුවෙහි සාක්ෂිකරුවෙකු හැටපස් වියට එළඹ

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 69 වෙනි කා., 99 වෙනි පිට බලනු.

සිටියේය. ඔහු සාක්ෂි දෙනවිට එක් අවස්ථාවක පළමු වන පැමිණිලිකරු පසලොස් හැවිරිදි කෙනෙකු බව තමා සිතන බව කී නමුත් ඊට පසු අවස්ථාවක ඔහු පළමු වන පැමිණිලිකරු එයට වඩා වැඩිමහලු බව තමා සිතන බව කීය. ඔප්පුවේ සඳහන්ව ඇති දීමනාව පිළිගැනීමේ ඡේදයෙහි දෙවන සහ තුන්වන පැමිණිලි කරුවෝ බාල වයස් කාරයන් බව අවධාරණයෙන් කියා ඇති බව මෙහි ලා සලකා ගත යුතු කරුණකි. මේ අනුව හැඟී යන්නේ පළමු වන පැමිණිලිකරු බාල වයස්කාරයෙකු නොවන බව ය. පී 4 දරණ ඔප්පුව ලියා අත්සන් කරන කාලයේදී පැමිණිලිකරුගේ වයස පිළිබඳව නඩුව විනිශ්චය කළ විනිශ්චයකාරවරයා කිසිම නිගමනයකට එළඹී නැත. විසඳීමට තමා ඉදිරියට පැමිණි ප්‍රශ්නයට ඔහු මුහුණ දී ඇත්තේ පළමු වන පැමිණිලිකරු යථා කාලයෙහි නිසි වයස් සම්පූර්ණවූවකු බවට එළඹී බව සිතාගෙනය. පී 4 දරණ ඔප්පුව නීත්‍යානුකූලව පිළිගෙන තිබේද යන ප්‍රශ්නය පළමු වන පැමිණිලිකරු තම මූලික සාක්ෂියඅවසන් කරන තුරුම විත්තියෙන් මතු කොට නැත. පී 4 දරණ ඔප්පුව පැමිණිල්ල සමගම කරන ලද විශේෂ ආයාචනයකි. වර්ෂ 1946 දී පළමු වන පැමිණිලිකරු නිසි වයස් පිරුණු කෙනෙකු බව ඔප්පු කොට නැතැයි දැන් අපට පිළිගැණීමට යැයි විත්තිකරුගේ නීතිවේදියා කරන තර්කය භාරගැනීමට අපට නොහැකි සේ පෙනීයයි.

පී 4 දරණ තැගි ඔප්පුව නීතියට අනුව පිළිගෙන තිබේදැයි යන ප්‍රධාන හබ ප්‍රශ්නය ගැන සලකා බැලීමේදී උගත් විනිශ්චයකාරවරයා මෙම අධිකරණයෙන් දෙන ලද **පකීර් මොහයියාදීන් එ. ආසියා උම්මා** (1956) 57 න.නී. වා. 450 පිට, යන නඩුවෙහි තීන්දුව අනුගමනය කිරීමට සැරසි තිබේ. එම නඩුවෙහිදී වර්තමාන නායක විනිශ්චයකාරතුමා පහත සඳහන් පරිදි ප්‍රකාශ කරණ ලදී.

''මෙහි වැඩි මහලු සොහොයුරා බාල සොහොයුරාගේ **සභාභාවික** භාරකාරයා හෝ නීත්‍යානුකූල භාරකාරයා නොවන බව පැහැදිළිව පෙණේ.''

නමුත් දැනට අප අතර ඇති මෙම නඩුව විනිශ්චය කළ විනිශ්චයකාරවරයා ඉන් පසුව ඇති වූ **නාගරත්නම් එ. ජෝන්** (1958) 69 න.නී.වා. 115 පිට, යන නඩුවෙහි නායක විනිශ්චයකාරතුමා තමාගේ කලින් තීන්දුව ''නිවැරැදිය යි තව දුරටත් සැලකීමට'' නොහැකි බව පැහැදිළිවම කියා තිබෙන බව නොදන්නාසේ පෙණේ. මෙසේ කීමට හේතුව **අබේවර්ධන එ. වෙස්ට්** (1957) 58 න.නී.වා. 310 පිට, දරණ නඩුවෙහි රාජාධිකරණය විසින් දෙන ලද තීරණයෙහි ගැබ් වී ඇති හේතුවක් නිසාය. එනම් ත්‍යාග ප්‍රදයකයා තමාගේ (ත්‍යාග ප්‍රදයකයාගේ) බාල වයස්කාර දරුවා වෙනුවෙන් මුත්තනුවන්ට ත්‍යාග දීමනාව පිළිගැනීමට ඉඩ හැර නිබීමය. මේ පිළිබඳව අග්‍ර විනිශ්චයකාර තුමාගේ ම වචන මෙහි බහාලීම මැනවයි හැඟේ —(116 වන පිට බලන්න.)— ''කෙසේ වෙතත් **අබේවර්ධන එ. වෙස්ට්** යන නඩුවෙන් දෙමවුපියන් විසින් දෙන ලද දීමනාවකදී එය බාල වයස්කාර ත්‍යාග ලාභියෙකු වෙනුවෙන් ඔහුගේ මස්සිනාගේ සහෝදරයන් විසින් පිළිගැනීම යෝග්‍යය. එසේ යෝග්‍ය වන්නේ බාලවයස්කාර දරුවා වෙනුවෙන් එබදු පිළිගැනීමක් කිරීමට ත්‍යාග ප්‍රදයකයින් විසින් ඉඩ හැර තිබෙන නිසාය.''

යම් හෙයකින් (ඉහත සඳහන්) **අබේවර්ධන එ. වෙස්ට්** යන නඩුවෙහි තීන්දුව හෝ (ඉහත සඳහන්) **නාගරත්නම් එ. ජෝන්** යන නඩු තීන්දුව හෝ මෙම නඩුව විනිශ්චය කළ විනිශ්චය කාර වරයාගේ අවධානයට යොමු කරවන ලද්දේ නම් මෙම නඩුවෙහි තීන්දුව වෙනස් වනු ඇත. මෙහිදී විසඳීමට තිබුණු අනිත් සියලුම ප්‍රශ්නවලට පිළිතුරු සැපයී ඇත්තේ විත්තිකාරියට විරුද්ධවය. එම නිසා අභියාචනයට භාජන වූ නඩු තීන්දුව සහ තීන්දු ප්‍රකාශය නිෂ්ප්‍රභා කිරීමට රිසි වන මම විත්තිකරුවන් යාඳු කර සිටින පරිදි මෙම උසාවියේත් පහළ උසාවියේත් නඩු ගාස්තුව ඔවුන්ට අයකර ගත හැකිසේ නඩු තීන්දුවක් සටහන් කිරීමට උපදෙස් දෙමි.

අලස් විනිශ්චයකාර තුමා
මම එකඟ වෙමි.

ඇපැලට ඉඩ දෙන ලදි.

වර්ෂ 1965 අංක 4 දරන මැතිවරණ පෙත්සම

ගරු ජී. පී. ඒ. සිල්වා විනිශ්චයකාරතුමා ඉදිරිපිට

මැතිවරණ කොට්ඨාශය නො: 55—බලපිටිය.

ලුවිස්දුරේ එද්රික් ද සිල්වා එ. ලොකුනේ චන්දදාස ද සිල්වා සහ අනෙක් අය*

විවාද කළ දිනය : 12 නොවැම්බර් 1965.
තීන්දුව නිකුත් කළ දිනය : 26 නොවැම්බර් 1965.

මැතිවරණ පෙත්සමක්—අසත්‍ය කරුණු ප්‍රචාරය කිරීම සහ වග උත්තරකරු නියම වගයෙන් හෝ අනියම් වගයෙන් රජය සමග කොන්ත්‍රාත්තුවලට බැඳී සිටීම නිසා පාර්ලිමේන්තු මන්ත්‍රීවරයකු ලෙස තෝරනු ලැබීමට සුදුසු තත්වයක නොසිටි බව චෝදනා මුඛයෙන් කියා සෑම—ලංකා (පාර්ලිමේන්තු මැතිවරණ) රාජ ආඥා පණතේ පැණවීම් වලට අනුකූලව මැතිවරණය නොපවත්වන ලදැයි චෝදනා මුඛයෙන් කියා සෑ තුන් වන කරුණ—චෝදනා තුනකට නැන්පත් කළ ඇප මුදල.

මැතිවරණ පෙත්සම පාර්ලිමේන්තු මැතිවරණ පෙත්සම් රීති මාලාවේ 4 (1) (බී) සහ 4 (4) (3) යන රීතිවලට එකඟ නොවී ඇති නිසා එය නිශ්ප්‍රභා කිරීමට කරන ලද ආයාචනයක්—ඇප මුදලේ ප්‍රමාණත්වය සහ පෙත්සමේ ඇති චෝදනා සංඛ්‍යාව—1946 (පාර්ලිමේන්තු මැතිවරණ) රාජාඥා පණත—42 (2), 58, 77 (බී) සහ (සී), සහ 86 (2) දරණ ඡේද—වර්ෂ 1946 ලංකා (පාලන සංස්ථා) රාජාඥාව, 13 සහ 13 (3) (සී) යන ඡේද.

පළමු වන වග උත්තරකරු තෝරනු ලැබීමට අභියෝග කෙරෙන මැතිවරණ පෙත්සමෙන් පහත සඳහන් දේ චෝදනා මුඛයෙන් ඉදිරිපත් කරන ලදී.

(1) ලංකා (පාර්ලිමේන්තු මැතිවරණ) රාජාඥා පණතේ 33 වන ඡේදයේ තේරුම් අනුව පළමු වන වග උත්තරකරු තමා විසින්ම හෝ ඔහුගේ නියෝජිතවරුන් සහ-හෝ වෙනත් අයවලුන් විසින් ඔහුගේ දැනීම හෝ අනුමැතිය ඇතිව එම මැතිවරණ ව්‍යාපාරයේදී හෝ එයට පෙර එම මැතිවරණයේදී තමාගේ ප්‍රතිපාක්ෂිකයා තේරී පත්වීම වැළකෙන ලෙස බල පැවැත්වෙන හැටියට ඔහුගේ පුද්ගලික චරිතය සහ-හෝ පැවතීම පිළිබඳව අසත්‍ය ප්‍රකාශයන් කිරීමේ හෝ පළ කිරීමේ හේතුවෙන් දූෂිත ක්‍රියාවක් කරන ලද නිසා යථොක්ත මැතිවරණයෙන් පළමු වන වග උත්තරකරු මන්ත්‍රීවරයා ලෙස තේරී පත්වීම නීති විරෝධ බල ශූන්‍ය දෙයක් වීම.

(2) ලංකා (පාලන සංස්ථා) රාජාඥා පණතේ 13 වැනි ඡේදය උල්ලංඝනය වන අයුරින් නියම ලෙස හෝ අනියම් ලෙස ඔහු විසින් සහ-හෝ ඔහුගේ වාසියට අනිත් අයවලුන් විසින් සහ-හෝ ඔහුගේ ප්‍රයෝජනයට හෝ ප්‍රතිලාභයට රජය විසින් ලංකා ආණ්ඩුව වෙනුවෙන් කරන ලද හෝ ඇතුළත් කෙරෙන ලද කොන්ත්‍රාත්තුවක් දැරීමෙන් සහ-හෝ ඒ මඟින් පලප්‍රයෝජන භුක්ති විඳීමෙන් පළමු වන වග උත්තරකරු තමා තෝරා පත් කරන ලද කාලයේ නියෝජිත මන්ත්‍රීවරයෙකු ලෙස තේරී පත්වීමට නුසුදුසු තත්වයක සිටී බව.

(3) ඡන්දදායකයන්ට දෙන ලද ඡන්ද පත්‍රිකා විශාල සංඛ්‍යාවක් මුද්‍රාව නොතබා හෝ කාර්යාලීය සලකුණ කැපෙන සේ සිදුරු නොකර හෝ තිබුණු නිසා එහි ප්‍රතිඵලය වූයේ ප්‍රතිපාක්ෂික අපේක්ෂකයාගේ වාසියට දෙන ලද ඡන්ද බොහෝ ගණනක් ඔහුට දෙන ලද ඡන්ද හැටියට ගණන් නොකර හැරීම බැවින් එසේ ලංකා (පාර්ලිමේන්තු මැතිවරණ) රාජාඥා පණතේ 42 (2) ඡේදයේ පැණවීම් වලට එකඟව මැතිවරණය නොපැවැත්වීමෙන් එය මන්ත්‍රීවරයෙකු තෝරා පත් කිරීමේදී බල පැවැත්වුනු බව.

පහත සඳහන් හේතූන් උඩ පළමුවැනි වග උත්තරකරු මැතිවරණ පෙත්සම නිශ්ප්‍රභා කිරීමට ඉල්ලා සිටියේය.

(ඒ) එම මැතිවරණ පෙත්සම වර්ෂ 1946 පාර්ලිමේන්තු මැතිවරණ රීති මාලාවේ (3 වන උප ග්‍රන්ථය) 4 (1) (බී) සහ 4 (4) (3) දරණ රීතිවල ඇති විධානයන්ට අනුකූලව ලියා නොතිබීම.

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 69 වෙනි කා., 103 වෙනි පිට බලනු.

(බී) තබන ලද රු. 5,000ක ඇප මුදල එකී පාර්ලිමේන්තු මැතිවරණ රිති මාලාවේ 12 වන රිතියේ පැණවීම් වලට එකඟ නොවීම හා එම මුදල ප්‍රමාණවත් නොවීම.

මැතිවරණ පෙත්සමේ ඇති පළමු වන හේතුව පිළිබඳව පළමු වන වග උත්තරකරු වෙනුවෙන් පෙනී සඳහන් පරිදි තර්ක ඉදිරිපත් කරන ලදහ :

(ඒ) පෙත්සමේ සඳහන් කොට ඇත්තේ මැතිවරණය නිෂ්ප්‍රභා කිරීමට හේතූන් මිස එයට අතිරේකව නව සංක්ෂේපයෙන් කරුණු ස්වල්පයක් නැති නිසා එය 4 (1) (බී) දරණ රිතියට අනුකූල නොවීම.

(බී) වර්ෂ 1946 පාර්ලිමේන්තු මැතිවරණ රිතිවල 5 වන රිතිය, 4 (1) (බී) දරණ රිතිය වෙනුවට යොදු ගැනීමට ඉඩ නැති බව.

(සී) පළමු වන වග උත්තරකරු සහ-හෝ අනිත් අයවලුන් ඔහුගේ දැනීම ඇතිව යනාදී වචන චෝදනාවේ ඇතුළත්වී තිබීමෙන් මෙම වරද කා විසින් කරන ලදද යන්න ගැන ඇති අස්පීර භාවය නිසා එය යම් කිසි කරුණක් සම්බන්ධයෙන් චෝදනා මුඛයෙන් සඳහන් කෙරෙන්නක් නොවන බව.

නීන්දුව : (1) 5 වන රිතිය ගැන සලකා බැලීමේදී එහි ඇති පරිදි පෙත්සමේ සාක්ෂි සඳහන් කිරීම අනවශ්‍ය බැවි සහ වග උත්තරකරු ඉල්ලා සිටි විටක ඔහුට බලාපොරොත්තු නැති කරුණු හදිසියෙන් ඉදිරිපත් කිරීමෙන් ඇති විය හැකි තත්වය හා දුරිමට සිදුවන අනවශ්‍ය වියදම් වැළැක්වීම ආදී දෙයෙහි පරමාර්ථයෙන් අවශ්‍ය විස්තර සැපයීමට යයි විනිසුරුතුමාට නියෝගයක් දීමට හැකි නිසා මෙම පෙත්සමේ සඳහන් වී ඇති කරුණු 4 (1) (බී) දරණ රිතියට එකහත්වය ඇති බව පෙනී යේ.

(2) 4 (1) (බී) රිතියෙන් අපේක්ෂා කරන " කරුණු සහ හේතු " වලට 5 වන රිතියෙන් බලාපොරොත්තු වන වැඩිමනත් කරුණු ඇතුළත් නොවන්නේය. 5 වන රිතිය එහි විද්‍යමාන වීමෙන්ම මෙය හැඟී යන බව සලකා ගත හැක. 4 (1) (බී) රිතියෙන් එබඳු විස්තර කරුණු නිති සම්පාදක මණ්ඩලය බලාපොරොත්තු වූ නම් 5 වන රිතිය අමතර (අනවශ්‍ය) රිතියක් ලෙස සැලකේ.

(3) පැල්මඩුල්ලේ මැතිවරණ පෙත්සම් නඩුවෙහි (රූපසිංහ එ. කරුණාසේන 69 ලංකා සතිපතා නීති සංග්‍රහය 49 පිට) නිගමනය කළ පරිද්දෙන්ම මෙම පෙත්සමේ ඇති ප්‍රකාශය එකම විශේෂයක චෝදනා කීපයක් කෙටියෙන් සඳහන් කිරීමේ විධියකි. චෝදනාවේ මේ ආකාරය මෙබඳු නඩුවලදී එංගලන්තයේද භාවිතා කෙරෙන්නක් වන අතරම වර්ෂ 1946 ලංකා (පාර්ලිමේන්තු මැතිවරණ) රාජාඥා පණතේ 86 (2) ඡේදයෙන් ද මෙය අනුමත වී තිබෙන්නක් ලෙස සැලකීමට සිදුවන්නේ අපේ රිතිවල නියමිත විශේෂ ආකාරයක් නැති බැවිනි.

පෙත්සමේ ඇති දෙවන හේතුව පිළිබඳ තර්ක ඉදිරිපත් කරන ලද්දේ පහත පෙනෙන පරිදිය :

(ඒ) දෙවන හේතුව ඉතාම ඉහළින් සලකා බැලුවත් එය තදනන්තරව සංශොධිත ලංකා (පාලන සංස්ථා) රාජ ආඥා පනතේ 13 (3) (සී) ඡේදය උපුටා දැක්වීමක් පමණකි. මේ නිසා කිසිසේත් මෙහි චෝදනාවක් ඇතුළත් නොවේ.

(බී) දුම්රියෙන් ගමන් කිරීමට ප්‍රවේශ පත්‍රයක් මිලදී ගන්නා විට සැමදම කෙනෙකු රජය සමග ඇතුළත් වන කොන්ත්‍රාත්තුව වැනි කෙනෙකු පාර්ලිමේන්තු ආසනයක අපේක්ෂකත්වයට නුසුදුසු නොකරණ නොයෙක් විධියේ කොන්ත්‍රාත්තු ඇති නිසා මෙහිදී කොන්ත්‍රාත්තුව කුමක්දැයි වෙසෙසා දැක්වීමට නොහැකි වීමෙන් චෝදනාව නරක චෝදනාවක් බවට පෙරළී තිබේ.

(සී) දැනට පවතින ආකාරයටම චෝදනාව නිබෙන්නට ඉඩ හැරියොත් පෙත්සම් කරුට වග උත්තරකරුගේ ක්‍රියා ගැනද, ඔහුගේ නියෝජිතයන්ගේ ක්‍රියා ගැනද, ඔහුගේ දැනීම හා කැමැත්ත ඇතුව අනිත් අයවලුන් කරන ක්‍රියා ගැනද සාක්ෂි ඉදිරිපත් කිරීමට හැකි වීමෙන් (33 නව නීති ධාර්තා 65 සඳහන්) නිලකවර්ධන එ. ඔබේසේකර යන නඩුවේ නීන්දුවට වෙනස්වන ලෙස සාක්ෂි ඉදිරිපත් කළ හැකිවනු ඇත. එම නඩුවේ පරීක්ෂණයට භාජනය වන්නේ අපේක්ෂකයා විසින්ම කරන ලද දූෂිත ක්‍රියා පිළිබඳ සිද්ධීන් ගණනාවක් ගැනය.

නිගමනය : (1) චෝදනා මුඛයෙන් කියන ලද ඉහත සඳහන් දෙවැන්න 77 වන ඡේදයෙහි ඇති හේතූන්ගේ ගණයටම වැටේ. (මෙම ඡේදය මෙහි විශේෂයෙන් සඳහන් කර නැති බව සැබෑය.) එහි චෝදනාව සංයුක්ත වීමට වුවමනා කරුණු සඳහන්වී තිබේ. මෙම චෝදනාවට සම්බන්ධ තව අතිරේක කරුණු පෙත්සමේ සඳහන් කිරීම වූකලී පෙත්සම් කරුවකු විසින් තමාට 5 වන රීතියෙන් කිරීමට නියමිත දෙයට වඩා වැඩිමනත් දෙයක් කිරීමකි.

(2) වර්ෂ 1946 ලංකා (පාලන සංස්ථා) රාජාඥා පණතේ 13 වන ඡේදය ගැන සඳහන් කිරීමෙන් වග උත්තරකරුට තමාට විරුද්ධව පෙත්සම්කරු චෝදනා එල්ල කරන්නේ එහි සඳහන් කොන්ත්‍රාත්තුවකට සමාන කොන්ත්‍රාත්තුවකට යයි සලකා ගැනීමට තරම් ප්‍රමාණවත් කරුණු ඇති බව පෙනෙන සේය. වැඩි විස්තර උවමනා නම් එය ලබා ගන්නා උපක්‍රමය 5 වන රීතියෙහි ගැබ්වී තිබේ.

(3) රාජාඥා පණතේ 77 (ඊ) ඡේදයෙන් පැණවී ඇති නුසුදුසුකමේ හේතුව ගැන මෙන්ම පාලන සංස්ථාවේ (Constitution) 13 (3) (සී) ඡේදයෙහි නම් කොට ඇති එක් ගණයකට පමණක් ඇතුළත් වන නුසුදුසුකමක පමණක් සාධක ගැන ද චෝදනාවේ සඳහන්වී ඇති නිසා පැමිණිලි කර ඇති ක්‍රියාවලට කවරෙකු වගකිය යුතු වුවත් ඒ සියලුම ක්‍රියාවල ප්‍රතිඵලය වන්නේ අපේක්ෂකයාගේ එක නුසුදුසුකමකි.

(4) චෝදනා මුඛයෙන් කියා ඇත්තේ වග උත්තරකරු නියම ලෙසින් හෝ අනියම් ලෙසින් රජය සමග ඇතුළත් වී ඇති කොන්ත්‍රාත්තු එකකට වැඩි ගණනකින් අයිතිවාසිකම් හා ප්‍රයෝජන ලබා ඇති බව නමුත් පැමිණිල්ලෙන් සඳහන් කරන සේ හැහෙන්නේ එකම විශේෂයක චෝදනා බැවින් මැතිවරණ පෙත්සමක පරමාර්ථය අනුව එයින් එක චෝදනාවක් පමණක් සැදෙන බව සිතාගත යුතුය.

මේ නියායෙන් කරුණු සලකා බලන කල පෙත්සමේ ඇත්තේ චෝදනා තුනක් බවත් ඒ නිසා ඉදිරිපත් කොට ඇති ඇප මුදල ප්‍රමාණවත් බවත් මේ සමගම තීන්දු විය.

ජී පී ඒ. සිල්වා විනිශ්චයකාරතුමා විසින් "මේ ආකාරයෙන් ඉදිරිපත්වී ඇති මූලික විරෝධයන් ගැන කල්පනා කිරීමේදී නිදහස් මහාජන ඡන්දය පාවිච්චි කිරීම සහ පිරිසිදු ලෙස මැතිවරණ පැවැත්වීම රජයකට ඇති ඉතා වටිනා දයාද බව මතක තබා ගැනීම අවශ්‍ය වේ. එබඳු දයාදයක් ආරක්ෂා කිරීමේදී ඒ අගනා දයාද සඳහටම පැවතීම සහතික කරන යන්ත්‍ර සූත්‍රය ක්‍රියාකාරී කරවන උපකරණය ලෙස ගිණිය හැකි මැතිවරණ පෙත්සමක් නියම සාරාංශයෙන් තොර රීති විරුද්ධත්වයක සියුම් රසය පමණක් සලකා ආරම්භයෙහිදීම තළා පෙළා අබල දුබල නොකරන ලෙස වග බලා ගැනීම උසාවිය පිට පැවරී ඇති යුතුකමකි. යම් කිසි මැතිවරණයකට එල්ලව ඇති චෝදනා මුඛයෙන් කිව හැකි ගරුක කියමන් ගැන සම්පූර්ණ විභාගයක් පැවැත්වීම මහාජනතාවට ඉතාම වැදගත් දෙයක් වන අතර තෝරා පත් කරන ලද නියෝජිතයෙකුට එල්ල කරන ලද චෝදනාවකට තුඩු දෙන ක්‍රියාවන් ප්‍රතිඵල විරහිත නම් ඒ බරින් බහු මිදවීම ද ඔහුට නිරායාසයෙන්ම අවශ්‍යය."

නීතිවේදියෝ:— ආර්. ඒ. කන්නන්ගර මයා, ඒ. එච්. ද සිල්වා, ඇම්. ඇල්. සිල්වා, ඇස්. සී. ක්‍රොසට් තම්බයියා සහ ආර්. ඩී. සී. ද සිල්වා මහතුන් සමග, පෙත්සම්කරු වෙනුවෙන්.

ආචාර්ය කොල්වින් ආර්. ද සිල්වා මයා., කේ. සින්නියා, හනන් ඉස්මයිල්, මතුරී ද සිල්වා තරුණ මහත්මිය, වී. නානායක්කාර සහ වී. ගුණරත්න මහතුන් සමග පළමු වන වග උත්තරකරු වෙනුවෙන්.

ඇම්. කනගසුන්දරම්, රජයේ අධිනීතිඥ මහතා, දෙවන වග උත්තරකරු වෙනුවෙන්.

ගරු ජී. පී. ඒ. සිල්වා විනිශ්චයකාර තුමා

මෙම නඩුවේ පෙත්සම් කරු වර්ෂ 1965 මාර්තු මස 22 වැනි දින මැතිවරණය පවත්වන ලද බලපිටියේ මැතිවරණ කොට්ඨාශයෙහි ඡන්ද දායකයෙක් වූ අතර වග උත්තරකරු ලොකුගේ චන්ද්‍රදස ද සිල්වා නමැත්තා එම මැතිවරණයෙන් එකී මැතිවරණ කොට්ඨාශයට යටා ආකාරයෙන් තේරී පත්වූ මන්ත්‍රීවරයා වේ. මෙම පෙත්සම්කරු වර්ෂ 1965 අප්‍රියෙල් මස 9 වැනි දින දරණ තමාගේ පෙත්සමෙන් එම මැතිවරණයට පහත සඳහන් කරුණු උඩ අභියෝගයක් එල්ල කර සිටී.

එම කරුණු නම්:—

1. ලංකා (පාර්ලිමේන්තු මැතිවරණ) රාජ ආඥා පණතේ 58 වැනි ඡේදයේ තේරුම් අනුව එකී පළමුවන වග උත්තරකරු තමා විසින්ම හෝ ඔහුගේ නියෝජිත වරුන් යහ-හෝ වෙනත් අයවලුන් විසින් ඔහුගේ දැනීම හෝ අනුමැතිය ඇතිව එම මැතිවරණ වකවානුවේදී හෝ එයට පෙර, එම මැතිවරණයේදී රුවන්පුර ලක්ෂමන් ද සිල්වා තේරී පත්වීම වැළකෙන ලෙස බල පැවැත්වෙන හැටියට ඔහුගේ පුද්ගලික චරිතය සහ හෝ පැවැතීම් පිළිබඳව අසත්‍ය ප්‍රකාශයන් කිරීමේ හෝ පළ කිරීමේ හේතුවෙන් දූෂිත ක්‍රියාවක් කරන ලද නිසා යටොක්ත මැතිවරණයෙන් පළමු වැනි වග උත්තරකරු මන්ත්‍රීවරයා ලෙස තේරී පත්වීම නීති විරෝධී බල ශූන්‍ය දෙයක් වීම.

2. ලංකා (පාලන සංස්ථා) රාජ ආඥා පණතේ 13 වැනි ඡේදය උල්ලංඝනය වන අයුරින් නියම ලෙස හෝ අනියම් ලෙස ඔහු විසින් යහ-හෝ ඔහුගේ වාසියට අනිත් අයවලුන් විසින් යහ-හෝ ඔහුගේ ප්‍රයෝජනයට හෝ ප්‍රතිලාභයට රජය විසින් ලංකා ආණ්ඩුව වෙනුවෙන් කරන ලද හෝ ඇතුළත් කෙරෙන ලද කොන්ත්‍රාත්තුවක් දැරීමෙන් සහ-හෝ ඒ මගින් පල ප්‍රයෝජන ගුක්ති විඳීමෙන් පළමු වැනි වග උත්තරකරු තමා තෝරා පත් කරන ලද කාලයේ නියෝජිත මන්ත්‍රී වරයෙකු ලෙස තේරී පත් වීමට නුසුදුසු තත්වයක සිටී බව.

3. වර්ෂ 1946 ලංකා (පාර්ලිමේන්තු මැතිවරණ) පණතේ පැණවීම්වල ගැබ්වී ඇති ප්‍රඥප්තීන්ට එකඟව එකී මැතිවරණය නොපවත්වන ලද බව සහ එසේ නොපැවැත්වීම මැතිවරණ ප්‍රතිඵලය කෙරෙහි බලපා තිබීම. පැමිණිලි කරන ලද පරිදි ප්‍රඥප්තීන්ට එකඟ නොවීම වී ඇත්තේ එම රාජ ආඥාවේ 42 (2) දරන ඡේදයෙන් නියමිත අන්දමට ඡන්ද දායකයන්ට දෙන ලද ඡන්ද පත්‍රිකා සිල් නොතැබීම් හෝ සිදුරු කිරීම නොකර තිබීමය. මේ නිසා එහි ප්‍රතිඵලය වූයේ රුවන්පුර ලක්ෂමන් ද සිල්වාට පක්ෂව දෙන ලද ඡන්ද විශාල සංඛ්‍යාවක් ඔහුට පිරිනැමුණු ඡන්ද ලෙස ගණන් නොකර හැරීමය.

පළමු වෙනි වග උත්තරකර තමාගේ දිවුරුම් පෙත්සමක ආධාරය ලබන ලදුව වර්ෂ 1965 සැප්තැම්බර් මස 23 වැනි දින අමුණන ලද ඉල්ලීමකින් වර්ෂ 1946 පණවන ලද පාර්ලිමේන්තු මැතිවරණ පෙත්සම් පිළිබඳ රීති මාලාවේ 4 (1) (බී) සහ 4 (iv) (3) දරණ රීතිවලට අනුව නොයෙදී ඇති නිසා නඩු ගාස්තුවටත් යටත්කොට ඉහත සඳහන් මැතිවරණ පෙත්සම නිෂ්ප්‍රභා කිරීමටයැයි අයැද සිටියේය. වර්ෂ 1965 ඔක්තෝබර් මස 14 වැනි න පළමු වැනි වග උත්තර කරු වර්ෂ 1946 (පාර්ලිමේන්තු මැතිවරණ) රාජ ආඥාවේ තුන්වැනි උප ග්‍රන්ථයෙහි ඇති හීනි රීතිවල දෙළොස් වැනි නීතියේ පැණවීම්වලට එකඟව පෙත්සම ඉදිරිපත් නොවී ඇතැයිද පෙත්සම්කරු විසින් තබන ලද ඇපය වන රු: 5,000 වන මුදල ප්‍රමාණවත් නොවේ යයිද කරුණු දක්වමින් වග උත්තරකරු විසින් තමා කලින් කළ යාඥුව සනාථ කරමින් තවත් අතිරේක ඉල්ලීමක්ද ඉදිරිපත් කර තිබේ.

මීත් පළමු වැනි විරෝධය සනාථ කරමින් කරුණු දක්වූ ආචාර්ය ද සිල්වා මහතා කියා සිටියේ 4 (1) (බී) දරණ රීතියට අනුව මැතිවරණ පෙත්සමක එයින් කරන ලද යාඥුව තහවුරු කිරීමට අවශ්‍ය කරුණු සහ එයට හේතු සංක්ෂෙපයෙන් නිබිය යුතු බවත් මෙම නඩුවෙහි මුලින් සඳහන් හේතු දෙක ගැන සලකා බලන කල මෙම පෙත්සමේ එකී රීතියෙහි තේරුමට අනුව අවශ්‍ය කරුණු කියවී නැති බවත්ය. ඔහුගේ කරුණු දක්වීමේදී තව දුරටත් සැලකර සිටියේ රාජ ආඥාවෙහි 77 වන ඡේදය යම් කිසි මැතිවරණයක් අවලංගු කිරීමට ඔප්පු කළ යුතු කරුණු දැක්වූ අතර 4 (1) (බී) දරණ රීතියෙන් පැහැදෙන්නේ එකී හේතූන්ට අමතරව තව ටිකක් සඳහන් දැක්විය යුතු බවකි. මෙය වෙන වචන වලින් කිවහොත් යම් කිසි පෙත්සමක 77 වැනි ඡේදයෙහි ඇති හේතු වලින් එකක් පමණක් සඳහන් වූවහොත් එය ඉහත සඳහන් හතර වැනි රීතියට අනුව ලියවී නැති පෙත්සමකි. උදාහරණයක් දක්වුවොත් ඔහු කියා සිටියේ මැතිවරණයක් යටෝක්ත රාජ ආඥාවෙහි පැණවීම් වලට එකඟ නොවීමේ හේතුව පමණක් (77වැනි ඡේදයෙහි බී අක්ෂරය දමා ලකුණු කළ හේතුවක්) සඳහන්වූ විටෙක එයින්ම එම්

පෙත්සම 4 (1) (බී) දරණ රීතියේ පැණවීම වලට අදාළ නොවන බවය. මා ඉදිරියෙහි ඇති මෙම නඩුවේ මැති වරණ පෙත්සම එකි අයුරින් සකස්වී තිබුනි නම් ආචාර්ය ද සිල්වා මහතාගේ තර්කයට මට එකඟ වීමට අපහසුවක් නැත. යම් කිසි මැතිවරණ පෙත්සමක වග උත්තර කරු දූෂිත හෝ නීතිවිරෝධී ක්‍රියාවක් කරණ ලදුයි පමණක් ප්‍රකාශ කර තිබේ නම් එම පෙත්සමේ මැති වරණය නිෂ්ප්‍රභා කිරීමට හේතුවක් පමණක් මිස ඒ හේතුව ස්ථාපිත කිරීමට කරුණු කියා නොමැති නිසා එය 4 (1) (බී) දරණ රීතියට අනුකූලව ලියවුණු පෙත්සමක් නොවේයයි කීමට මෙහට ඉඩ තිබේ. එබඳු අවස්ථාවක පෙත්සමෙහි ඇති පැමිණිල්ලෙන් රාජ ආඥාපණතෙහි 77 ඡේදයෙහි ඇති අංග වලින් එකක් උපුටා දැක්වීමට වඩා අමුත්තක් සිදුවී නැති බැවින් 4 (1) (බී) දරණ රීතියට සියුම් ලෙස අර්ථ කථනය කළොත් එම රීතියට එය නොගැලපෙන බව පිළිගත යුත්තක්සේ හැගේ. ඒ කෙසේ වෙතත් දැනට මා ඉදිරියේ ඇති පෙත්සම ගැන සලකා බලන කල එබඳු කරුණු දැක්වීමක් කිරීමට අවකාශ තිබෙන බවක් මට නො පෙනේ. ඒ මන්ද? පළමු වැනි චෝදනාව ගැන සලකා බැලීමේදී පෙත්සම්කරු කියා ඇත්තේ වර්ෂ 1946 ලංකා (පාර්ලිමේන්තු මැතිවරණ) ආඥා පනතෙහි 58 වැනි ඡේදයෙහි තේරුම් අනුව දූෂිත ක්‍රියාවක් කළ පළමු වැනි වග උත්තරකරු තමා විසින්ම හෝ ඔහුගේ නියෝජිත වරුන් යහ-හෝ චෙනත් අයවලුන් විසින් ඔහුගේ දැනීම හෝ අනුමැතිය ඇතිව එම මැතිවරණ වකවානුවේදී හෝ එයට පෙර එම මැතිවරණයේදී රුවන්පුර ලක්ෂ්මන් ද සිල්වා තේරී පත්වීම වැලකෙන ලෙස බල පවත්වන හැටියට ඔහුගේ චරිතය සහ-හෝ හැසිරීම පිළිබඳව අසත්‍ය ප්‍රකාශයන් කිරීමේ හෝ සළ කිරීමේ හේතුවෙන් දූෂිත ක්‍රියාවක් කරන ලද නිසා යටොක්ත මැතිවරණයෙන් ඔහු (පෙත්සම්කරු) තේරී පත්වීම සිදු නොවීමේ බලාපොරොත්තුවෙන් එය එසේ කරන ලද දෙයක් බවකි. එසේ කිරීමෙන් පෙත්සම්කරු පහත සඳහන් පරිදි කටයුතු කර තිබේ.

1. රාජ ආඥා පණතෙහි 77 වැනි ඡේදයෙහි පැණවී ඇති පරිදි මැතිවරණය අවලංගු කිරීමට හේතුව ඡේදය සඳහන් නොකර ඇතත්—කියා තිබේ. ඡේදය සඳහන් කිරීම අවශ්‍ය යැයි නීතියෙන් කියවී නැති නිසා සමහර විට ඡේදය සඳහන් කිරීම සිදුවී නැතැයි සලකාගත හැක.

2. පැමිණිලි කරන ලද දූෂිත ක්‍රියා තේරුම් කර ඇති 58 වැනි ඡේදය පෙත්සම්කරු විසින් නියමිත අන්දමට සඳහන් කර තිබේ.

3. තමා ඔප්පු කිරීමට ප්‍රයත්න දරණ දූෂිත ක්‍රියාව පිළිබඳ කරුණු සැකෙවින් පෙත්සම් කරු විසින් නියමිත පරිදි දක්වා තිබේ. එනම්:—මැතිවරණ කාලය අතරතුර එකී මැතිවරණයෙහි තරහ කරුවෙක් වූ රුවන්පුර ලක්ෂ්මන් ද සිල්වාගේ පුද්ගලික චරිතය යහ-හෝ පැවැත්ම පිළිබඳව අසත්‍ය ප්‍රකාශ කිරීම හෝ ප්‍රසිද්ධ කිරීම.

දූෂිත ක්‍රියාවක් කිරීම පිළිබඳව ඇති චෝදනාවට 4 (1) (බී) දරණ රීතියට අනුව ප්‍රමාණවත් ලෙස ඉහත සඳහන් වී ඇති වගන්තිවල කරුණු ඇතුළත් වී තිබේ යැයි මා සිතන්නේ එම රීති මාලාවේ පස් වන රීතියෙන් මැතිවරණ පෙත්සමෙන් එබඳු ක්‍රියාවක් ගැන සාක්ෂි ඇතුළත් කිරීම අනවශ්‍ය බවත් වග උත්තර කරුවකුට දූරීමට සිදුවන නුවුවමනා වියදම් වලක්වා ගැනීමට සහ ඔහුට කරුණු හදිසියේ දන්වන ලදුව එයින් තමා පුදුමයට පත්වීම වලක්වා ගැනීමට උවමනා වූ විට මෙම අයි කරණයෙන් ඉල්ලීමක් කර එම කරුණු ලබා ගත හැකි බවත් පැණවී තිබෙන නිසාය. මේ නියායෙන් බලන කල චෝදනාවක් ඉදිරිපත් කිරීමට උද්ගත වී ඇති හේතුවට අමතරව කියවෙන යම්කිසි සිදුවීමක කරුණු පිංවත් තිබිය යුතු යයි කියමින් ආචාර්ය ද සිල්වා මහතා කරන ලද තර්කය සම්බන්ධයෙන් සැහීමකට පත්විය හැකි පරිදි එකි දූෂිත ක්‍රියාවක් කිරීම පිළිබඳ චෝදනාවට ප්‍රමාණවත් කරුණු මෙහි ඉදිරිපත් වී තිබෙන ලෙස පෙනේ. මේ සම්බන්ධයෙන් ම වග උත්තරකරුගේ නීති වේදියා 4 (1) –(බී) දරණ රීතිය 5 වැනි රීතිය වෙනුවට යොදා ගත නොහැකි යැයිද එම නිසා මැතිවරණය අවලංගු කිරීමට තමාගේ යාඥාව පදනම් කොට ඇති හේතුව පමණක් ප්‍රකාශ කොට චෝදනාවට අදාළ අනිත් කරුණු විස්තර වශයෙන් කීම ඉන් පසුව අධිකරණය නියෝග කළහොත් පමණක් කිරීමට පෙත්සම්කරුට අවකාශ නැතැයිද වැඩි දුරටත් තර්ක කළේය. දළ වශයෙන් බලන කල මෙම තර්කය සැහෙන ප්‍රමාණයක බලවත් තර්කයක් ලෙස පෙනී යන නමුදු මා ඉදිරියේ ඇති චෝදනාවට ඉදිරිපත් කොට ඇති කරුණු අවලෝකනය කිරීමේදී මෙම නඩුවෙහි එබඳු තර්කයක් පවත්වා ගත හැකි යයි මම නොකියමි. මෙම නීති ප්‍රඥප්තිය යම්කු විසින් ඉතා සැකෙවින් කිවහොත් ඒ තැනැත්තාට කිව් හැක්කේ සාමාන්‍ය වශයෙන් මෙසේ චෝදනාවක් ඉදිරිපත් කරන විට එය හේතුවක් දැක්වීමට වඩා දුර ප්‍රමාණයක් යා යුතු අතර අවශ්‍යයෙන්ම අංක 5 දරන රීතියෙන් බලාපොරොත්තු වෙන චෝදනාවේ විස්තර සටහන් කිරීම දක්වා එය යා යුතු නොවන බවය. අංක 5 දරණ රීතිය විද්‍යමාන වන නියාම එයින් තීරණාත්මකව හැඟී යන්නේ අංක 4 (1) (බී) දරණ රීතිය අනුව සඳහන් කළ යුතු කරුණු සහ හේතුවලට අංක 5 දරණ රීතියෙන්

බලාපොරොත්තු වන වඩා සම්පූර්ණ විස්තරය සාමාන්‍යයෙන් ඇතුළත් නොවන බවකි. යම් හෙයකින් අංක 4 (1) (බී) දරණ රීතියෙන් එබඳු විස්තරයක් ව්‍යවස්ථාදායක මණ්ඩලය බලාපොරොත්තු වූයේ නම් අංක 5 දරණ රීතිය අනවශ්‍ය අමතර රීතියක් වනු ඇත. පෙත්සමේ ඇති මෙම චෝදනාව අංක 4 (1) (බී) දරණ රීතියට අනුව ඉදිරිපත්වී ඇතිවා පමණක් නොව අංක 5 දරණ රීතියේ ගැබ්වී ඇති පැණවීම් එම චෝදනාවේ ඇතුළත් වූ කරුණු වල අඩු ලුහුඬු කමක් ඇතැයි කියා ප්‍රයෝජනවත් ප්‍රතිචාරයක් දීමට සැරසෙන කල පණපෙවී පෙරමුණට ඒ යැයි මට පෙනියේ.

මේ කරුණින් ඉවත් වීමට සැරසෙන විට ආචාර්ය ද සිල්වා මහතා මෙම චෝදනාවෙහි ආකාරය ගැනද විරෝධය දක්වූ සේ හැඟි ගියේය. චෝදනාවේ නිබුණේ පළමු වන වග උත්තරකරු ඔහු විසින්ම හෝ ඔහුගේ නියෝජිතයන් විසින් සහ-හෝ අනිත් අයවලුන් විසින්ද වග උත්තරකරුගේ දැනීම සහ අනුමැතිය ඇතිව (අසත්‍ය ප්‍රකාශ) කරන ලදැයි හෝ ප්‍රසිද්ධ කරන ලදැයි යන ආදී වශයෙනි. ඔහු කරුණු සැලකර සිටියේ යම් චෝදනාවක වග උත්තරකරු සහ-හෝ අනිත් උදව්ය ඔහුගේ දැනීම ඇතිව ක්‍රියා කරමින් යන ආදී වචන ඇතුළත් වූ විට එහි ඇති මැතිවරණ වරද කරන ලද්දේ කා විසින්ද යන්න ගැන ඇති අස්පීර ගතිය නිසා එය සිදුවූ කරුණක් පිළිබඳව චෝදනා එල්ල කිරීමක් වශයෙන් සලකාගත හැකි නොවේ යැයි කියමිනි. මෙම තත්වය සම්බන්ධයෙන් අංක 140 දරන පැල්මඩුල්ල මැතිවරණ කොට්ඨාශයේ වර්ෂ 1965 නොවැම්බර් 8 දරණ මැතිවරණ පෙත්සමේදී ඉදිරිපත් කරන ලද විරෝධයන් විසඳීමේදී සැහෙන කරුණු මා විසින් ප්‍රකාශ කරන ලද නිසා එය යළිත් පුන පුනා කිම අවශ්‍ය නොවේ යැයි මම සිතමි. ද සිල්වා මහතාගේ මෙම තර්කය බුද්ධිමත් තර්කයක් යයි මට පිළිගැනීමට බැරි බව පමණක් මෙහි ලා කිම ප්‍රමාණවත්ය. මෙම චෝදනාවේ ආකාරය ගැන එහි සාරාංශය අනුව බලන කල මෙබඳු නඩුවල එංගලන්තයේ පවා භාවිතයට ගෙන ඇති ආකාරයක් මෙම චෝදනාවෙහි ඇති බව යහ අපේ ලංකා (පාර්ලිමේන්තු මැතිවරණ) රාජ ආඥා පණතේ 86 (2) ඡේදයෙන් එයට අවසර ලැබී ඇති බවද වැඩි දුරටත් කිව යුතුය. මේ සඳහා අපේ මැතිවරණ රීතිවල නියමිත විශේෂ චෝදනා ආකාරයක් නොමැති බව සලකා ගත හැක. (තිලකරත්න එ. ඔබේසේකර—33 න. නී. වා. 65—67 වන පිටුව බලන්න.)

පළමු වන වග උත්තර කරුට නිබුණා යැයි කියන මැතිවරණ පෙත්සමේ අංක 6 දරණ ඡේදයේ සඳහන්ව ඇති **නුසුදුසුකම්** පිළිබඳව ගෙනෙන ලද චෝදනාව ගැන නිතිවෙදියා කරන ලද පැමිණිල්ල සලකා බැලීමට මම දැන් සැරසෙමි. මෙම චෝදනාව වෙනුවෙන් නොයෙක් හේතූන් උඩ පහර දීම කෙරිණ. ආචාර්ය ද සිල්වා මහතාගේ කරුණු සැල කිරීම අනුව මැතිවරණ පෙත්සමේ මෙම චෝදනාව ඇති කොටස ඉතාම වැඩි වශයෙන් සලකා බැලුවහොත් එය 1946 ලංකා (පාලන සංස්ථා) රාජ ආඥා පණතේ සංශොධිත 13 (3) (සී) දරණ ඡේදය නැවත ඉදිරිපත් කිරීමක් පමණකි. එම නිසා එය කිසි සේත් චෝදනාවක් හැටියට ගිණිය නොහැක. අසත්‍ය ප්‍රකාශ කිරීමේ හා ප්‍රසිද්ධ කිරීමේ මුල් චෝදනාවේදී මෙන්ම මෙහිදීද කෙනෙකු විසින් සලකා බැලිය යුත්තේ මෙම චෝදනාව 77 වැනි ඡේදයට අසු වේද යන්න ගැන යහ ඒ බව සනාථ කිරීමට සැකෙවින් කරුණු ඇතුලු කර නිබේද යන්න ගැනය. අංක 77(සී) ඡේදයේ පැණවීම් අනුව මැතිවරණයක් නිෂ්ප්‍රභා කිරීමට වුවමනා කරණ එක් කරුණක් නම් යම් කිසි අපේක්ෂකයෙක් මැතිවරණ සමයේදී මන්ත්‍රීවරයෙකු ලෙස තෝරනු ලැබීමට නුසුදුසු වී සිටීමය. මැතිවරණ පෙත්සමේ 6 වන කොටසින් මෙම හේතුව සඳහන් කිරීමට අදහස් කර ඇති අතර ඉතාම කෙටියෙන් වග උත්තරකරු නියම වශයෙන් හෝ අනියම් වශයෙන් තමා විසින්ම හෝ-සහ ඔහු වෙනුවෙන් අනිත් අයවලුන් විසින් හෝ ඔහුගේ වාසියට හෝ ප්‍රයෝජනයට රජය වෙනුවෙන් ලංකාවේ ආණ්ඩුව පිළිබඳව කරන ලද කිසියම් කොන්ත්‍රාත්තුවකින් හෝ කොන්ත්‍රාත්තුවලින් හෝ එල ප්‍රයෝජන හෝ ප්‍රතිලාභයක් හෝ ලබන ලදැයි සැකෙවින් කියා නිබේ. මෙම නුසුදුසුකම ගැන තව දුරටත් එහි කියා ඇත්තේ එය ලංකා (පාලන සංස්ථා ආඥා පනතේ 13 (3) (සී) ඡේදයෙන් අනාවරණය වී) ඇති නුසුදුසුකම් වලට ද ඇතුළත් වන බවය. මෙම 13 වන ඡේදයෙහි (3) උප ඡේදයෙහි නියෝජිත මන්ත්‍රීවරයෙකුගේ හෝ උත්තර මන්ත්‍රීවරයෙකුගේ නුසුදුසුකම් ප්‍රභේද වශයෙන් එකොළොසකට බෙදා ඇති අතර ඉන් එකක් ලෙස ගැනෙන්නේ රජය වෙනුවෙන් ලංකාවේ ආණ්ඩුව පිළිබඳව කරන ලද කොන්ත්‍රාත්තුවකින් යම් කිසි අයිතිවාසිකමක් හෝ වාසියක් භුක්ති විඳීමය. මෙම මැතිවරණ පෙත්සමෙහි 6 වැනි කොටසෙහි නියම වශයෙන් හෝ අනියම් වශයෙන් අපේක්ෂකයාගේ වාසිය පිණිස කොන්ත්‍රාත්තුවලට ඇතුළත් වී ඇති යථා සිද්ධීන් අනාවරණය කර නැති නමුදු මෙබඳු චෝදනාවක් සකස් කිරීමට අවශ්‍ය කරුණු එහි සැකෙවින් ලියවී නිබේ. මෙම චෝදනාවට අයත් අනිත් කරුණු පෙත්සමට ඇතුළත් කිරීම අංක 5 දරණ රීතිය අනුව පෙත්සම් කරුවකු විසින් අවශ්‍යයෙන් නොකළ යුතු යම්කිසි දෙයක් කිරීමකි. මේ සඳහා වැඩි විස්තර සපයා දීමට අවශ්‍ය වන්නේ වග උත්තර කරුට එබඳු දේ වුවමනාය කියා ඒ පිණිස උසාවියෙන් නියෝගයක් ලබාගත් කලක පමණකි.

යම් කිසි පුද්ගලයකුට පාර්ලිමේන්තුවට අපේක්ෂකයෙකු ලෙස ඉදිරිපත් වීමට නුසුදුසු කමක් නොවන ආණ්ඩුව සමඟ කෙරෙන කොන්ත්‍රාත්තු විශාල සංඛ්‍යාවක් ඇති බව ආචාර්ය ද සිල්වා මහතා සඳහන් කළේය. උදාහරණයක් වශයෙන් දිනපතාම වාගේ දුම්රියෙන් යෑමට බල පත්‍රයක් මිල දී ගන්නා විට කෙනෙකු ඇතුළත් වන කොන්ත්‍රාත්තුව පෙන්වා දිය හැක. මෙම නඩුවෙහි වග උත්තරකරුට 6 වන කොටසේ සඳහන්ව ඇති පරිදි නුසුදුසු කමක් ලෙස පෙන්වා දෙන ලද්දේ කුමන කොන්ත්‍රාත්තුවක් දැයි නොදක්වා ඇති නිසා මෙසේ එය නියමිත වශයෙන් දැක්වීමට නොහැකි වීම 6 වන කොටසෙහි ඇති චෝදනාව නරක් වීමට හේතුවක් යැයි ඔහු තර්ක කළේය. පෙත්සමේ මෙම කොටසෙහි ඇති පසුබිමට අනුව මෙම තර්කය පරීක්ෂා කළ යුතුව තිබේ. පෙත්සම් කරු වග උත්තරකරුට විරුද්ධව චෝදනා මුඛයෙන් කියා සිටින කොන්ත්‍රාත්තුව පිළිබඳව පෙත්සමේ මෙම කොටසෙහි ලංකා (පාලන සංස්ථා) රාජ ආඥාවෙහි 13 වෙනි ඡේදය ගැන සඳහන් කර තිබීම නිසා මෙම ඡේදයෙන් කියැවෙන්නේ එබඳු කොන්ත්‍රාත්තුවක් යැයි සිතා ගැනීමට එයින් සැහෙන කරුණු සැපයෙන බව හැඟේ. එබැවින් වග උත්තරකරුට චෝදනාවක් ලෙස ගෙනෙන මෙම කරුණ පිළිබඳව සැහෙන දැන්වීමක් තිබුන බව සහ ඔහුට නියම කොන්ත්‍රාත්තුව පිළිබඳව වැඩි විස්තර වුවමනා කරන ලද නම් ඒ පරමාර්ථය ඉටු කරවා ගැනීමට වුවමනා කරන ක්‍රියා මාර්ගය 5 වන රීතියෙන් සම්පාදනය වන බව සිතා ගැනීම යුක්ති යුක්ත බව පෙනේ.

ද සිල්වා මහතාගේ ඊළඟ කරුණු සැලකිරීම වූයේ 13 (3) ඡේදය යටතේ වුවද අපේක්ෂකයා විසින් හෝ ඔහුගේ නියෝජිතයන් විසින් හෝ අනිත් අයවලුන් විසින් හෝ ඔහුගේ දැනීම ඇතිව ඇතුළත් වන ලද—ඒ නිසාම වෙන් වෙන් වශයෙන් චෝදනා ඉදිරිපත් කළ හැකි—වෙනත් කොයෙක් වර්ගයේ කොන්ත්‍රාත්තු තිබිය හැකි බව සහ දැනට පවතින ආකාරයට 6 කොටසෙහි ඇති චෝදනාව එසේම තිබීමට ඉඩ හැරියේ නම් පෙත්සම් කරුට වග උත්තරකරු විසින් කරන ලද්දේ පිළිබඳව ද වග උත්තරකරුගේ නියෝජිතයන් විසින් කරන ලද දේ පිළිබඳව, සහ වග උත්තරකරුගේ දැනීම සහ අනුමතිය ඇතිව යම් යම් පුද්ගලයන් කරන ලද දේ පිළිබඳවද සාක්ෂි ඉදිරිපත් කිරීමට පුළුවන්ව තිබුනි. නමුත් විසින් එසේ කියන ලද එම කරුණ **නව තිනි වාර්තාවේ 33 වන ග්‍රන්ථයේ 65 වන පිටෙහි තිලකවර්ධන එ. ඔබේසේකර** අතර කියවුණු නඩුවෙහි **ඩරිබර්ග්** විනිශ්චයකාර තුමා විසින් දෙන ලද තීන්දුවට වෙනස් බව ද ඔහු කියා පෑවේය. එසේ වෙනස් වීමට හේතුව වශයෙන් ඔහු දැක්වූයේ එම තීන්දුවේ සලකා බලන ලද දුෂිත ක්‍රියා අපේක්ෂකයා විසින්ම කරන ලද දේ වූ අතර ඔහුගේ පැමිණිල්ලේ සලකා බැලීමට සිදුවී ඇත්තේ විවිධ පුද්ගලයන් විසින් කරන ලද දේ ගැන බවය. මෙසේ කරුණු සැල කිරීම ගැන පෙත්සම්කරුගේ නීති වේදියා වන කන්නන්ගර මහතාගේ පිළිතුර වූයේ පැවිණිලි කර තිබෙන ක්‍රියා පිළිබඳව වග කිව යුත්තේ කවරෙකු වුවත් ඒ සෑම ක්‍රියාවකම ප්‍රතිඵලය වූයේ අපේක්ෂකයාගේ නුසුදුසු බව ඇතිවීමය යනුවෙනි. කන්නන්ගර මහතාගේ මෙම තර්කය පිළිගැනීමට මගේ රුචිකමක් ඇති බව කිවයුතු වේ. 6 වන කොටසෙහි සඳහන් වී ඇති නුසුදුසු කමෙහි ඇති හේතුව ගැබ්වී ඇත්තේ 77 (සී) ඡේදයේය. එමෙන්ම පෙත්සමේ 6 වන කොටසෙහි 13 වන ඡේදයෙහි ගැබ්වී ඇති නුසුදුසුකම පිළිබඳව අවශ්‍ය වන යම් යම් සාධක ගැනද සඳහන් වී ඇත. එහි 13 වන ඡේදයෙහි කුමන උප ඡේදයක් යටතෙහි දැයි සඳහන් වී නැතත් එම කොටසෙහි පැමිණිල්ල පදනම් කිරීමට ඇදා ගත් කරුණු පෙනී යන්නේ 13 (3) (ඊ) ඡේදයෙහි පමණකි. ඇත්ත වශයෙන්ම පෙත්සම් කරුට කොන්ත්‍රාත්තුවේ විස්තරය දීමෙහිදී කරුණු සවිස්තරව කීමට හැකිව තිබුණු නමුත් පැමිණිල්ලේ මෙම කොටසෙහි යොදවා ඇති වචනවලින් එම චෝදනාව අබල දුබල වෙයැයි මට කිව නොහේ. යම් හෙයකින් උදාහරණයක් වශයෙන් එක්තරා නඩුවක පෙත්සම් කරුවකු විසින් පැමිණිල්ලේ එකම කොටසක වග උත්තර කරු ආණ්ඩුවෙහි නිලධාරියකු බවත්, ඔහු රජය සමඟ බැඳුණු කොන්ත්‍රාත්තුවකින් ප්‍රයෝජනයක් ලබන බවත් මැතිවරණයට පෙරාතුව හත් අවුරුදු කාලයක් තුළ භය මාසයක සිර දඬුවමක් විඳින ලද බවත් යනාදී ලංකා (පාලන සංස්ථා) රාජ ආඥාවෙහි 13 වන ඡේදයෙහි ඇතුළත් වන නොයෙක් මාදිලියේ නුසුදුසුකම් දමා ඇත්තේ නම් වග උත්තර කරුගේ උගත් නීති වේදියාගේ තර්කය යම් කිසි සාරාංශයක රස ඉඳුල්වන තත්වයක් ඇති කිරීමට පොහොසත් වීමට ඉඩ තිබුණු නමුත් එබඳු අවස්ථාවක වුවද එම තර්කය සාර්ථක නොවීමට ඉඩ තිබේ. නමුත් 13 වන ඡේදය යටතේ එකම වර්ගයක නුසුදුසුකමක් ගැන පමණක් පෙත්සම්කරු ඇණවූ කල මාගේ නිගමනයෙහි හැටියට මෙම තර්කය අවශ්‍යයෙන්ම අසාර්ථක විය යුතුය. එම නිසා වග උත්තරකරු නියම වශයෙන් හෝ අනියම් වශයෙන් රජයේ එක් කොන්ත්‍රාත්තුවකට වැඩි කොන්ත්‍රාත්තුවලින් පල ප්‍රයෝජන ලබන ලද බව චෝදනා මුඛයෙන් කී කලක පවා මා විසින් ඊට කලින් දෙන ලද නොම්මර 140 දරණ පැල්මඩුල්ල මැතිවරණ කොට්ඨාශය පිළිබඳව වර්ෂ 1965 අංක 8 දරන මැතිවරණ පෙත්සමෙහි දෙන ලද තීන්දුවට අනුව එබඳු පැමිණිල්ලකින් සඳහන් වන්නේ එතරම් ගණයක චෝදනා නිසා මැතිවරණ පෙත්සමක පරමාර්ථය අනුව බලන කල මෙයින් එකම චෝදනාවක් සැදෙන බව සිතාගත යුතුය.

වෙස්ට්මින්ස්ටර් ප්‍රදේශයේ මැතිවරණ පෙත්සමේ (L.T.R. කාණ්ඩ XIX—N.S. 565) නඩු විභාගයේදී අග්‍ර විනිශ්චයකාර කොවිල් මහතා විසින් ප්‍රකාශ කරන ලද පහත සඳහන් වචන උපුටා දැක්වීම මෙහිදී ඉතා උචිත යයි හැඟේ. "මැතිවරණ පෙත්සමක් ඉතා දීර්ඝ ලිපියක් බවට පත් කිරීමට කවදවත් අදහස් නොකරන ලද නිසා විනිශ්චයකාර වරයකුගේ අභිමතය පරිදි වැඩි විස්තර වුවමනා වූ විට ඒ ගැන නියෝගයක් කිරීමට හැකිව තිබීමේ ප්‍රතිඵලය ගැන සලකා බැලීමේදී එබඳු පෙත්සමක් යංකිෂ්ඨ වීම නිසා ඇති වන අයුක්තියක් නැත." මෙම ප්‍රකාශයට මගේ ගෞරව සම්ප්‍රයුක්ත එකඟත්වය ප්‍රකාශ කරන අතර මෙසේ මා ඉදිරියේ ඇති පෙත්සමෙහි සංක්ෂිප්ත භාවය පිළිබඳව පහර දීමට යෙදූ තර්කයන්ගෙන් වැඩි කොටසක් මෙබඳු පෙත්සමක් කෙටි විය යුතුය යන්නට සමාන අදහසක් ගිණිය හැකි බව ඇතුළත් 5 වන රීතිය ගැන නොසලකා හැර නිබෙන බව සහ එම තර්ක, මැතිවරණ පෙත්සමක් එහි ඇති යාඥාව ඔප්පු කිරීමට විශ්වාසය තබා ඇති කරුණු සැකෙවින් යදහන් කළ යුතුය යන්න පැණවී ඇති 4 (1) (බී) දරණ රීතිය ස්ථිර කරන බව වැඩි දුරටත් මා විසින් කිව යුතුය.

මෙ ආකාරයෙන් ඉදිරිපත් වී ඇති මූලික විරෝධයන් ගැන කල්පනා කිරීමේදී නිදහස්ව මහාජන ඡන්දය පාවිච්චි කිරීම සහ පිරිසිදු මැතිවරණ පැවැත්වීම රජයකට ඇති ඉතා වටිනා දයාදයක් බව මතක තබා ගැනීම අවශ්‍යවේ. එබඳු දයාදයක් ආරක්ෂා කිරීමේදී ඒ අගනා දයාද සඳහටම පැවතීම සහතික කරන යන්ත්‍ර සූත්‍රය ක්‍රියාකාරී කරවන උපකරණය ලෙස ගිණිය හැකි මැතිවරණ පෙත්සමක් නියම සාරාංශයෙන් තොර රීති විරුද්ධත්වයක සියුම් රසය පමණක් සලකා ආරම්භයෙනිදී ම තළා පෙළා අබල දුබල නොකරන ලෙස වග බලා ගැනීම උසාවිය පිට පැවරී ඇති යුතුකමකි. යම් කිසි මැතිවරණයකට එල්ලව ඇති චෝදනා මුඛයෙන් කිව හැකි ගරුක කියමන් ගැන සම්පූර්ණ විභාගයක් පැවැත්වීම මහාජනතාවට ඉතාම වැදගත් දෙයක් වන අතර නෝරා පත් කරන ලද නියෝජිතයෙකුට එල්ල කරන ලද චෝදනාවකට තුඩු දෙන ක්‍රියාවන් ප්‍රතිඝ්‍යා විරහිත නම් ඒ බරින් ඔහු මිදවීම ද ඔහුට නිරායාසයෙන්ම අවශ්‍යය.

5, 6, ඡේද ගැන මා විසින් බසින ලද නිගමනය සැලකීමේදී "හේතු" සහ "චෝදනා" යන වචන අතර කිසියම් විශේෂයක් මැතිවරණ පෙත්සමක පරමාර්ථයේ ඇද්ද යන අතිරේක ප්‍රශ්නය සහ මැතිවරණ පෙත්සමේ 7 වන කොටසේ ඇතුළත්ව ඇති පැමිණිල්ල චෝදනාවක් ලෙස ගත හැකි දැයි යන ප්‍රශ්නය ගැනද මා නිගමනය කිරීම අවශ්‍ය නොවේ. යම් හෙයකින් 7 වන කොටසෙහි චෝදනාවක් ගැබ්ව ඇතත් මැතිවරණ පෙත්සමෙහි තිබිය හැක්කේ චෝදනා තුනක් නිසා 12 වන රීතියෙහි ඇති පැණවීමට අනුකූල වන පරිදි රුපියල් 5,000ක් ඇප නබා නිවීම එම ඡේදයෙහි පැණවීම ඉටු කිරීමට ප්‍රමාණවත්ය.

එම නිසා වග උත්තරකරු විසින් දක්වන ලද විරෝධ අසාර්ථකය. ඒ අනුව ඔහුගේ ඉල්ලීම ගාස්තුවට යටත් කර මම නිශ්ප්‍රභා නරටි.

පෙත්සම නිශ්ප්‍රභා කිරීමට ඉල්ලීම ඉවත දමන ලදී.

ගරු අලස් විනිශ්චයකාරතුමා ඉදිරිපිට

කොර්නේලිස් සිංඤෙ එ. ජයතිලක (පොලිස් පරීක්ෂක, අතුරුගිරිය)*

ශ්‍රේෂ්ඨාධිකරණයේ අංකය : 803/1965—ප්‍රධාන මහේස්ත්‍රාත්වරයාගේ උසාවිය, කොළඹ අංකය 43516/සී.

විවාද කළ දිනය : 10, නොවැම්බර් 1965.
නින්දු කළ දිනය : 10 නොවැම්බර් 1965.

අපරාධ නඩු විධාන සංග්‍රහය, 418 ඡේදය—එය යටතේ භුක්තිය ආපසු ලබා දීමට නියෝගයක්—පැමිණිලි කරුවම සාපරාධ ලෙස බලාත්කාරකම් කිරීමේ දර්ශනයක් තිබිය යුතුද යන්න.

එක් ගෙයක සහ ඉඩමක් භුක්තිය හාරදීම පිණිස දිස්ත්‍රික් උසාවිය විසින් අයිතිය ඔප්පු කිරීමේ නඩුවක් (Rei vindicatio action) අවසානයේදී එම නඩුවේ විත්තිකරුවූ මෙම නඩුවෙහි චෝදිතයාට විරුඬව ඔහුව පිටමන් කිරීමට ආඥා පත්‍රයක් නිකුත් කරන ලදී. පිස්කල් නිලධාරී තැන මෙම නඩුවෙහි චෝදිතයාට සහ ඔහුගේ පවුලට අයත් සියලු බඩු මුට්ටු පිටට විසිකොට, පැමිණිලි කාරියගේ ස්වාමියුරුෂයා වන "සී" නමැත්තාට භුක්තිය හාර දුන්නේය. පිට කළ පැය කිපයකින්ම චෝදිතයා සහ ඔහුගේ පවුල බලාත්කාරයෙන් නැවතත් ගෙයි පදිංචි වූහ.

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 69 වෙනි කා., 101 වෙනි පිට බලනු.

එම නියා මේ නඩුවෙහි සාපරාධී ලෙස බලාත්කාරයෙන් ගෙට ඇතුල්වීමේ චෝදනාව යටතේ නඩු දමන ලද චෝදිතයා ඒ චෝදනාවට තමා වැරදිකරු යයි කියා සිටියෙන් ඔහුට එම ඉඩමෙන් පිටවී යාමට තුන් මාසයක් කල් දෙන ලදී. ඉක්බිති මෙම කාල සීමාව තව දුරටත් දික් කරන ලද නමුත් ඔහු ඉඩමෙන් පිටවී යාමට ඒ කාල සීමාව අතර තුරදී අපොහොසත් වූ නිසාත් එසේ පිටවී යන බවට දුන් පොරොන්දුව ඉටු නොකිරීම නිසාත් ඔහු බරපතල වැඩ ඇතුව තුන් මාසයකට සිර ගෙට යවනු ලැබිය. චෝදිතයා ඉදිරිපත් කළ ඇපැල් පෙත්සමද නිෂ්ප්‍රභා වූ පසු පැමිණිලිකාරිය විසින් කරන ලද ඉල්ලීමකට අනුව අපරාධ නඩු විධාන සංග්‍රහයේ 418 වන ඡේදය යටතේ මහේස්ත්‍රාත්වරයා නැවතත් භුක්තිය ඇයට පවරා දුන්නේය.

තීන්දුව : (1) අපරාධ නඩු විධාන සංග්‍රහයේ 418 ඡේදය අනුව මේ නඩුවේ එබඳු නියෝගයක් මහේස්ත්‍රාත්වරයා විසින් කිරීම යුක්තියුක්තය.

(2) පැමිණිලිකරුවකුටම සාපරාධ ලෙස බලහත්කාරකම් කිරීමේ සිද්ධියක් නිබීම එවැනි නියෝගයකට අවශ්‍ය නැත. පැමිණිලිකරුගේ සේවකයන්ට හෝ ඔහුගේ නියෝජිතයන්ට ඉඩමෙන් පිටවී නීතියේ සරණ සෙවීමට හේතු වන අයුරු තර්ජනයක් එල්ල වුවොත් එය ප්‍රමාණය.

නීතිඥවරු: ප්‍රින්ස් රාජසූරිය මහතා—චෝදිත ඇපැල්කරු වෙනුවෙන්.
සිසිල් ගුණවර්ධන, රජයේ අධිනීතිඥ—ඇටෝර්නි ජනරාල්තුමා වෙනුවෙන්.

ගරු අලස් විනිශ්චයකාරතුමා

මෙම නඩුවේ විත්තිකරුවා මහේස්ත්‍රාත්වරයා විසින් අපරාධ නඩු විධාන ආඥා සංග්‍රහයේ 418 වන ඡේදයට අනුව අලුබෝගහලන්ද නමැති ඉඩමක් සහ එහි පිහිටා ඇති ගෙයද පිළිබඳ භුක්තිය ආපසු චාර්ල්ස් සිල්වා නමැති පැමිණිලිකරුට භාර දෙන ලෙස කරන ලද නියෝගයට විරුද්ධව මෙම ආයාචනය ඉදිරිපත් කර ඇත. පැමිණිලිකරු කියා සිටියේ විත්තිකරු විසින් මෙම ඉඩමෙන් තමා පිටමං කරන ලද බවකි. මහේස්ත්‍රාත්වරයා විසින්ද පිළිගන්නා ලදුව චෝදක ඇපැල් කරුගේ නීතිවේදියා විසින් අභියොගයකට භාජනය නොකළ මෙම නඩුවේ කරුණු මෙසේය. සිසිලියානා පෙරේරා නැමැත්තිය චාර්ල්ස් සිල්වාගේ භාර්‍යාව ය. ඈ කොළඹ දිස්ත්‍රික් උසාවියෙහි ඉහත සඳහන් ගෙය සහ ඉඩමට හිමිකම් තමාට ඇති බවට ප්‍රකාශයක් කරවා ගන්නා අටියෙන් මෙම නඩුව ඉදිරිපත් කළාය. එම නඩුවෙහි මෙම චෝදිතයා විත්තිකරුවෙක් වී සිටියේය. සිසිලියානා පෙරේරා නඩුවෙන් ජය ගත්තාය. 1963 ජූලි මස 1 වන දින භුක්තිය භාර ගැනීමට ආඥාවක් උසාවියෙන් නිකුත් කළ පසු පිස්කල් නැනගේ නිලධාරියා එම ඉඩමට පිවිස ඉඩමෙහි සහ ගෙයි භුක්තිය භාර්‍යාව වෙනුවෙන් ඇගේ ස්වාමී පුරුෂයා වූ චාර්ල්ස් සිල්වාට පවරා දෙන ලදී. මෙහිදී චෝදිතයාට සහ ඔහුගේ පවුලට අයත් සියළු බඩු මුට්ටු ද්‍රව්‍ය ආදිය පිස්කල් නිලධාරී නැන විසින් පිටට විසි කරන ලදුව චෝදිනයෝද එම භූමි ප්‍රදේශයෙන් පිටමං කරන ලදහ. මේ නිසා සවස 4 ට හෝ 4.30ට පමණ චාර්ල්ස් සිල්වා ඉඩමෙහි භුක්තිය භාර ගත් සැනෙකින්ම පී. වී. කරුණාරත්න නමැත්තෙකු සහ තවත් දෙදෙනකු එම ඉඩමෙහි නබා ඔවුනට එම ඉඩම සහ ගෙය බලා ගන්නා ලෙස අවවාද කොට ගියේය. එදම සැන්දෑවේ චෝදිතයා තවත් බොහෝ දෙනෙකු සමග ඉඩමට පැමිණ (මෙයින් එක් තැනැත්තෙක් පිහියක්ද රැගෙන පැමිණි බව කියැවේ.) කරුණාරත්න සහ එහි සිටි අනික් අය මරණ බවට තර්ජනය කොට නිබේ. චෝදිතයා සහ ඔහු සමග ආ කණ්ඩායම කරුණාරත්නට සහ ඔහු සමග සිටි අනික් අයට ඉඩමෙන් පිටවීමට කරන ලද නියෝගය නිසා කරුණාරත්න ඉඩමෙන් පිටවී ගොස් පොලිසියට පැමිණිල්ලක් කළේය. මේ නිසා පිස්කල් නිලධාරියා විසින් පිටමං කරන ලදුව පැය කීපයකින් පසු නැවත බලහත්කාරයෙන් චෝදිතයා සහ ඔහුගේ පවුලේ අය එම ගෙයි පදිංචි වූ බව පෙනී යනු ඇත. මින් පසු චෝදිතයා දිස්ත්‍රික් උසාවියේ නඩු තීන්දුවට විරුද්ධව ඇපැල් පෙත්සමක් ඉදිරිපත් කරන ලද නමුත් එම ඇපැල් පෙත්සම නිෂ්ප්‍රභා කරන ලදී. චාර්ල්ස් සිල්වා නමැත්තාගේ භාර්‍යාව එම ඉඩමට සහ එයට අයත් භූමි ප්‍රදේශයට හිමිකාරිය බව කියමින් දෙන ලද දිස්ත්‍රික් උසාවි නඩු තීන්දුව ශ්‍රේෂ්ඨාධිකරණය විසින්ද අනුමත කරණ ලදී. කරුණාරත්නගේ 63.1.1 දින දරණ පැමිණිල්ල අනුව පොලිසිය සාපරාධී ලෙස බලහත්කාරයෙන් ඉඩමට ඇතුළු වීමේ චෝදනාවට විත්තිකාරියට විරුද්ධව නඩු පවරා තිබේ. මෙහිදී 63.12.24 වන දින චෝදිතයා තමා වැරදිකරු බව කියා ඉඩමෙන් අස්වී යාමට තුන් මාසයක කාලයක් වුවමනා බව කියා තිබේ. මෙම ඉල්ලීමට උසාවිය විසින් ඉඩ දෙන ලදී. ඉන් පසු මෙම කාල සීමාව 13.7.64 දින දක්වා නැවත වරක් දික් කොට නිබේ. නමුත් එම දිනයෙහි තමා පොරොන්දු වූ පරිදි ඉඩමෙන් පිටමං වී තම පොරොන්දුව ඉෂ්ට නොකිරීම නිසා ඔහුට බරපතල වැඩ ඇතිව තුන් මාසයක සිර දඬුවමක් නියම විය.

චින්තිකරු තමා වරදකරුයයි කියා සිටි දිනයෙහිම එම ඉඩමෙහි භුක්තිය අපරාධ නඩු විධාන සංග්‍රහයෙහි 418 වන ඡේදය අනුව තමාට නැවත පවරා දෙන ලෙස ඉල්ලීමක් පැමිණිලිකරු විසින් උසාවියට ඉදිරිපත් කරන ලදී. නමුත් මේ සඳහා තව දුරටත් සාක්ෂි සටහන් කර ගැනීම පිණිස එය 20.7.64 දින දක්වා කල් දමන ලදී. චෝදිතයා තමාට විරුද්ධව පවරා තිබුණු, බලහත්කාරයෙන් ඇතුළු වීමේ චෝදනාවට වැරදිකරු යයි පිළිගත් දිනම තමා වැරදිකරු කිරීමට සහ තමා පිට පවරන ලද දඬුවමට විරුද්ධව ඇපැල් පෙත්සමක් ඉදිරිපත් කරන ලද නිසා ඒ ගැන සලකා; පැමිණිලිකරු විසින් 418 වන ඡේදය යටතේ කරන ලද ඉල්ලීම ගැන සලකා බැලීම ශ්‍රේෂ්ඨාධිකරණයෙන් ඇපැල් පෙත්සමට දෙන තීරණය අපේක්ෂාවෙන් කල් දමා තිබේ. නමුත් 10.12.64 වන දින චෝදිතයාගේ ඇපැල් පෙත්සම ශ්‍රේෂ්ඨාධිකරණය විසින් නිෂ්ප්‍රභා කරන ලදී. ඉන් පසු යථා පරිදි 27.2.65 වන දින චෝදිතයා මෘග ඊකට සිර ගෙට යැවිය. දඬුවමට අනුව චෝදිතයා සිර ගෙයි සිටි කාලය තුළ ඔහුගේ පවුල එම ඉඩමෙහි පදිංචිව සිටියේය. සිර ගෙයින් නික්ම ආ චෝදිතයා යළිත් අවුත් එම ගෙයි පදිංචි විය. මේ නඩුවේ සාක්ෂිවලින් පෙනී යන්නේ කළ හැකි සියළුම බාහිර උපායයන් යොදා ශ්‍රේෂ්ඨාධිකරණයේ සහ කොළඹ දිස්ත්‍රික් උසාවියේ තීන්දු ප්‍රකාශ සියල්ලක්ම අබල දුබල අක්‍රියාකාරී තත්ත්වයකට පත් කිරීමට චින්තිකරු වෙහෙස ගෙන ඇති බවය. එම නිසා මෙම නඩුව අපරාධ නඩු විධාන සංග්‍රහයේ 418 වන ඡේදයට අනුව විසඳීමට සුදුසු නඩුවක්ය යන නිගමනයකට බැස ගත් මහේස්ත්‍රාත්වරයා සමග මම සම්පූර්ණයෙන්ම එකඟ වෙමි.

කෙසේ හෝ වේවා චෝදිත ඇපැල්කරු වෙනුවෙන් පෙනී සිටින නීතිවේදියා කරුණු ඉදිරිපත් කරමින් කියන්නේ පැමිණිලිකරුට ශාරීරික වශයෙන් සාපරාධී ලෙස බලපෑමක් කළ නොමැති හෙයින් කලෙක නොවේ නම් 418 වන ඡේදයට අනුව ක්‍රියා කළ නොහැකි බවයි. මේ සඳහා ඔහු ජයවර්ධන අතිරේක ශ්‍රේෂ්ඨාධිකරණ විනිශ්චයකාර තුමා විසින් තීරණය කරන ලද 26 න. නී. වා. 353 වන පිටේ ඇති **හෙරිජ් එ. පිච්චෙල්ලම්මා** යන නඩුව සහ මාවිතයි ශ්‍රේෂ්ඨාධිකරණයේ විනිශ්චයකාර තුමා විසින් විසඳන ලද 3 ටෙමිස් නීති වාර්තා 126 වන පිටේ ඇතුළත් **හෙන්රි ද සිල්වා එ. සෙනෙවිරත්න** යන නඩුවද උපයෝගී කර ගනී. ඉහත සඳහන් නඩු දෙකින් පළමු වැන්නෙහි 459 වන පිටේ ජයවර්ධන අතිරේක ශ්‍රේෂ්ඨාධිකරණ විනිශ්චයකාරතුමා මෙසේ කියයි :

"චෝදිතයෙක් සාපරාධී ලෙස බලහත්කාරකමින් ඇතුළු වීමේ චෝදනාවකට වරදකරු වූ විට එබඳු ඇතුළුවීමක් සාපරාධ ලෙස බලහත්කාරකමින් කරන ලද කලෙක හෝ පැමිණිලිකරුට ඒ අයුරින් බලපවත්වා ඔහු පිටමං කරන ලද කලෙක මිස ඒ සඳහා 418 වන ඡේදයට අනුව නියෝගයක් දිය නොහැක."

අනතුරුව බලපැවැත්වීමක් හෝ හිරිහැරයක් කිසිම පුද්ගලයකුට නොකර වසා නිබුණු දොරක ඉබි යතුරු කැඩීමෙන් පමණක් පැමිණිලිකරුගේ භුක්තිය පැහැර ගන්නා ලද නඩුවක් සම්බන්ධව උගත් විනිශ්චයකාර වරයා අවධානය යොමු කොට තිබේ. ඉහත සඳහන් **හෙරිජ් එ. පිච්චෙල්ලම්මා** යන නඩුව ඩෝල්ටන් විනිශ්චයකාර තුමා විසින් මුදියන්සේට එරෙහිව ද අල්විස් යන වාර්තා කොට නොමැති නඩුවෙහිද නිහිල් විනිශ්චයකාරතුමා විසින්, 15 සතිපතා නීති සංග්‍රහයේ 156 වන පිටේ ඇති **ජෝන් එ. රිවඩ පිරිස්** යන නඩුවෙහිද සලකා බලන ලදී. මෙම නඩු දෙකිහිම හෙරිජ් එරෙහිව පිච්චෙල්ලම්මා යන නඩුවෙහි සඳහන් වී ඇති කරුණුවල විශේෂත්වය පෙන්වා දී තිබේ. කලින් නඩුවෙහි හිංසා කිරීමෙහි සහ මිනී මැරීමෙහි තර්ජන නිසා ඉඩම්වලින් මිනිසුන් පිටමං වී ගොස් ඇති කලෙක එහි සාපරාධී බල කිරීමක් පිළිබඳ දර්ශනයක් තිබෙන බව වෙගවත් ලෙස ඩෝල්ටන් විනිශ්චයකාර තුමා විසින් සඳහන් කොට තිබේ. ජෝන් එරෙහිව රිවඩ පිරිස් යන නඩුවෙහි තර්ජනයකට ලක්වී ඇත්තේ පැමිණිලිකරුගේ මෙහෙකරුවෝය. මේ හේතුවෙන් තමාගේ කාර්යය අතහැර ඔවුන් පලා යාම නිසා චින්තිකරු ඉඩමට ඇතුළු වී එය භුක්ති විඳ තිබේ. 60 න. නී. වා. 332 යන පිටේ සඳහන් වී ඇති **ඒබ්‍රහම් සිඤ්ඤෝ එ. එලියස්** යන නඩුවෙහි ටී. එස්. ප්‍රනාන්දු විනිශ්චයකාරතුමා විසින්ද මෙම මතයම අනුමත කර තිබේ.

මේ නිසා පැමිණිලිකරුටම සාපරාධී බල කිරීමක් කිරීම මෙහිලා අනාවශ්‍යය. එපමණක්ද නොව ඇපැල්කරු වෙනුවෙන් පෙනී සිටි නීති වේදියා ගෙනහැර දැක්වූ නඩුවලින්ද මෙසේ පැටිලිකරුට සාපරාධී බල පැවැත්වීමක් කළ යුතුය යන මතය සනාථ නොකෙරේ. පැටිණිලිකරුගේ මෙහෙකරුවන්ට හෝ ඔහුගේ නියෝජිතයන්ට තර්ජනයක් කළොත්, ඒ කරන ලද තර්ජනයෙන් ඔවුන් පලා ගොස් නීතියේ පිළිසරණ සෙවිවොත් එය හොඳටම ප්‍රමාණවත්ය. මෙම නඩුවෙහි සිදු වී ඇත්තේ එපමණය. කරුණු මෙසේ සලකා බලන විට මහේස්ත්‍රාත්වරයා අපරාධ නඩුවිධාන සංග්‍රහයේ 418 වන ඡේදයට අනුව මෙහිලා නියෝගයක් දී තිබීම ඉතාම යුක්ති යුක්ත බව මම නිගමනය කරමි.

එම නිසා මෙම ඇපැල නිෂ්ප්‍රභා කරමි.

ඇපැල නිෂ්ප්‍රභා විය.