The

Ceylon Law Weekly

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

with a Section in Sinhala

VOLUME LXXVII

WITH A DIGEST

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

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

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

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

1970

Subscription payable in advance, Rs. **17/50** per Volume. Past Volumes (10-77) are available at Rs. **20/00** per Volume, plus postage. Copies may be obtained at: 50/3, Siripa Road, Colombo 5.

INDEX OF NAMES

DIGEST

CONTROL OF PRICES

Price Control Act — Sale of one pound tin of Nespray above controlled Price — Can the prosecution succeed without proving that tin contained a pound of milk food known as Nespray but relying on the label on it — Evidentiary value of label — Need to ascertain whether what is controlled is a pound of milk food or tin of milk food.

Charge of failing to exhibit conspicuously on a notice board the maximum retail price — Failure to produce notice board—Can conviction be sustained?

Where the evidence established that the accused sold a pound tin of milk food labelled Nespray, for Rs. 3/-, when such a tin is price controlled at Rs. 2/90.

Held: (1) That the conviction should stand as an examination of the relevant Price Order confirms the submission that the price is fixed per tin and not per pound.

(2) That therefore the question whether what is stated in the label is factually true does not arise.

(3) That a conviction for failing to exhibit conspicuously on a notice board the maximum retail price could not be sustained where the prosecution failed to produce the notice board to enable the Magistrate to form his own opinion.

Per **de Kretser, J.** "From the evidentiary point of view the legend Nespray 1 lb. nett on the label is hearsay and the case of *Myers v. Director of Public Prosecutions*, (1964) 2 A.E.R. 881 cited with approval in *Patel v. Controller of Customs*, (1965) 3 A.E.R. 593, 'makes clear beyond doubt that the list of exceptions to the hearsay rule cannot be extended judicially to include such things as labels or markings.' "

Control of Prices Act (*Cap.* 173) *as amended, sections* 3, 4 — *Charge of selling beef at rate above maximum price fixed in terms of Act — Offence alleged to be committed within Administrative District of Kalutara — Stall described in evidence both as Keselwatte-Panadura stall and as Sarikkamulla stall — Has prosecution discharged its burden — Administrative Districts Act,* (*Cap.* 392), *Schedule* 1.

Meaning of word 'beef' — Whether prosecution had failed to prove that item sold was beef within the meaning of the Price Order in question — Expression 'beef' to be given normal meaning in English language in absence of definition in Price Order — Meaning in Oxford Dictionary — Consultation of appropriate works of reference — Whether flesh of Ceylon buffalo would be 'beef' — Evidence Ordinance, section 57 *— Butchers Ordinance* (*Cap.* 272) *sections* 2, 24.

The accused-appellant was charged and convicted under section 4(1) read with section 3(2) of the Control of Prices Act with the sale of beef at a rate above the maximum price fixed in terms of the Act and notified in Government Gazette No. 14218 of 7.11.64.

The two main points urged by the appellant were firstly that there was no proof that the offence was committed within the Administrative District of Kalutara to which the Gazette notification applied; and secondly that the prosecution had failed to prove that the item sold was 'beef' within the contemplation of the Order in question. It was strenuously urged that the prosecution had failed to exclude the possibility that the meat sold was buffalo meat. The submission was made in view of the report of the Government Analyst which stated that the production was found upon analysis to be beef within the meaning of that term in the Butchers' Ordinance. A perusal of this Ordinance showed that the word beef as used therein included the flesh of tame buffaloes. Thus the only expert evidence before the Court left open the possibility that the flesh in question was that of a buffalo.

In regard to this point, the relevant price order which appeared in the Government Gazette directed that for the purpose of that order the expression 'Beef' did not include imported beef whether frozen, salt or chilled or any form of offal. Beyond that explanation the order did not seek to propound a defintion of the expression 'beef'.

The argument on the first point was based on the stall at which the sale occurred was described variously in the proceedings as the Keselwatte-Panadura stall and as the Sarikkamulla beef stall. It was submitted that there was no proof that Keselwatte-Panadura or alternatively Sarikkamulla were places falling within the Administrative District of Kalutara.

Held: (1) That it was clear from the evidence and the submissions before the trial Judge that the Stall which the witnesses referred to as Keselwatte-Panadura stall and the Sarikkamulla stall was one and the same stall and that this same stall was known by both descriptions.

(2) That it followed that the evidence of the witness who spoke of having proceeded to the Keselwatte-Panadura meat stall constituted evidentiary material before the Court indicating that the stall was situated in Panadura.

(3) That further, the Alphabetical and Numerical List of Villages in the Western Province (compiled by

the Department of Census and Statistics) which was a work the Court could consult and act upon in terms of section 57 of the Evidence Ordinance, showed that the Village Keselwatte fell within Panadura. It was clear that Panadura itself was within the Administrative District of Kalutara from the Second entry in the first Schedule of the Administrative Districts Act No. 24 of 1955, (Cap. 392).

(4) That the expression 'beef' must be given the normal meaning which it bears in the English language inasmuch as there was no definition to serve as a guide in the present Price Order.

(5) That after consulting appropriate works of reference such as the Encyclopaedia Britannica and W.W.A. Phillips' treatise on the Mammals of Ceylon, which the Court was entitled to do in terms of section 57 of the Evidence Ordinance, it would appear that the buffalo of Ceylon was the animal *bubalus* which was scientifically grouped as a member of the Ox family and was therefore an animal of the ox kind. Its flesh would therefore be 'beef' as defined in the Oxford Dictionary and in the absence of a definition in the Price Order would be beef for the purpose of that order also.

Price Control Act — Price Order fixing maximum price of mutton with bones and that bone content shall not exceed 25% of the total weight of one pound — Reasonableness of the order — Impossibility of ascertaining precisely the required percentage — Ultra vires.

The accused (a butcher) was convicted of selling (*a*) a pound of mutton with bones at Rs. 2/50 when the controlled price was Rs. 2/25 per lb.

(*b*) a pound of mutton with bones, the weight of the bones exceeding 25% of the total weight of one pound in contravention of Price Order No. E.D. 107 published in Government Gazette 13255 of 7.8.1962, paragraph 3 of which provides that when mutton is sold with bones, the weight of bones sold therewith shall not exceed 25% of the total wieght sold."

Held: (1) That the said Price Order is *ultra vires* as it is unreasonable to insist that where there is a sale of mutton with bones, the percentage of bone must not exceed 25%, for it is impossible for a butcher to ascertain with precision what percentage of it is bone without scraping the flesh off it.

(2) That the falsity of the evidence given for the defence does not necessarily show that the evidence for the prosecution is true.

Control of Prices Act — Evidentiary value of the label in regard to weight of tin of condensed milk — Whether hearsay — Has prosectuion discharged its burden.

Proof — Burden on prosecution in criminal case — Meaning of phrase "beyond reasonable doubt."

The accused was convicted under the Control of Prices Act for having sold a tin of condensed milk — "Golden Crown" 14 ounces — for 98 cents when the maximum controlled retail price was 90 cents.

Held: That there was sufficient circumstantial evidence to afford *prima facie* proof that the article that was sold by the apellant was the article referred to in the Food Price Order.

Held further: (1) That the evidence led by the prosecution might not have been sufficient if the offence related to opium, ganja or unlawfully manufactured spirits for the reason that such things are *per se* either injurious or harmful or prohibited by law.

(2) That in the case of offences in respect of opium ganja or unlawfully manufactured spirits as well as offences in respect of condensed milk, the standard of proof is that of proof beyond reasonable doubt, but in the case of the latter, proof need not be as strict as in the case of the former because of the principle that the more serious the imputation, the stricter is the proof which is required.

(3) That the phrase "beyond reasonable doubt" does not mean that the degree of probability must in all cases be as high as 99% or as low as 51%. The degree required must depend on the mind of the reasonable or just man who is considering the particular subject-matter. In some cases 51% would be enough, but not in others.

(4) That in the present case, by an examination of the tin of condensed milk one can be satisfied as to its weight to that degree of probability as is referred to above.

CO-OPERATIVE SOCIETIES

Co-operative Societies Ordinance — Award made thereunder — Enforcement of award in terms of Section 53A of the Co-operative Societies (Amendment) Act No. 27 of 1964 — Issue of Writ by Court — Is judgment-debtor's dwelling house liable to be seized and sold — Civil Procedure Code, section 218 proviso, as amended by Section 2(2) of Act No. 49 of 1958.

Held: That where a court directs a writ to issue for the enforcement of an award section under 53A(4) of the Co-operative Societies Ordinance, the judgment-debtor is not entitled to the benefit of the exemption of his dwelling house from seizure and sale conferred under section 218 of the Civil Procedure Code as amended by section 2(2) of Act No. 49 of 1958.

COURT OF CRIMINAL APPEAL DECISIONS

Penal Code, Section 32 — Murder — Common Intention — Circumstantial evidence— Directions necessary in trial Judge's summing up — Sole reasonable

inference — Position when either view possible — Divided verdict — Court of Criminal Appeal Ordinance (Cap. 7), section 5, proviso.

The 4 accused appellants were indicted on a charge of murder. Specific acts of shooting at the deceased were attributed to the 1st and 2nd accused. The 3rd and 4th accused were indicted on the basis of their having shared a common intention to be inferred from purely circumstantial evidence.

The prosecution case, which the jury accepted in convicting all the accused of murder, consisted of:

As against the 1st accused, the fact that he fired the first shot, the evidence of a strong motive or ill will towards the deceased as disclosed by a complaint made by him to the Police made about eighteen hours before the shooting, as well as a definite threat uttered about three or four hours before the shooting.

As against the 2nd accused, the fact that he fired the second shot, the words uttered by him immediately before firing the shot that the deceased was not yet dead, and the finding of the weapon used for the commission of the offence in his house.

As against the 3rd and 4th accused, the fact of the relationship between themselves and the other two accused (the 3rd accused being the father of the 1st and 4th accused and the father-in-law of the 2nd accused); their arrival not together with, but 35 to 40 feet at least behind the 1st and 2nd accused; being armed with a katty and a club respectively; and dragging the body of the deceased in the river, after the deceased fell.

The Commissioner directed the jury as to the meaning of a common intention and explained to them the constructive liability of those who participated in a common criminal enterprise.

Held: (1) That although the proved circumstances in this case were consistent with the presence of a common intention, in a case based on circumstantial evidence, the jury should also be directed that before returning a verdict of guilty, they should be satisfied that the proved circumstances should, not only be consistent with guilt but inconsistent with any reasonable hypothesis other than the guilt of the accused.

(2) That the failure of the trial Judge to lay equal emphasis in his summing up on this aspect would be a non-direction which amounts to a misdirection, for in the absence of such a direction a jury would only consider whether the circumstances are consistent with guilt and would not even appreciate the necessity of applying their minds at all to the question whether those circumstances are equally consistent with innocence, in which event the verdict has to be one of not guilty.

(3) That when the circumstances testified to are such that on careful analysis either view may be reasonably possible, it would, in appropriate instances, be necessary to direct the jury that if they are not able to make up their minds whether the proved circumstances are consistent only with guilt, their verdict should even then be one of not guilty as the case would in that event not have been proved beyond reasonable doubt.

(4) That that the Court felt that in this case such a direction might in the circumstances well have compelled the jury to return a verdict favourable to the 3rd and 4th accused, particularly in view of the fact that the jury was divided as 5:2 even on the inadequate direction given.

(5) That that this was not an appropriate case in which the proviso to Section 5 of the Court of Criminal Appeal Ordinance (Cap. 7) could be applied.

Privy Council — Court of Criminal Appeal — Accused convicted of murder — Plea of self-defence — Whether Jury adequately directed on defence.

Evidence Ordinance, sections 3, 105 *and* 106 — *Burden of Proof — Interpretation of words, burden of proving in section* 105 — *Position in English Law — Correctness of Rex v. Chandrasekera* (1942) 44 *N.L.R.* 47.

This appeal was on the question whether at the trial the jury was rightly directed on the burden of proof on the issue of private defence, which is permitted as a defence to a charge of murder not only as a general exception but also as a special exception under sections 93 and 294 respectively of the Penal Code.

Basing his argument on section 105 of the Evidence Ordinance counsel for the appellant submitted. (1) that there are two kinds of burdens (*a*) the legal burden, or the burden of establishing the case (*b*) the evidential burden or the burden of adducing some evidence in support of the case, and that the burden imposed by section 105, is in the second category. If it were in the 1st category the summing up could not be criticised (2) that the words "burden of proving" in section 105 referred to the burden of adducing evidence and they should be interpreted in the light of the decision in *Woolmington v. D.P.P.* (1935) A.C. 462 thus enabling the preservation of the "golden thread" referred to in the famous passage of the Lord Chancellor for the Law of Ceylon. The essence of the appellant's case is that he has not got to provide any sort of proof that he was acting in self-defence.

Their Lordships without scrutinising the summing up proceeded to determine whether the appellant's argument on section 105 is correct.

Held: (1) That in a trial by jury, a party may be required to adduce some evidence in support of his case whether on the general issue or on a particular issue before that issue is left to the jury. Although such a requirement may be described as a burden and it may be convenient to call it an evidential burden, it is confusing and misleading to call it a *burden of proof* whether legal or evidential or by any other adjective, when it can be discharged by the production of evidence that falls short of proof.

(2) That since the mode of proof in Ceylon is spelt out by section 3 of the Evidence Ordinance, it is impossible to suppose that there can be more than one kind of proof or that the burden of proof imposed by section 105 can be anything less than proof in accordance with section 3. The incongruities of any such supposition are fully exposed on the judgments of the majority in *R. v. Chandrasekere* (1942) 44 N.L.R. 47.

(3) That even if there were an ambiguity in the language of sections 3 and 105 of the Evidence Ordinance, the decision in *Woolmington v. D.P.P.* would not aid in resolving it as that decision is an example of a change in the content of the Common Law resulting from a change in the manner of applying it, the common Law being malleable to an extent that a code is not.

(4) That before the decision in the case of *Woolmington v. D.P.P.* in the year 1935 it was widely believed that every killing was presumed to be murder and that if an accused contended that a killing was accidental or provoked or done in self-defence, the burden of proof of any of these issues rested on him. The foundation for this view was the statement of the law in Foster's Crown Law written in 1762 (which view the said decision Woolmington Case declared erroneous) which doubtless was adopted in the codification of the law introduced into Ceylon by the Evidence Ordinance.

On the submission that the effect of section 105 of the Evidence Ordinance upon section 73 of the Penal Code, which includes accident among General exceptions would be to put the burden on the defence of negativing intention.

Held: (5) That as no case under section 73 is before Their Lordships they would not decide where the burden of proof lies when accidental killing is in question. Such a question would raise different considerations. Proof of intentional killing does not negative the answer of private defence. On the contrary, it is only after intentional killing is proved that private defence need be put forward. But proof of intentional killing does negative accident.

(6) That in cases where the accused deny intention (unlike in the present case where the accused admitted the intention to kill, but relied entirely upon private defence) such as in defence of provocation and accident and in cases where the accused says he did not intend to cause bodily injury but in any way he was acting in self-defence, it is not only proper, but may be necessary for the judge to remind the jury that the burden of establishing the intention beyond a reasonable doubt rests always on the prosecution.

(7) That by a direction to the jury that while the burden of proof of a particular defence is on the accused, the general burden of proving guilt beyond a reasonable doubt remains always on the prosecution if the effect produced is that some lighter burden of proof is placed upon the accused, it would be a wrong direction.

(8) That it must be remembered that the evidence of which the accused relies, when an issue of provocation or private defence is raised, may go to challenge the prosecution's case as well as to establishing his own.

(9) That the conclusion arrived at by the Board on section 106 of the Evidence Ordinance in the two cases *Attygalle v. R.* (1936) A.C. 338 2 A.E.R. 116 and *Seneviratne v. R.* (1936) 3 A.E.R. 36 to the effect that the section does not cast upon an accused person the burden of proving that no crime has been committed does not help the aforesaid argument on section 105.

Autrefois acquit — Statement by prosecution before accused asked to plead to the charge that no evidence will be adduced against the accused — Accused discharged— Whether plea of autrefois acquit available in subsequent prosecution — Burden of establishing such plea — Procedure where defence calls no evidence on ground "no case to meet"—Verdict of acquittal reversed — Should appeal court give opportunity for pleading in mitigation?

Held: (1) That where the prosecution stated at the commencement of a trial of a person accused of an offence that the prosecution is not adducing evidence against the accused before the accused is required to plead to the charge, and thereupon the accused is discharged, he cannot rely on those proceedings to support a plea of *autrefois acquit* in a subsequent prosecution, as he was never put in peril on the first occasion.

(2) That in such a situation it is unnecessary to consider the question whether the substantial issues raised in the second proceedings are the same as those raised in the first.

(3) That the burden of establishing the plea of *autrefois acquit* lies upon the accused.

(4) That if after the close of the prosecution case, the defence indicates that it does not propose to call any evidence (on the basis that there is "no case to answer") but merely tenders a charge sheet and record of earlier proceedings in support of a plea of *autrefois acquit*, the Court is not obliged to give the accused a second opportunity of leading evidence, if it is of the view that the charge has been established. It can proceed to convict the accused.

(5) That where a verdict of acquittal is reversed in appeal to one of conviction, sentence should not be passed without giving the accused an opportunity of pleading in mitigation.

Per **the Judicial Committee:** "Their Lordships do not regard with satisfaction the practice, if such there be, of dealing with sentences without having a plea in mitigation.

Even though appeals against acquittals may be few in number, they regard it as highly desirable that accused persons in such cases should have the opportunity after conviction by an appellate court of pleading in mitigation."

Court of Criminal Appeal — Indictment of three accused for murder — Verdicts of hurt, grievous hurt and murder against different accused — Note of alleged dying deposition — Illegally admitted — Not a case to apply proviso to section 5(1) *of Court of Criminal Appeal Ordinance* (*Cap.* 7) *— Re-trial ordered — Evidence*

Ordinance (*Cap.* 14), *sections* 159 *and* 160 — *Court of Criminal Appeal Ordinance* (*Cap.* 7), *section* 5(1).

The 3 accused appellants were indicted on the charge of the murder of S. The jury found the 1st accused guilty of voluntarily causing grievous hurt the 2nd accused of voluntarily causing hurt and the 3rd accused of murder.

The prosecution called two alleged eye witnesses, N and T. The verdict indicated that the jury acted on N's evidence in deciding that the 2nd accused hit S with a club, that the 1st accused cut his finger and that the 3rd accused stabbed him in the abdomen after S had fallen down. At the same time the jury did not appear to have accepted fully the evidence that each of the three men alighted from a bus with a knife in his hand, since, if they had accepted this evidence they might have had no alternative but to hold that the murder was committed in pursuance of a common intention.

An apothecary who had been summoned to the scene stated in evidence that when he came to the scene S was able to speak and made a statement to the apothecary. Sometime later the apothecary made a note of what S told him. The apothecary himself did not give evidence in Court as to what S had told him. But the prosecution produced through him the document P6 as the note which he had made and according to which S has said that the 2nd accused assaulted him with a stick and the 1st and 3rd accused cut him with their knives.

Held: (1) That the document P6 was illegally received in evidence inasmuch as the apothecary had neither given oral evidence regarding the note nor used the note to refresh his memory under section 159 of the Evidence Ordinance, nor had he testified to the facts mentioned in the documents in terms of section 160 of the said Ordinance.

(2) That the Court of Criminal Appeal would not apply the proviso to section 5(1) of the Court of Criminal Appeal Ordinance since on the verdicts of the jury, might have entertained a doubt as to the truth of a part of the admissible evidence and the Court should therefore hesitate to hold that a reasonable jury would without doubt convict on the evidence of the witnesses particularly because the verdict of murder against the third accused was reached by a majority of five to two despite N's evidence that it was the 3rd accused who inflicted the fatal injury. Therefore the test laid down in *Stirland v. D.P.P.* 1944, A.C. 315 could not be applied in this case.

Court of Criminal Appeal — Unlawful assembly, murder and common intention — Convictions for grievous hurt — Examination-in-chief of witness conducted by trial Judge — Leading questions — Evidence contradictory and unimpressive — Observations by trial Judge re credibility of witness on questions of identity and other questions — Tending to show that Judge considered evidence trustworthy — Misdirection — Functions of trial Judge.

Five accused were indicted on charges of being members of an unlawful assembly, the common object of which was to cause the death of one Siyathuwa, of the murder of Siyathuwa and also of causing grievous hurt to the son of Siyathuwa. On the 4th count the 5 accused were charged with the murder of Siyathuwa on the basis of a common intention and on the 5th count, of causing grievous hurt to the son of Siyathuwa on the same basis.

All 5 accused were convicted on the first three counts but only on the footing of a common object to cause grievous hurt. On the 4th and 5th counts the first four accused were convicted of causing grievous hurt to Siyathuwa and his son.

The trial judge, after one of the alleged principal eye witnesses, K, had been examined by Crown Counsel, on some preliminary matters, took on the examination of K with the result that the whole of his evidence incriminating the accused and describing alleged assaults by some of them was presented to the jury in answer to questions by the judge, some of which were of a leading nature.

The evidence of the two principal prosecution witnesses, K and W, fell short of establishing that the seven persons involved came armed to the scene. The trial judge correctly directed the jury on the facts regarding this matter.

The witness W fell into somewhat serious difficulty in the course of cross examination and contradicted himself regarding the acts done by the accused and the identity of the persons responsible for the assaults. The trial judge at more than one stage asked the witness "are you quite sure. Please dont's say "yes" to everything" and "I want to remind you that there is really no harm if you say 'you cannot say or you did not see' if you say that all of them came and assaulted you all that is quite sufficient. No one expects you to give such evidence in detail."

Held: (1) That it was most unfortunate that in regard to the witness K the judge performed the functions of the prosecutor for the jury could scarcely have resisted the impression that the trial judge was presenting the evidence of the witness as being evidence in which the judge himself had confidence.

(2) That it followed from the correct direction by the trial judge on the question of the seven persons coming armed to the scene that the prosecution could not establish any of the charges based upon the existence of an unlawful assembly, unless there was some impressive evidence of the actual conduct of the members of the accused party which might have justified an inference of a common object to kill or to injure the deceased.

(3) That the observations made by the trial judge to the witness W were bound to create in the minds of the jury an impression that the trial judge himself fully accepted the evidence of that witness to the effect that the accused did participate in the alleged assaults even though the witness was unable to speak with certainty to any act done by each or any of the accused.

(4) That however much a trial judge may be entitled in his summing up to express an opinion as to the credibility of a witness, there is no sanction in law of the course of intimating to the jury during the

examination of a witness that the judge considered his evidence to be trustworthy.

(5) That the remark that the witness need not give details concerning the alleged assaults by various people on the deceased's party was in fact highly prejudicial to the defence, and that the defence was entitled to a consideration by the jury of the entire evidence before it reached a conclusion that any one of the accused had been a member of the alleged assembly and that it was misdirection to leave it open to the jury to reach such a conclusion independently of the evidence which related to the alleged assaults.

(6) That but for the above misdirections the jury could not have reasonably reached the conclusion that there had been an assembly the common object of which was to kill or cause hurt to Siyathuwa.

COURT OF CRIMINAL APPEAL ORDINANCE

Section 5 proviso — Applicability.

COURTS ORDINANCE

Section 73 — Order granting an interim injunction restraining the Ceylon Hotels Corporation from ejecting the plaintiff, the resthouse keeper of a resthouse let to the Corporation by the Ceylon Tourist Board — The order is an appealable one.

Section 61 — Division of judicial district.

CRIMINAL PROCEDURE CODE

Section 167(2).

Section 152(3).

CUSTOMS ORDINANCE

Customs Ordinance (Cap. 235) — Importation of prohibited goods — Forfeiture — Liability to forfeiture also of goods "made use of in any way in the concealment" of such prohibited goods — Meaning of "concealment" in Section 125.

The Appellants (father and son) carried on business in partnership in Jaffna as general merchants and importers and exporters. In May 1961, the father on behalf of the firm ordered 50 bags of Fenugreek seed from a firm in India of which the son was sole proprietor. The Indian firm shipped 50 packages described on the Bill of Lading as being "Bags Fenugreek" and having the marks "Mani" for carriage to Jaffna, and the son as sole proprietor of this firm made an export application in India in respect of a consignement of goods described as Fenugreek seed and consisting of 50 bags with the marks "Mani". When the 50 bags arrived in Jaffna, the agent of the appellants, as importers of the goods, signed a Bill of Entry in respect of the goods wherein they were described as 50 bags Fenugreek seeds (Mathe Seeds). Fenugreek seeds are free of duty on importation. At the request of the Customs, the appellants' Agent produced for inspection samples of Fenugreek seeds. The Assistant Collector of Customs independently took samples and found that 20 bags did not contain Fenugreek seeds but contained poppy seeds the importation of which is prohibited. It was further found that though all 50 bags had the mark "Mani" there was a distinction between the bags containing Fenugreek seeds and those containing poppy seeds in that on the former there was an additional mark (218X). The Assistant Collector thereupon (*a*) Ordered the confiscation of the 20 bags containing poppy seeds imposing also a penalty under Section 127 of the Customs Ordinance; which he later mitigated and (*b*) ordered the confiscation of the 30 bags containing Fenugreek seeds. The appellants contested the validity of the latter order.

Held: That the order confiscating the bags containing the Fenugreek seeds was lawful in that these were made use of in contravention of section 125 of the Customs Ordinance in the concealment of bags containing poppy seeds liable to forfeiture under the Ordinance.

Their Lordships were of the view that the word "concealment" was not limited in the context of section 125 to cases where there was something in the nature of a *secret* disposition having the result that goods were hidden or were in some way removed from observation or were placed somewhere as to avoid detection.

DAMAGES

Defendant's tree falling on plaintiff's house causing damage — Is defendant liable?

DELICT

Delict — Damage by falling tree — Tree standing on defendant's land, not overhanging but slanting towards plaintiff's house and land adjoining—Failure on part of defendant to take steps to prevent tree falling, though aware of dangerous condition of tree — Negligence — Tree falling on plaintiff's house — Damage caused — Is defendant liable?

Where an arecanut tree standing on the defendant's land, which did not overhang the plaintiff's house but stood 14 feet away from it, and was slanting towards it, crashed on it causing damage thereto, and where

the evidence established that the defendant had been aware of the dangerous condition of the tree for about three years prior to the said damage.

Held: That although the tree did not overhang the plaintiff's house, the principles laid down in *Jinasena v. Engeltina* (1919) 21 N.L.R. 445 are applicable to the facts of this case, and as the defendant had been guilty of negligence in that he failed to take any steps to prevent the tree falling despite his knowledge of the potential danger therefrom, he was liable for the damage caused.

EVIDENCE ORDINANCE

Section 57.

Evidence Ordinance, section 15 — *Admissibility of evidence of similar facts at non-summary inquiry — Magistrate permitting such evidence to be led — Revision, whether it lies — Whether admission involves either an illegality or grave irregularity which would result in a miscarriage of justice — Such evidence admissible to rebut defence — Rule that judge can exclude such evidence if possible prejudice to defence outweighs probative value.*

The accused was charged with abducting one Nandawathie in order that she may be forced or seduced to illicit intercourse. Non-summary proceedings were taken by the Magistrate. At the proceedings the prosecution sought to adduce the evidence of eight other young girls to the effect that they were adbucted in order to be forced or seduced to illicit intercourse. The learned Magistrate admitted the evidence, and these proceedings were taken in revision to reverse his order admitting the evidence.

Held: (1) That the question whether a case had been made out to place the accused on trial was one to be decided by the Magistrate at the conclusion of the inquiry, and the Attorney-General could also decide whether proceedings were to be taken in a higher Court. The Supreme Court would not decide these questions in revision at the present stage.

(2) That the only question it could consider at this stage was whether the admissibility of this evidence was an illegality or grave irregularity which would result in a miscarriage of justice.

(3) That under section 15 Evidence Ordinance, such evidence was admissible to rebut a defence of mistake, and that such a defence had been foreshadowed in the cross-examination of Nandawathie by the defence.

(4) That such evidence could be led to rebut a defence which was open to the defence; it was not necessary that such defence should be specifically taken for the evidence to become admissible.

(5) That there was a rule of judicial practice by which a judge could exclude such evidence, even though legally admissible, if the prejudice likely to be caused by the admissibility of the evidence will outweigh its probative value; but that the circumstances in the instant case did not call for the application of this practice.

Sections 3, 105 *and* 106 — *Burden of proof — Interpretation of words burden of proof in section* 105.

Sections 159 *and* 160.

FIDEICOMMISSUM

Fideicommissum — Tacit fideicommissum — Construction of words restricting alienation — Whether prohibition 'nude' — Restriction only for a specified period following donor's death — Whether sufficient to create fideicommissum — Alienation before the expiry of the specified period — Construction of language restricting alienation — Phrase 'by way of mudusom or dowry.'

Civil Procedure Code, section 118, 119 — *Translations — Expert evidence — Whether Court should use its knowledge of the language.*

The single issue involved in the three appeals was whether Deed of donation No. 21891 executed on 3rd March, 1921 by one V.M. in favour of his two sons contained words sufficient to create a *fideicommissum.* The donor died on 27th August, 1927, and one of the donees had predeceased him. It was common cause that the half share of the properties donated to the son who predeceased the donor passed on the donor's death absolutely to the other donee. The relevant terms and conditions of the Deed of donation were as follows:—

"For and in consideration of the love and affection which I have and bear unto them, I do hereby give and grant by way of donation unto them in equal shares the aforesaid lands together with their appurtenances valued at the said sum of Rs. 77,500.00, subject to the following conditions:

There should be full authority and power for me to alienate by way of transfer, donation, dowry and any other documents, or to encumber by way of mortgage, otty, security or by way of other instruments, during my lifetime according to my wish, the said properties or to revoke this donation.

I do hereby bind them and declare that they should not alienate the said lands by any instruments such as transfer, donation, dowry or any other document and should not encumber the same by document such as mortgage, otty, security or any other instruments, with in 25 years after me except giving and granting the

same to their children by way of mudusom or dowry and that the said lands shall not be liable for any debts which may be incurred by them.

I do hereby nominate and appoint their grandfather Ilanthalaivasinga Iragunathamudaliyar Thillainather of Vannarponnai east and Saravanamuttu Ambalavaner of Vadukkodai east after me and give them power to jointly and severally look after and manage the said properties and to utilize the produce and income thereof for the food, clothing and education of the Kathiravelupillai and Kamaravelupillai and for their wives and children during the said period."

The surviving donee purported to transfer absolutely within the period of twenty five years referred to in the said conditions certain lands comprised in the gift. He died on 20th October 1940, i.e. within twenty five years of the death of the donor. His heirs were his two daughters, the 2nd and 4th appellants in appeals 1964/55 and 1965/14 and the 2nd and 4th respondents in appeal 1965/7. They claimed as *fideicommissaries* to be entitled to the lands alienated on the death of their father. The alleged *fiduciaries* had made improvements on the land.

Held: (1) That the phrase 'by way of mudusom or dowry' in the conditions was used in a colloquial sense as equivalent to dowry or the acquisition of property by a son or daughter before marriage.

(2) That before a disposition can be treated as a *fideicommissum*, whether the disposition be testamentary or *inter vivos*, it must be proved beyond reasonable doubt that there was an intention to create a *fideicommissum*.

(3) That once an intention to create a *fideicommissum* is established, mere difficulty of construction of the words used does not prevent its creation.

(4) That where there is a prohibition on alienation but there is no express *fideicommissum* it is a question of construction as to its legal effect. If the prohibition is imposed without indicating the purpose of such prohibition or the persons for whose benefit the prohibition is imposed then it is said to be a "nude' prohibition and will be disregarded and the absolute gift to the donee will remain. But on a consideration of the provisions and scheme of the disposition in question, the donor intended the prohibition for the benefit of the donee's children, and consequently it was not "nude."

(5) That the fact that the donor reserved an express power of revocation did not tend against the creation of a *fideicommissum*.

(6) That the words 'or any other documents' in condition 2 were not to be construed *ejusdem generis*. The result was that the prohibition on alienation was wide, and embraced an alienation by testamentary disposition.

(7) That the fact that the prohibition was for a limited time (here for 25 years) could not in principle defeat an otherwise valid *fideicommissum*.

(8) That the *fideicommissaries* are bound to compensate the *fiduciaries* for improvements effected by the latter, but the basis of compensation would depend on whether they were *bona fide* or *mala fide* improvers.

HOUSING & TOWN IMPROVEMENTS ORDINANCE

Does mandamus lie in view of remedy prescribed by section 95 of the Ordinance to enforce award of District Court.

INDUSTRIAL DISPUTES ACT

See under — LABOUR TRIBUNAL.

INJUNCTION

Injunction — Action for declaration and interim injunction against Ceylon Hotels Corporation — Ceylon Tourist Board — Rest House keeper employed by Board — When services of employees terminable — No statutory employment — No right to occupation of Rest House — Conduct and dealings of plaintiff before interim injunction to be considered — Courts Ordinance (Cap. 6) section 73 — Civil Procedure Code, section 666—Ceylon Tourist Board, Act No. 10 of 1966, section 56 — Motor Transport Act, No. 48 of 1957 section 9(3)(a), (b) and (c).

This was an appeal by the Ceylon Hotels Corporation from an order granting an interim injunction restraining the Corporation from ejecting the plaintiff, the Rest House Keeper of a Rest House let to the Corporation by the Ceylon Tourist Board, from the Rest House.

On the preliminary objection, that the defendant has no right of appeal against the order granting the interim injunction.

Held: That the order was an appealable one under Section 73 of the Courts Ordinance. Section 666 of the Civil Procedure Code does not disallow that right of appeal and would apply in cases where the Court grants an interim injunction *ex parte* or where there are subsequent supervening circumstances which could not have been foreseen at the time the interim order was made.

Held also: (1) That Section 9(3)(a), (b) and (c) of the Motor Transport Act No. 48 of 1957 which is made applicable to employees of the Ceylon Tourist Board by the Ceylon Tourist Board Act No. 10 of 1966 has nothing to do with the powers of the Board to discontinue its employees.

(2) That the plaintiff's employment under the Board was not a statutory employment and the relationship between the Board and the plaintiff was that of employer and employee.

(3) That the District Judge had misdirected himself when he thought that Section (93)(a) and (b) restricted the right of the Board to discontinue an employee only on the grounds of age or ill-health.

(4) That in this case the services of the plaintiff were in fact discontinued by the Board and the control and management of the Rest House had been handed over to the Corporation.

(5) That the plaint did not disclose a right in the plaintiff to the occupation of the Rest House.

(6) That the interim injunction ought not therefore to have been issued.

(7) That interim injunctions are granted on equitable grounds and the conduct and dealings of the parties before the application to Court should be taken into consideration.

JAFFNA MATRIMONIAL RIGHTS AND INHERITANCE ORDINANCE OF 1911 (CAP. 5)

Sections 19, 20, 21 *and* 22.

JUDGE

Trial Judge — Functions of.

JUDICIAL NOTICE

Evidence Ordinance, Section 57 *— Judicial notice — Proclamation published under Section* 3 *of Buddhist Temporalities Ordinance — Contents of such proclamation embodied in Law Book — Authors stating that such contents based on a certified copy issued by Public Trustee — Is the court entitled to take judicial notice of such Proclamation*?

Where the authors of the book entitled "Kandyan Law and Buddhist Ecclesiastical Law" gave a list of the temples brought under the operation of section 4(1) of the Buddhist Temporalities Ordinance stating that it is based on a certified copy issued by the Public Trustee of a proclamation published under section 3 of the said Ordinance and the Court on the invitation of counsel took judicial notice of it.

Held: (1) That the court was entitled to take Judicial notice of the said work as an appropriate book of reference to be resorted to for its aid under section 57 of the Evidence Ordinance.

(2) That therefore, the courts must take notice of such proclamation.

Can Court take judicial notice of the fact that Police officer is not authorized by law or terms of his employment to accept a gratification.

JURISDICTION

Of Magistrate — Charge triable by District Court — Magistrate proceeding to hear case without assuming jurisdiction under Section 152(3) *of Criminal Procedure Code — Validity of proceedings.*

JUS SUPERFICIARUM

The permission that is granted by a landlord to a tenant to erect a temporary building on the land which is the subject matter of the tenancy, subject to the condition that the building is dismantled on the termination of the tenancy, and the materials removed, is not a jus superficiarum.

KANDYAN LAW

Kandyan law — Classification of property — Person subject to Kandyan law dying intestate leaving two children — Several lands devolving on said children — Division of such inheritance by the two children on a Deed — One child becoming sole owner of a land P thereby — Is such land partly acquired property and partly paraveni in his hands — Effect of such division by heirs.

The question that had to be determined in this appeal arose as follows:—

One Appuhamy, a person subject to the Kandyan law died intestate leaving two children Kiribanda and Dingiri Amma. The several lands belonging to Appuhamy then devolved upon these two persons and they by deed P1 of 13th October, 1893 divided their inheritance in such a manner that Kiribanda became sole owner of 16 lands and Dingiri Amma the sole owner of 20. They also agreed that the other lands inherited from Appuhamy were to be possessed in common.

One of the lands known as Paragahapitiyahena fell to Kiribanda upon this division and the question that had to be decided in this case was whether this land was entirely paraveni in his hands or whether it was only paraveni in part.

The question arose as a partition action was instituted by certain illegitimate children of Kiribanda who claimed interests in Paragahapitiyahena as on intestacy. The present appellant who was a transferee from some of Kiribanda's legitimate children sought the dismissal of this action on the ground that this land was entirely paraveni property in the hands of Kiribanda and that the plaintiffs being illegitimate children were not entitled to any land therein.

The learned Trial Judge held that the land was paraveni only in regard to an undivided half share and was acquired property in regard to the other undivided half.

This conclusion he reached on the basis that as each of Appuhamy's two children became entitled on his death to an undivided half share in each of his

lands and as Kiribanda's title to the other half share of this land rested solely on the deed P1, such latter half share was derived by acquisition from a collateral and not by inheritance from a parent and thus constituted acquired property in his hands.

It was submitted on behalf of the appellant that this land was entirely paraveni in Kiribanda's hands inasmuch as it was property coming to him by right of paternal inheritance and attributable to no other source despite the execution of P1.

It is to be noted that question is not affected by the Kandyan Law Declaration and Amendment Ordinance of 1938 as it arose prior to the enactment of this Ordinance.

Held: (Wijayatilake, J. *dissentiente*) That the land Paragahapitiyahena was paraveni property in the hands of Kiribanda despite the fact of the execution of the deed P1. It was property coming to him by right of paternal inheritance.

Per **Fernando, C.J.** "I think therefore that when heirs who are subject to the Kandyan Law do possess in common the lands of the deceased, there is a presumption that they have decided to hold shares in common. But if a division into separate portions takes place within a reasonable time after the death, then the division is referable to an antecedent intention to take separate portions, and the presumption of common ownership is thus displaced."

Per **Weeramantry, J.** (*A*) "Mr. Perera for the appellant rightly submits that what paraveni in effect means is that which each heir gets in his capacity as heir, and that the Kandyan law in considering what property was paraveni and what acquired, would consider the concrete thing to which a person so succeeds rather than indulge in an abstract analysis of legal concepts.

This view fits all the more readily into the framework of a law of succession which did not operate through the elaborate processes of modern administration or the precise logic of an immediate vesting. Against this background it is difficult to think that the Kandyan law in every case treated every item of property of a deceased person as vesting immediately in undivided shares in his heirs. If this be so it would lead to the curious result that there would be no single item of property to which a person could become entitled exclusively as paraveni where the deceased has left more than one child, for since death would precede division even by a moment of time, a separate item of property falling to one heir upon a division would always come to him partly by succession and partly by acquisition. This is indeed a situation too far removed from reality to command acceptance when one considers such common examples as the mulgedera which had so much significance for that society."

(*B*) "Furthermore the concept of paraveni evolved and had its being in the informal setting where deeds were not requisite, and it is against that setting that it is necessary to view the question before us. The requirement of a deed is no doubt essential today for a conveyance of legal title upon such a division, but to lay too much stress on this modern and adventitious requirement is to obscure the practical simplicity of the Kandyan law of inheritance by a reliance on alien concepts and technical modes of thought."

Per **Wijayatilake, J.** (*dissentiente*): "The character of 'paraveni' is not something that the property acquires at the time of the death of the owner, but it is a character that the property assumes at the time that a person becomes entitled to it. In the instant case when the two children succeeded to Appuhamy's properties they assumed the character of 'paraveni' but when the children sought by the deed P1 to put an end to the common ownership of 36 lands of this inheritance clearly Kiribanda became entitled to the half-share owned by Dingiriamma in the 20 lands not by virtue of succession from his father but by virtue of the deed P1, On this deed Kiribanda has, in my view, clearly acquired the rights of Dingiriamma to the 20 lands dealt with, of which the corpus in this action is the first. In this context we have to recognise the significance of only a portion of the inheritance being dealt with in P1. With great respect in my view the legal effect of P1 is the crucial point in this case. The question is not what the parties intended to do by entering into this deed, but what is the meaning of the words used in the deed and what their legal effect."

KUMARIHAMY *v.* DINGIRIAMMA & OTHERS .. 57

LABOUR TRIBUNAL

Labour Tribunals — Dismissal of Kangany and 67 labourers — Their re-employment on a settlement between Management and Trade Union — Whether dismissed Kangany should be re-employed on same Division of Estate — Interference with discretion of the Management — Requisites of just and equitable order.

Rainis, a Kangany of the Udagama Division of Nakiadeniya Group, was dismissed along with 67 labourers as a consequence of being involved in a shooting incident. In furtherance to a settlement between the management and the Respondent Trade Union whereby it was agreed that the estate would give employment to all the labourers dismissed provided they applied for it to the Superintendent or Manager, Rainis was offered employment as a Kangany, but not on the Udagama Division. He refused employment and sought redress from a Labour Tribunal which ordered, *inter alia*, that he be re-employed on the estate as Kangany on his old Division, on the ground that there was an "unexpressed decision" in the settlement that the workers would be given employment in the same sections in which they had earlier worked.

Held: (1) That the President of the Labour Tribunal had misdirected himself on the evidence which clearly showed that there was no agreement between the management and the Trade Union as to the divisions on the estate in which the labourers would be employed.

(2) That, therefore, the demand that the Kangany Rainis should be re-employed on his old Division was not one that the Tribunal should have granted.

MANAGER, NAKIADENIYA GROUP *v.* LANKA ESTATE WORKERS' UNION 52

Labour Tribunals — Dismissal of Conductor employed by Ceylon Transport Board for failure to issue tickets — Application to Labour Tribunal — President of Labour Tribunal holding misappropriation not proved but only negligence — Same penalty imposed — Appeal to Supreme Court — Order of dismissal set aside as being too severe in the circumstances — Industrial Disputes Act (Cap. 131).

The applicant, a conductor of the Ceylon Transport Board, was found guilty at a Departmental Inquiry of having failed to issue tickets to about 7 passengers although he had recovered money from them, and was in consequence dismissed from the service of the Board on the ground of misappropriation.

The matter came up before the Labour Tribunal and the learned President held that the charge of misappropriation, contained in the answer filed by the Ceylon Transport Board and in the cross-examination on this basis, had not been established but only a degree of negligence not of a criminal nature had been proved, but he imposed the same penalty.

Held: That in view of the trying circumstances under which the applicant was forced to issue tickets as disclosed by the evidence and of the said finding of the learned President, it would be neither just nor equitable to affirm the order. He should be reinstated without back wages, but a deduction of Rs. 100/- should be made out of his salary at Rs. 10/- per month.

LANDLORD AND TENANT

See also under — RENT RESTRICTION.

Landlord and tenant — Rent Restriction Act, sections 5 and 7 — Original premises assessed prior to November, 1941 — Premises divided after November, 1941 and separately assessed — Computation of "authorised rent" of new premises — Interpretation of proviso to section 5(1).

The premises in question were originally part of a larger premises which had been assessed prior to November 1941, and bore assessment No. 53. The original building was subsequently divided into two premises, renumbered 53 and 55 and assessed as such for the first time in 1948. What was the "authorised rent" of the newly constituted premises was the question at issue.

Held: (1) When premises which have been assessed prior to November, 1941 are divided and reassessed after that date, the new premises take the place of the old as separate entities.

(2) The authorised rent for each of the newly assessed premises should be based upon the annual value fixed when they are first assessed as separate premises and not on the annual value of the original premises.

Landlord and tenant — Attornment — Plaintiff averring that defendant was his lessor's tenant, and that he informed her of the lease and requested her by letter to pay rent — Defendant silent on receipt of letter and failing to pay rent — Action for ejectment — Defendant denying tenancy and averring lessor kept her as his mistress undertaking to execute a deed in her favour — Failure to call lessor.

The plaintiff as lessee of one D on Indenture (P1) of 1963 sued the defendant alleging

(*a*) that she was a tenant of his lessor;

(*b*) that the plaintiff, by his Proctor's letter dated 4/3/63 (P2) informed the defendant of the lease and requested her to remit rent to the plaintiff from February, 1963;

(*c*) that she failed to remit rent for about a year;

(*d*) that plaintiff gave defendant notice to quit on 31/5/64;

The defendant in her answer while denying any tenancy agreement averred that she was kept by D as his mistress and that D put her in possession of the premises undertaking to execute a transfer deed in her favour.

The learned Commissioner held that the plaintiff was not entitled to a decree for ejectment but was entitled to rent as from February, 1963. It was in evidence that the defendant did not send any reply to the said letter P2.

Held: That although silence on the part of the defendant on receipt of letter P2 may be recognised as an attornment notwithstanding her failure to pay rent, inasmuch as the plaintiff has failed to prove that the defendant was a tenant of the lessor, by calling the lessor, the action based on attornment in respect of a monthly tenancy is misconceived.

Landlord and Tenant — Tenant in arrears for more than 3 months — Monthly rental of premises below Rs. 100/- Payment of rent arrears in instalments to authorised officer of Municipality after institution of action — Landlord accepting such rent — Does it amount to a waiver and create a new tenancy?

Rent Restriction Act, Amendment No. 12 of 1966 — Failure to explain delay in answer filed or to raise issue claiming relief — Explanation given in evidence at the trial — Should court accept it?

Where the tenant of premises whose monthly rental was below Rs. 100/- was in arrears of rent for more than three months and on receipt of a notice to quit and after the institution of an action for ejectment paid his arrears to the authorised officer of the Municipality in instalments and not only did he fail in the answer filed to explain why he did not pay rent on the due dates, but also failed to raise an issue at the trial claiming relief under Section 12A(1)(a) and 12A(2) of the Rent Restriction Act No. 12 of 1955. (Amendment).

Held: (1) That in the circumstances, the learned Commissioner was justified in rejecting the explanation given by the tenant in his evidence at the trial for the delay in sending the rent.

(2) That where a tenant enjoys the protection of the Rent Restriction Act (after termination of the contractual tenancy) the mere acceptance of rent by the landlord after the institution of the action did not amount to a waiver and give rise to the creation of a new tenancy.

PERERA *v.* MAGIE NONA HAMINE 68

Landlord and Tenant — Tenancy agreement in respect of bare land on payment of ground rent — Tenant agreeing to put up temporary garage at his own expense and to demolish and remove material after ten years — Each party at liberty to terminate tenancy by giving 3 months' notice — Landlord giving notice in tenth year with a request to remove materials used for building — Tenant's failure to reply — Order for ejectment — Do Rent Restriction Acts apply?

By agreement P1 of 1956 the plaintiff allowed defendant to put up a temporary building within an Urban Council area to be used as a garage for 10 years on payment of Rs. 2/50 per month as ground rent. It was also agreed by the parties that the tenancy could be terminated by either party by giving 3 months' notice and on the termination of the contract the defendant would be allowed to demolish the building and remove the materials.

The defendant erected the garage at his own expense with pillars supporting a roof of zinc sheets where he installed machinery and carried out repairs to motor vehicles. Admittedly defendant paid Rs. 5/- as ground rent after the garage was constructed. The plaintiff by P2 gave notice to quit in April, 1966 informing him that he was at liberty to remove the materials used for the construction of the garage, but the defendant did not reply thereto. Plaintiff obtained judgment for ejectment.

In appeal it was submitted that the premises in question were governed by the Rent Restriction Acts and therefore the plaintiff's action was not maintainable.

Held: (1) That the documents P1 and P2 and the failure to reply to P2 established that the contract of tenancy was in respect of a bare land.

(2) That the fact that the rental was raised from Rs. 2/50 to Rs. 5/- did not make it a different contract of tenancy.

(3) That for the defendant to succeed it must be established that the premises which formed the subject-matter of the tenancy was a building or a part of a building together with the land appertaining thereto.

PERERA *v.* JAYAWARDENA 85

Landlord and Tenant — Action for ejectment — Tenant denying tenancy — Is it necessary to prove a valid notice to quit?

Held: That a tenant who disclaims to hold of his landlord and puts him at defiance is not entitled to have the action against him dismissed for want of a valid notice to quit.

SHAKOOR *v.* ALIM SAIBO & TWO OTHERS .. 102

LEGAL MAXIMS

Sic utere tuo ut alienum non laedas.

WIMALAWATHIE *v.* GUNARATNE 11

MAGISTRATE

Jurisdiction of Magistrate's Court — Charge triable by District Court only — Magistrate proceeding to hear case assuming jurisdiction under Section 152(3) of the Criminal Procedure Code — Conviction of accused — Delivery of reasons on subsequent date — Question of jurisdiction considered, but held properly tried — Validity of all proceedings.

Where an accused person was charged with threatening to do bodily injury to the complainant by shooting with a gun (offence under section 486 of the Penal Code and triable only by the District Court) the Magistrate having proceeded to hear the case without assuming jurisdiction under section 152(3) of the Criminal Procedure Code, convicted the accused and while delivering reasons two weeks later stated that the question of jurisdiction engaged his attention and that in his opinion he tried the case properly as Magistrate.

Held: That the entire proceedings without assuming jurisdiction under Section 152(3) by the Magistrate at the commencement are not only irregular but illegal.

RAM BANDA *v.* I.P. PADUKKA 32

Admissibility of evidence of similar facts at non-summary inquiry—Magistrate permitting such evidence to be led — Whether admission involves either an illegality or grave irregularity which would result in grave miscarriage of justice — Such evidence admissible to rebut defence — Rule that judge can exclude such evidence if possbile prejudice to defence outweighs probative value.

JAYAKODY & ANOTHER *v.* S.I. POLICE, HETTIPOLA .. 73

MANDAMUS

Mandamus, Writ of — Petitioner applying for Certificate of Conformity in respect of building duly completed before its occupation— Failure to grant certificate — Appeal to District Court — Order by appellate tribunal directing issue — Certificate issued, but not in terms of section 15 of the Housing and Town Improvement Ordinance — Application for Writ of Mandamus to Supreme Court — Does it lie in view of remedy prescribed by section 95 of the Ordinance to enforce award of District Court — Housing and Town Improvement Ordinance (Cap. 265) sections 10(a), 15(1), (2), 16, 88 and 95.

The petitioner, the owner of certain premises at Wattegama submitted a plan of a proposed building to the respondent, the Chairman of the Wattegama Urban Council, for his approval as the competent authority under the Housing and Town Improvement Ordinance (Cap. 268). After giving due notice in terms of section 10(a) of the said Ordinance, the petitioner commenced building operations in June, 1963 and completed the building in February, 1964. On 24.2. 1964 in terms of section 15(2) of the said Ordinance the petitioner applied to the respondent for a certificate of conformity to occupy the said building and as he did not receive a reply the petitioner appealed to the District Court, being the tribunal of appeal constituted for the purpose under section 68 of the said Ordinance.

On 23.11.1964 the District Judge allowed the appeal directing the respondent to issue a certificate of conformity.On 30.11.1968 the respondent in terms of the order of the appeal tribunal issued a document purporting to be a Certificate of Conformity permitting the occupation of the house but deleting the words "conforms with the requirements of the Urban Council". As the most material words had been deleted the petitioner wrote to the respondent requesting him to issue a Certificate of Conformity in terms of section 15 of the said Ordinance. There being no reply to this letter, the petitioner applied to the Supreme Court for a Writ of Mandamus on the respondent directing him to issue a Certificate as required by section 15 of the said Ordinance.

Held: (1) That the petitioner was not entitled to succeed inasmuch as he had admittedly not sought the aid of section 95 of the Housing and Town Improvement Ordinance which provides for the enforcement of the award of the appeal tribunal.

(2) That it was incumbent on the petitioner to follow the procedure laid down in the Civil Procedure Code for the purpose as prescribed by the said Ordinance. Inasmuch as this Ordinance created a right in favour of the petitioner and the correlative obligation on the part of the respondent and at the same time prescribed the remedy to which the petitioner was entitled on a breach of the obligation, this remedy must be resorted to by the petitioner as the party seeking to enforce the right.

(3) That it would be premature and undesirable to consider argument that such a procedure is inapplicable to an order of the type the petitioner is seeking to enforce until he has failed to achieve his object by following the procedure.

MASTER AND SERVANT

Right of Ceylon Hotels Corporation to terminate services of Employee.

MORTGAGE ACT

Mortgage — Sale under decree entered in mortgage action — Conditions of Sale prescribed by Court — Binding effect thereof on purchaser — Whether Court has power to alter a condition — Consent of all parties affected necessary — Civil Procedure Code, sections 260, 262 — Mortgage Act (Cap. 89) sections 50, 61.

Sections 50 and 61.

NEGLIGENCE

Defendant negligently allowing tree to stand on his land — Tree falling on plaintiff's house causing damage — Liability.

PARTITION

Partition Action — Dismissal for want of appearance of plaintiff — Does such dismissal bar second action in respect of the same land — Civil Procedure Code sections 84, 85, 207, 403, 496 — Default of appearance in a partition action — Applicability of the provisions of the Civil Procedure Code in such a case— Provision for casus omissus in section 79 of partition Act — Whether case of default in appearance covered by such section — Partition Act (Cap. 69), sections 25, 71, 76, 79.

Held: (1) That where a partition action was dismissed after decree *nisi* had been entered and made absolute by reason of the absence of the plaintiff on the trial date, this was no bar to the maintenance of a second action in respect of the same land. This would be so whether the first action had been one that was contested or not so long as there had been no adjudication on the contest.

(2) That in any event, the provisions of Chapter XII of the Civil Procedure Code relating to the consequences and cure of defaults in appearance, have no application at all to a Partition action instituted under the Partition Act. The Act itself provides for the dismissal of an action for many instances of default including the absence of a plaintiff, but in every one of such instances where the action is dismissed without adjudication, section 76 of the Act provides that such a dismissal should not operate as a bar to the institution of another action.

(3) That section 71 of the Partition Act provides for the procedure which is applicable when a plaintiff in a partition action is absent and section 79 of the Act which provides for a casus omissus to be governed by the Civil Procedure Code has no application.

Courts Ordinance, section 61 — Partition action instituted in District Court K in respect of land situated within its jurisdiction — Interlocutory decree — Subsequent alteration of territorial jurisdiction of such court necessitated by establishment of new District Court P — Whole area where subject matter of partition situated brought under jurisdiction of new Court P — Without

transferring case to P, commission issued for scheme of partition — Case transferred to P after scheme prepared — Final decree entered by Court P — Is it valid?

The interlocutory decree in a partition action instituted in the District Court of Kalutara was entered in 7/6/1937 in respect of a land situated within the Panadura Totamune Division.

The establishment of the District Court of Panadure in October, 1945 necessitated the alteration of the territorial Jurisdiction of the District Court of Kalutara and the entirety of the Panadure Totamune was by a Proclamation brought under the District Court of Panadure where the said partition action should have been transferred thereafter.

The District Court of Kalutara however on 25/3/1962 issued a commission to a Surveyor to prepare a scheme of partition and final decree was entered by the District Court of Panadure (where the case was transferred subsequently) giving effect to the scheme of partition prepared in execution of the said Commission issued on 25/3/1962.

Held: (1) That in view of the provisions of Section 61 of the Courts Ordinance the said commission issued by the District Court of Kalutara was contrary to law as the court had then no jurisdiction to issue it.

(2) That, therefore, the final decree which gives effect to the said scheme of partition is bad in Law.

PENAL CODE

Section 32.

Criminal Procedure Code, section 167(2) — *Penal Code, sections* 434, 443 — *Charge of house-breaking — Whether manner of breaking into house must be specified in charge — Charge of house trespass— Whether complainant in occupation of house — Application of decision in Selvanayagam's case.*

Where a Magistrate had acquitted the accused of house-breaking by night for absence of reference in the charge to the manner in which the house was broken into by the respondents—

Held: That the acquittal on this ground was wrong in view of section 167(2) of the Criminal Procedure Code which enacted that "if the law which creates the offence gives it any specific name, the offence may be described in the charge by that name only."

The accused had also been acquitted of the charge of house trespass. This charge too, as did the former, related to their occupation of a certain house in a Housing Scheme belonging to the Urban Council, Beruwela. This house, along with several others, had been allotted to selected persons and the keys of the houses had been with the Chairman until such time as they could be handed over to the allottees. In the meantime the accused had effected an entrance and got into occupation of this house.

The learned Magistrate had acquitted the accused on the basis that the Chairman of the Urban Council (the present petitioner) had divested himself of occupation inasmuch as an applicant had been selected as tenant for this house and also on his application to the facts of this case of the decision in *The King v. Selvanayagam*, 51 N.L.R. 470.

Held: That as the Chairman of the Urban Council remained the occupant until occupation was actually given over to the selected tenant, the Magistrate was wrong in acquitting the accused on this ground.

Helf further: That the decision in *The King v. Selvanayagam* had no application to the facts of this case as the accused had no right to have this house allotted to them.

PLEADINGS

Action on cheque — Need to plead presentment and notice of dishonour or the circumstances dispensing with necessity therefor — Action not properly constituted otherwise.

PRIVY COUNCIL DECISIONS

Forfeiture under — CUSTOMS ORDINANCE

Fideicommissum.

Thesawalamai.

Conviction for murder — Plea of self defence — Was jury adequately directed.

Autrefois acquit

RENT RESTRICTION

Rent Restriction Act (Cap. 274), as amended by Act No. 12 of 1966 — Action for ejectment on grounds of reasonable requirement and sub-letting — Premises whose rental value is less than Rs. 100/- — Section 4(1)(A) of the Amending Act — Does it render action null and void?

Where the plaintiff sought for the ejectment of his tenant from premises to which the Rent Restriction Act was applicable and whose rental value was less than Rs. 100/- per mensem on the grounds that

(*a*) the premises were reasonably required for his occupation

(*b*) the defendant had sub-let the premises,

Held: That Section 4(1)(a) of the Amending Act No. 12 of 1966 did not render the action null and void. It is applicable to pending actions for ejectment from such premises on grounds other than those set out in Section 12A(1).

Rent Restriction Act (as amended by Act No. 12 of 1966) section 12A — Tenant of rent controlled premises whose standard rent does not exceed Rs. 100/- per month — Erection of temporary buildings with landlord's consent — Subletting such premises to third party — Does it amount to letting of a jus superficiarum — Is the tenant liable to be ejected?

Rent Restriction Act (Cap. 274) sections 9(1), (2) — Rent Restriction (Amendment) Act No. 10 of 1961, section 11 — Definition of word "premises" — Whether subletting of part of premises sufficient — Variation in language between Section 9 of Act and Section 12A of the amending Act of 1966.

Held: (1) That a tenant of premises to which section 12A applies who sublets a part of premises without the written authority of the landlord is liable to be ejected from the premises.

(2) That permission that is granted by a landlord to a tenant to erect a temporary building on a land which is the subject matter of the tenancy, subject to the condition that the building is dismantled on the termination of the tenancy and the materials removed, is not a jus superficiarum.

REVISION

Admissibility of evidence of similar facts at non-summary inquiry — Magistrate permitting such evidence to be led — Does revision lie?

SOCIAL DISABILITIES ACT

Social Disabilities Act, No. 21 of 1957 — Conviction for preventing or obstructing low caste Hindu from entering or worshipping at Hindu Temple — Defence that this Act necessarily operated to prevent poojahs at temple and therefore altered constitution of a religious body in violation of section 29(2)(d) of Ceylon Constitution Act and the Act could not be regarded as superseding section 4 of the Thesawalamai — Validity of such defence.

The appellant who was convicted by a magistrate with having in contravention of the Social Disabilities Act, No. 21 of 1957 prevented or obstructed a low caste Hindu from entering or worshipping at a Hindu temple in Jaffna, appealed against the conviction on the ground (*a*) that the above Act in penalising the prevention of entry of persons of low caste into the temple in question necessarily operated to prevent the High priest from performing *poojahs* in the temple and, thus, altered the constitution of a religious body in violation of Section 29(2)(d) of the Ceylon Constitution and, (*b*) that the above Act being general in character cannot be regarded as having superseded section 4 of the *Thesawalamai* which regulates the rights and privileges between the Vellala castes and the lower castes in the Northern Province according to the ancient customs and usages of the Province. The Supreme Court rejected both contentions and affirmed his conviction.

Per **Fernando, C.J.:** "(i) Section 29(2)(d) of the Constitution of Ceylon would in my opinion apply to a law which purports to alter the rule by which a religious body is elected, appointed or otherwise set up, or to commit any power or function of such a body to some other person, or to change the principles governing the relationship *inter se* of members of the body."

(ii) "If as is manifest section 183 of the Penal Code covers any obstruction to the discharge of functions committed to a public servant both before and after the enactment of the Code, the Social Disabilities Act of 1957 equally covers obstruction to any entry to which the Act refers, whether or not a right to such entry has existed before the Act was passed."

STAMPS

Stamps Ordinance (Cap. 247) — Application under Section 54 to cover deficiency of stamp duty and penalty on deed of donation from person accepting the gift on behalf of donee — Is person accepting liable to pay such deficiency — Test to determine "person executing a document".

Held: That a person, who signed a deed of donation to show that he accepted the gift on behalf of his brother who did not have the mental capacity to accept, could not be said to be a person who executed the deed of donation. Consequently he is not liable to pay any deficiency of stamp duty due thereon or to any penalty arising therefrom.

Per **de Kretser, J.:** "As Viscount Sumner has pointed out in *Puranchand v. Manmothunath*, 1928 A.I.R. (P.C.) at Page 38 a person who executes a document is not merely someone who signs the document, but means something more *namely the person who by a valid execution enters into an obligation under the instrument.*"

BALASUBRAMANIAM *v.* COMMISSIONER OF INLAND REVENUE 14

THESAWALAMAI

Thesawalamai — Husband acquiring lands for valuable consideration during the subsistence of marriage — Tediatetam within the meaning of section 19 of Jaffna Matrimonial Rights and Inheritance Ordinace of 1911 — Death of wife intestate in 1948 — Amending Ordinance No. 58 of 4th July, 1947 repealing sections 19, which provided that property so acquired shall be "tediatetam" and common to both— And section 20, which provided for devolution of such joint property — Substitution of two new sections—Common ground that subject of this appeal did not fall within the new definition — How did the wife's share devolve upon her death intestate? Jaffna Matrimonial Rights and Inheritance Ordinance of 1911 (Cap. 5) sections 19, 20, 21 and 22 Wills Ordinance, section 7.

The plaintiff as the administrator of the estate of a deceased wife, who died intestate in 1948 sought to recover a half-share of lands out of the estate belonging to the husband of the deceased wife on the ground that they were acquired at various times by the husband for valuable consideration during the subsistence of their marriage and therefore constituted '*tediatetam*" within the meaning of section 19 of the Jaffna Matrimonial Rights and Inheritance Ordinance of 1911, the parties being Jaffna Tamils and subject to *Thesawalamai.*

Section 20(1) of the said Ordinance provided that the "*tediatetam*" property referred to in section 19 (as being acquired for valuable consideration by either spouse) shall be property common to the two spouses and section 20(2) provided *inter alia* that on the death intestate of either spouse one-half of the joint property shall remain the property of the survivor and the other shall vest in the heirs of the deceased.)

On 4th July, 1947, during the wife's lifetime Ordinance No. 58 of 1947 came into force amending the said Ordinance of 1911, which repealed the said sections 19 and 20 and substituted in their places two new sections.

The new section 19 excluded from the definition of "*tediatetam*" property, which had previously been included in the definition of the same word in the former section 19. It is common ground that the subject of this appeal did not fail within the new definition.

The new section 20 in contrast to the former section 20 does not deal with any legal incidents thereafter to attach to *tediatetam* as newly defined other than its devolution upon the death of a spouse intestate.

Held: (1) That, agreeing, with the Supreme Court decision in *Akilandanayaki v. Sothinagaratnam* 53 N.L.R. 385 (5 Judges), at the date of the wife's death in 1948 the wife was still entitled to an undivided half share in the land in suit, although it would not be correct after 4th July, 1947 to attach either to the land in suit or to the half-share in it the label "*tediatetam*" in veiw of the new definition of the word in the said Amending Ordinance.

(2) That the new section 20 which applies only to property within the new definition of *tediatetam* in section 19 did not apply either to the land or to the wife's half-share in it which had vested in her before the Amending Ordinance was passed.

(3) That inasmuch as by the date of wife's death the former section 20 had been repealed, it could no longer affect the devolution of her half-share, but as the half-share formed part of the property to which she was entitled at the date of her death, its devolution was accordingly regulated by the general provisions as to inheritance contained in section 21 *et seq.* of the said Ordinance of 1911, none of which was amended by the Amending Ordinance.

(4) That under the said sections 21 *et seq.* the wife's half-share in the lands in suit devolve upon her children upon her death and the plaintiff as administrator is entitled to recover the share from the estate of her husband.

SUPRAMANIAM *v.* KADIRIGAMAN 46

IN THE COURT OF CRIMINAL APPEAL

Present: **G. P. A. Silva, S.P.J. (President), Siva Supramaniam, J. and Tennekoon, J.**

M. A. WIMALASENA & THREE OTHERS *v.* THE QUEEN

Appeals Nos. 33-36/69 — *Applications Nos.* 43-46/69
S.C. No. 84/68 — *M.C. Matugama* 6863

Argued on: 6th, 7th, 8th and 9th August, 1969.
Decided on: 9th August, 1969.
Reasons delivered on: 31st August, 1969.

Penal Code, Section 32 — *Murder — Common Intention — Circumstantial evidence — Directions necessary in trial Judge's summing up — Sole reasonable inference— Position when either view possible — Divided verdict — Court of Criminal Appeal Ordinance* (*Cap.* 7), *section* 5, *proviso.*

The 4 accused appellants were indicted on a charge of murder. Specific acts of shooting at the deceased were attributed to the 1st and 2nd accused. The 3rd and 4th accused were indicted on the basis of their having shared a common intention to be inferred from purely circumstantial evidence.

The prosecution case, which the jury accepted in convicting all the accused of murder, consisted of:

As against the 1st accused, the fact that he fired the first shot, the evidence of a strong motive or ill will towards the deceased as disclosed by a complaint made by him to the Police made about eighteen hours before the shooting, as well as a definite threat uttered about three or four hours before the shooting.

As against the 2nd accused, the fact that he fired the second shot, the words uttered by him immediately before firing the shot that the deceased was not yet dead, and the finding of the weapon used for the commission of the offence in his house.

As against the 3rd and 4th accused, the fact of the relationship between themselves and the other two accused (the 3rd accused being the father of the 1st and 4th accused and the father-in-law of the 2nd accused); their arrival not together with, but 35 to 40 feet at least behind the 1st and 2nd accused; being armed with a katty and a club respectively; and dragging the body of the deceased in the river, after the deceased fell.

The Commissioner directed the jury as to the meaning of a common intention and explained to them the constructive liability of those who participated in a common criminal enterprise.

Held: (1) That although the proved circumstances in this case were consistent with the presence of a common intention, in a case based on circumstantial evidence, the jury should also be directed that before returning a verdict of guilty, they should be satisfied that the proved circumstances should, not only be consistent with guilt but inconsistent with any reasonable hypothesis other than the guilt of the accused.

(2) That the failure of the trial Judge to lay equal emphasis in his summing up on this aspect would be a non-direction which amounts to a misdirection, for in the absence of such a direction a jury would only consider whether the circumstances are consistent with guilt and would not even appreciate the necessity of applying their minds at all to the question whether those circumstances are equally consistent with innocence, in which event the verdict has to be one of not guilty.

(3) That when the circumstances testified to are such that on careful analysis either view may be reasonably possible, it would in appropriate instances be necessary to direct the jury that if they are not able to make up their minds whether the proved circumstances are consistent only with guilt, their verdict should even then be one of not guilty as the case would in that event not have been proved beyond reasonable doubt.

(4) That that the Court felt that in this case such a direction might in the circumstances well have compelled the jury to return a verdict favourable to the 3rd and 4th accused, particularly in view of the fact that the jury was divided as 5:2 even on the inadequate directions given.

(5) That that this was not an appropriate case in which the proviso to Section 5 of the Court of Criminal Appeal Ordinance (Cap. 7) could be applied.

E. R. S. R. Coomaraswamy, with *C. Chakradaran*, *T. Joganathan*, *S. C. B. Walgampaya* and *P. H. Kurukulasuriya*, for the 1st, 3rd, and 4th accused-appellants.

M. L. de Silva, with *I. S. de Silva* and *P. Tennekoon*, for the 2nd accused-appellant.

D. A. E. Thevarapperuma (Assigned), for the accused-appellants.

T. A. de S. Wijesundera, *Senior Crown Counsel*, for the Crown.

G. P. A. Silva, S.P.J.

At the close of the argument in this case we dismissed the appeals of the 1st and 2nd appellants and allowed the appeals of the 3rd and 4th appellants and directed a verdict of acquittal to be entered in their favour. We now state the reasons for our order:—

The four appellants were indicted on a charge of murder, the basis of the charge being that they acted in furtherance of the common intention of all. While specific acts of shooting at the deceased were testified to in respect of the 1st and 2nd appellants the 3rd and 4th appellants were found guilty of the offence by virtue of having entertained a common intention on purely circumstantial evidence. Several submissions, mainly directed against the credibility of the only eye witness, were made on behalf of all the appellants and even though some of them appealed to us as having substance, they failed to reach that degree of compulsion which would have warranted our interference with the unanimous verdict of the Jury on the ground of its unreasonableness. We therefore arrived at our decision in respect of the successful appellants on the basis of the acceptance by the Jury in substance of the evidence placed by the prosecution. For a proper appreciation of the reasons which induced us to direct a judgment of acquittal in favour of the 3rd and 4th appellants it is useful to recount briefly the main items of evidence against the 1st and 2nd as well.

At 5.25 p.m. in the evening of the day before the deceased Wijepala was done to death the first accused Wimalasena made a complaint to the Badureliya Police against the deceased to the following effect:—

"The land called Katuhena situated at Kapugedera is a crown land. I cleared this land and on the 17th of this month I sowed paddy. When I cleared this land I had no trouble from the Government or the people in the village. This morning at about 9.00 a.m., when I got ready to barbed wire this above land with barbed wires, one P. D. Wijepala of Kapugedera, armed with a katty came in front of my house, and said that he would not allow me to barbed wire this land and that he would kill me if I went to the land. So saying he went in the direction of the land where I had sown paddy. Then I did not go to the land but came to the police station. He has no claim to this land. Witnesses G. Magilin Nona and M. A. Wimaladasa."

The prosecution also placed evidence of a threat by this accused through the witness Thomas Singho who lived in a boutique room adjoining that of one David Appuhamy who ran a tea kiosk. According to this witness the 1st accused, who lived in a house opposite the tea kiosk within about 15 feet of each other, came to David Appuhamy's boutique on the day of the incident at about 7.30 a.m. which would be 2 to 2 1/2 hours before the deceased is alleged to have been shot, and after having a cup of tea said "This is the last cup of tea that I am taking. I will finish off that Wijepala before 12 noon." Thereafter he went to his house and told his wife to sell the goods and go wherever she liked, implying thereby that he would not return to her. The boutique keeper David Appuhamy too supported this witness in regard to the first part of the statement made by the 1st accused in the boutique and added that he was busy serving customers and did not hear the threat uttered by the 1st accused.

The next step in the sequence of events narrated by the prosecution witnesses was deposed to by Chandrasena, a younger brother of the deceased, who said that he went with the deceased to this land, the scene of the tragedy, at about 7 a.m. on the day of the incident and engaged themselves in digging holes and fixing some posts to enclose the land with barbed wire. The adjoining land was being worked at this time by the 1st accused. At about 11 a.m. when the deceased was digging one of the holes, the 1st and 2nd accused, brothers-in-law, got on to the bank of a river which adjoined the land on which they were working having apparently crossed the river. The 1st accused was armed with a gun and the 2nd with a club. As he climbed up to the bank the 1st accused fired a shot at the deceased who stumbled and fell and having got up ran towards the river. Thereupon the 2nd accused snatched the gun from the 1st accused and saying that he was not yet dead, reloaded the gun and fired a second shot at the deceased. The witness was unable to say whether the deceased received that shot, but he saw the deceased falling near the river and the 3rd and 4th accused who were there in the river dragged the deceased into the water. The 3rd accused, is the father of the 1st accused and the 4th accused, the latter being the younger of the two. The 3rd accused had a katty and the 4th a club when the witness saw them. When the Police arrived later after receipt of information they discovered the deceased's body under a large log of wood in the river a little distance away from the scene. It is important to say here that although in answer to a later question by the Court which was put in a leading form as to whether the witness saw the 3rd accused and the 4th accused also coming with the 1st and 2nd, he answered in the affirmative, his original answer to the question by Crown Counsel whether anybody came when the deceased was digging holes was that the 1st and 2nd accused got on to the bank. If the 3rd and 4th accused too came together with them I should expect him to have said that the 1st, 2nd, 3rd and 4th accused got on to the bank. This original answer, taken in conjunction with the witness's own evidence that the 3rd and 4th accused were in the river when the 1st and 2nd accused fired at the deceased, as well as the markings on the sketch which showed a distance of 35 to 40 feet between the 1st and 2nd accused on the one hand, and the 3rd and 4th accused on the other, at the time the second shot was fired, renders it quite probable that the witness's statement to the effect that the 3rd and 4th accused accompanied the 1st and 2nd accused was a mistaken and unwarranted inference from the facts observed by him.

As regards other incriminating evidence, it is sufficient for the purposes of this case to mention that a gun was handed to the headman by the wife of the 2nd accused when he visited the house of the 2nd accused in the course of the inquiries on this day and the Government Analyst was of opinion that the spent cartridge, discovered by the Police at the scene, was fired from that gun.

In the result, the prosecution case which the jury had no doubt accepted contained as against the 1st accused in addition to the firing of the first shot, evidence of a strong motive or ill-will towards the deceased, as clearly disclosed by his own complaint to the Police made about 18 hours before the shooting, as well as evidence of a threat uttered in unmistakable language 3 to 4 hours before it. As against the 2nd accused, in addition to the evidence of his having fired the second shot, there were the words uttered by him immediately before firing that shot that the deceased was not yet dead and the finding of the weapon used for the commission of the offence in his house.

As against the 3rd and 4th accused, the items of evidence consisted of the relationship between them and the other two accused; their arrival, as I have analysed before, not together with, but 35 to 40 feet at least behind the 1st and 2nd accused; being armed with a katty and club respectively; and dragging the body of the deceased in the river. The irresistible inference of a common murderous intention had then to be drawn from

these four items of circumstantial evidence. On more than one occasion during the charge, the learned Commissioner directed the Jury as to the meaning of a common intention under our law and explained to them the constructive liability of those who participated in a common criminal enterprise. What he intended to convey to the Jury, of course, was that so far as the 3rd and 4th accused were concerned, even though they did not participate in the shooting, if the circumstances of their presence and the act of dragging the deceased to the river showed a community of purpose in a joint criminal enterprise of killing the deceased, they would be equally guilty of murder along with one or more others who actually caused the death. That indeed would have been a proper direction regarding the aspect of the presence of a common intention in the circumstances deposed to, and there is no doubt that those circumstances are consistent with the presence of a common intention. But, in a case based on circumstantial evidence, the Jury should also be instructed that before returning a verdict of guilty, they should be satisfied that the proved circumstances should not only be consistent with guilt, but inconsistent with any reasonable hypothesis other than that of guilt of the accused. The failure of the trial Judge to lay equal emphasis in his charge on this aspect would be a non-direction which amounts to a misdirection. For, in the absence of such a direction, a Jury, being unaware of the law, would only consider whether the circumstances are consistent with guilt and would not even appreciate the necessity of applying their minds at all to the question whether those circumstances are equally consistent with innocence, in which event the verdict has in law to be one of not guilty. That is not all. When the circumstances testified to are such that on careful analysis either view may be reasonably possible, it would, in appropriate instances be necessary to direct the Jury that if they are not able to make up their minds whether the proved circumstances are consistent only with guilt, their verdict should even then be one of not guilty as the case would, in that event, not have been proved beyond reasonable doubt. We feel that in this case such a direction may well have compelled the Jury to return a verdict favourable to the 3rd and 4th accused.

There are many reasons which persuade us to this conclusion. In the case against the 3rd and 4th accused the prosecution did not proceed on the basis that there was any motive for them to destroy the deceased. The fact that the 3rd and 4th accused did not go to the scene along with but followed closely the 1st and 2nd accused could in the circumstances of this case be pregnant with meaning. The 3rd accused was the aged father of the 1st accused who had openly uttered a threat at a tea kiosk a few hours before the incident. Was it not more than probable that the old man, having heard of this threat, himself rushed to the scene along with his younger son to prevent the execution of the threat by his impetuous elder son, the 1st accused? The katty and the club alleged to have been carried by the 3rd and 4th accused may require an explanation in the circumstances. Having heard that the deceased had threatened to kill his son the 1st accused if the latter went to the land, as mentioned in the complaint lodged by the 1st accused which I have referred to earlier, could the old father have called his younger son and also armed themselves with the katty and club not as weapons of offence but in order to defend themselves should the deceased turn aggressive? There was evidence from the prosecution itself that when the Grama Sevaka went for inquiries he found the 4th accused sawing some timber and evidence was called by the defence to show that he was so engaged even at the time of this alleged offence. Is it likely that if he had participated in the act of killing the deceased along with the 1st and 2nd accused he would have had sufficient composure to be following his ordinary pursuits in the afternoon? The question arises as to the inference to be drawn from the act of the 3rd and 4th accused in dragging the body of the deceased to the water, the circumstance which is strongly relied on by the prosecution. Even though he may have rushed to the scene to prevent the 1st accused from carrying out his

threat, having failed in his endeavour, was it improbable that, as a father, he may not have instinctively tried to protect his son and son-in-law from a murder charge by assisting in concealing the body? These situations are not at all improbable in human relations and conduct and if the directions indicated above were before the Jury which was divided as 5:2 in respect of these two accused even on the inadequate directions which were given, the Jury may well have entertained at least a reasonable doubt as to their guilt and pronounced a verdict of not guilty on the basis that the circumstances were not inconsistent with a hypothesis of innocence. In these circumstances it does not seem to us that this is a case in which the proviso to section 5 of the Court of Criminal Appeal Ordinance can be applied. Far from concluding that any reasonable Jury properly directed would without doubt have convicted the 3rd and 4th accused we are of the unanimous view that, had the proper directions been addressed to the Jury, which, even without such directions, were divided on this question they would most probably have returned a verdict of not guilty in respect of these two accused.

Appeals of 1st and 2nd accused-appellants dismissed.

Appeals of 3rd and 4th accused-appellants allowed.

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

CEYLON HOTELS CORPORATION LTD. *vs.* C. JAYATUNGE

S.C. 262/'68 (*F*)—*D.C. Colombo* 69122/*M*

Argued on: 24th, 26th, 30th June & 1st July, 1969.
Reasons delivered on: 15th July, 1969.

Injunction — Action for declaration and interim injunction against Ceylon Hotels Corporation—Ceylon Tourist Board—Rest House keeper employed by Board—When services of employees terminable—No statutory employment — No right to occupation of Rest House — Conduct and dealings of plaintiff before interim injunction to be considered—Courts Ordinance (Cap. 6) section 73—Civil Procedure Code, section 666 — Ceylon Tourist Board, Act No. 10 of 1966, section 56— Motor Transport Act, No. 48 of 1957 section 9 (3) (a) (b) and (c).

This was an appeal by the Ceylon Hotels Corporation from an order granting an interim injunction restraining the Corporation from ejecting the plaintiff, the Rest House-Keeper of a Rest House let to the Corporation by the Ceylon Tourist Board, from the Rest House.

On the preliminary objection, that the defendant has no right of appeal against the order granting the interim injunction,

Held: That the order was an appealable one under Section 73 of the Courts Ordinance. Section 666 of the Civil Procedure Code does not disallow that right of appeal and would apply in cases where the Court grants an interim injunction *ex parte* or where there are subsequent supervening circumstances which could not have been foreseen at the time the interim order was made.

Held also: (1) That Section 9(3)(a), (b) and (c) of the Motor Transport Act No. 48 of 1957 which is made applicable to employees of the Ceylon Tourist Board by the Ceylon Tourist Board Act No. 10 of 1966 has nothing to do with the powers of the Board to discontinue its employees.

(2) That the plaintiff's employment under the Board was not a statutory employment and the relationship beween the Board and the plaintiff was that of employer and employee.

(3) That the District Judge had misdirected himself when he thought that Section 9(3)(a) and (b) restricted the right of the Board to discontinue an employee only on the grounds of age or ill-health.

(4) That in this case the services of the plaintiff were in fact discontinued by the Board and the control and management of the Rest House had been handed over to the Corporation.

(5) That the plaint did not disclose a right in the plaintiff to the occupation of the Rest House.

(6) That the interim injunction ought not therefore to have been issued.

(7) That interim injunctions are granted on equitable grounds and the conduct and dealings of the parties before the application to Court should be taken into consideration.

Case referred to: *Vine v. National Dock Labour Board*, 1957 A.C. 488; (1957) 2 W.L.R. 106; (1956) 3 A.E.R. 939.

C. Ranganathan, Q.C. with *Paul Perera* and *C. Sandrasagara*, for the defendant-appellant.

E. R. S. R. Coomaraswamy with *Nihal Jayawickreme, C. Chakradaran, S. C. B. Walgampaya* and *P. H. Kurukulasuriya*, for the plaintiff-respondent.

Sirimane, J.

I am unable to uphold the preliminary objection taken by Mr. Coomaraswamy that the defendant has no right of appeal against the order of the learned trial Judge granting the plaintiff an interim injunction restraining the defendant from ejecting the plaintiff from the Kitulgala Rest House. That was an *inter partes* order made after inquiry at which both parties were heard. Such an order is an appealable one, and the right of appeal is granted to the party dissatisfied by section 73 of the Courts Ordinance, Chapter 6. Section 666 of the Civil Procedure Code does not disallow that right of appeal, and that section would apply in cases where the Court grants an interim injunction in the first instance before the other party is heard; or where there are subsequent supervening circumstances which could not have been foreseen, at the time the interim order was made.

The plaintiff was appointed by the Tourist Bureau as a Resthouse-Keeper in Grade II in 1957. The Tourist Bureau was a Government Department to which the Public Service Commission had delegated powers to make such appointments. The plaintiff thereby became a Government Servant subject to the Public Service Com mission Rules, Financial Regulations, Departmental Orders, etc.

On 1.5.1966, the Tourist Board Act 10 of 1966 came into force, and it is clear that the plaintiff was employed by the Tourist Board from that day. Though the plaintiff has not expressly stated that he accepted the employment, it is quite clear that he did. He received his salary from the Tourist Board and worked as its employee from 1.5.1966 till 31.3.1967. Counsel for him had admitted employment under the Board in his address in the Lower Court and I do not think there can be any doubt on this matter now.

Section 56(1) of the Ceylon Tourist Board Act reads as follows:

> "On the appointed date, those officers and servants of the Government Tourist Bureau or the Tourist Development Board, who do not belong to a transferable service of the Government, may be employed by the Board on such terms and conditions as shall be agreed upon by the officer and the Board; and in any such case Section 9(3)(a), (b) and (c) of the Motor Transport Act No. 48 of 1957 shall apply *mutatis mutandis* to any such officer or servant."

The plaintiff accepted his employment. Had he not, he would have been retired under the provisions of section 56(2). It is unnecessary to consider whether section 56(2) is *ultra vires* the Constitution for that situation does not arise here. This contention was not urged before us in appeal.

On acceptance of employment under the Board, the provisions of section 9(3)(a) applied to him and he ceased to be a public servant. Under section 9(3)(b)(i) and section 9(3)(b)(ii), any pension rights which had accrued to him while serving as a public servant, were conserved. Section 9(3)(b)(i) sets out the manner in which the *quantum* of his pension was to be ascertained for the purpose

of making an award. Section 9(3)(b)(ii) specified the *time* at which he would be entitled to payment.

Sections 9(3)(b)(i) and 9(3)(b)(ii)* read as follows:

(i) he shall be eligible for such an award under those Minutes, (i.e. the Minutes on Pensions) as might have been made to him if he had been retired from the public service on the ground of ill-health on the date of his permanent appointment to the staff of the Board.

(ii) the amount of any such award made under those Minutes shall not be paid to him unless his employment in the staff of the Board is terminated by retirement on account of age or ill-health or by the abolition of the post held by him in such staff or on any other ground approved by the Minister of Finance.

These sections have nothing to do with the powers of the Board to discontinue its employees. The plaintiff's employment under the Board was not a "statutory employment". The relationship between the Board and the plaintiff was that of an employer and employee.

The learned District Judge seriously misdirected himself when he thought that these two sub-sections, particularly 9(3)(b)(ii), restricted the right of the Board to discontinue an employee only on the grounds of age or ill-health. The Board had every right, like any other employer, to discontinue the services of an employee. If the discontinuance was wrongful, the employee would have a cause of action against the Board.

I think it is quite clear that the Board, by its circular letter dated 8.3.1967, discontinued the services of the plaintiff. The relevant parts of that letter read as follows:

"As intimated to you by the Chairman, while your services are not required by the Board from 1st April, 1967, in lieu of notice you will be paid by the Board till 8th June, 1967. You will however be under the control and supervision of the Hotels Corporation from 1st April, 1967. Those of you who have completed 10 years pensionable service in the Government up to 30.4.1966, will be paid a pension in terms of section 7(1)(i) of the Pension Minutes."

The Board apparently sent another letter dated 27.3.1967 addressed to the plaintiff personally, terminating his services, as stated in the affidavit of the General Manager of the defendant Corporation. It had been agreed at the hearing in the District Court that this matter should be decided on the affidavits filed, and this statement was not contradicted. In fact, in para 13 of his affidavit, the plaintiff himself referred to this letter. There is also the defendant's letter dated 28.3.1967 addressed to all Rest House Keepers, including the plaintiff, in which it states:—

"With reference to the letter dated 8th March, 1967 addressed to you by the Ceylon Tourist Board, you are hereby informed that *at the termination of your service under the Board*, your service will continue under the Ceylon Hotels Corporation, subject to your having had a good record of service and competency."

Those two letters make it quite clear that the plaintiff's services were terminated by the Board.

The learned trial Judge appears to have overlooked this vital fact. Having so terminated the plaintiff's services the Board handed over the control and management of the Rest-House to the defendant Corporation.

The plaintiff then worked on probation under the defendant in accordance with the terms in the letter dated 28.3.1967 to above. He went through a course of training and subjected himself to a test. He was found to be unfit and his temporary services were terminated as from 31.1.1968 by letter P1 dated 31.10.1967. The plaintiff then apparently made on appeal to the defendant that

* of the Motor Transport Act,

he be granted an extension. This appeal was granted on compassionate grounds and by letter dated 31.1.1968, the date of the termination of his services was extended to 30.4.1968. Having obtained this extension, the plaintiff filed this action on 27.4.1968.

Whether the plaintiff is entitled to a declaration that he is still a public servant on the ground that the Ceylon Tourist Board Act 10 of 1966 is *ultra vires* the Constitution, or to a declaration that he is still in the service of the Tourist Board on the ground that the letter terminating his services by the Board is *ultra vires* the powers of the Board — even so — he has no right to the occupation and control of the Rest-House. The plaint, *prima facie*, does not disclose a right to the occupation of the Rest-House in question. His causes of action appear to be based on contracts of services.

In *Vine v. National Dock Labour Board*, 1957 A.C. at page 488, Lord Keith said:—

> "Normally, and apart from the intervention of statute, there would never be a nullity in terminating an ordinary contract of master and servant. Dismissal might be in breach of contract and so unlawful, but could only sound in damages."

I do not wish to say more regarding the plaintiff's claims as the main case is pending. On the arguments adduced, and the material placed before us in the present appeal, I am of the view that the plaintiff is not entitled to an interim injunction. Such an injunction is granted on equitable grounds and the conduct and dealings of the parties before the application to Court should be taken into consideration. (Vide Volume 21 Simonds Edition of Halsbury, page 367).

The plaintiff accepted employment under the Board. When he was discontinued by the Board, he raised no protest. He then worked for the defendant on the conditions offered to him. When he was found unfit and discontinued, he obtained an extension from the defendant on compassionate grounds and at the end of the extension, he filed this action. He is an employee who, so far, has failed to show that he has any right to remain in occupation; but, he still remains in the rest-house and prevents the defendant, or anyone else, from controlling it.

I am of the view that an interim injunction should not have been granted to the plaintiff in this case.

The order of the learned District Judge is set aside. The defendant is entitled to costs of this appeal.

Weeramantry, J.

I agree.

Appeal allowed.

Present: **Sirimane, J.**

S. H. JAMALDEEN *v.* A. MANAFF AND ANOTHER*

S.C. 77/67 — *C.R. Kandy Case No.* 190

Argued and decided on: 28th October, 1967

Rent Restriction Act (*Cap.* 274), *as amended by Act No.* 12 *of* 1966 — *Action for ejectment on grounds of reasonable requirement and sub-letting — Premises whose rental value is less than Rs.* 100/- *— Section* 4(1)(*A*) *of the Amending Act — Does it render action null and void?*

Where the plaintiff sought for the ejectment of his tenant from premises to which the Rent Restriction Act was applicable and whose rental value was less than Rs. 100/- per mensem on the grounds that

(*a*) the premises were reasonably required for his occupation

(*b*) the defendant had sub-let the premises,

*For Sinhala translation, see Sinhala section, Vol. 19, Part 2 p. 4

Held: That Section 4(1)(a) of the Amending Act No. 12 of 1966 did not render the action null and void. It is applicable to pending actions for ejectment from such premises on grounds other than those set out in Section 12A(1).

P. Somatilekam, with *P. Edussuriya*, for the plaintiff-appellant.

B. J. Fernando, for the defendant-respondent.

Sirimane, J.

This was an action for ejectment filed by the plaintiff on 27.7.65 on the grounds:—

(*a*) That the premises were reasonably required by him for his occupation and

(*b*) That the defendant had sub-let these premises.

It was admitted that the Rent Restriction Act applied to these premises and that the rental value of the premises was under Rs. 100/- per month. Answer was filed by the defendant on 3.9.66. Between these dates (i.e. on 10.5.66) the Amending Act 12 of 1966 was passed. The effect of that Act is to further restrict a landlord's right to file an action for ejectment, where the rental value of the premises is under Rs. 100/- per month. But Section 12A(1) (introduced by Section 2 of the Amending Act) sets out those instances in which the landlord may still file an action for ejectment even where the rental value is under Rs. 100/- per month. Section 12A (1)(b) empowers the landlord to sue for ejectment when the premises have been sub-let by the tenant.

By Section 4 the provisions of this Act were made retrospective as from 20th July, 1962.

On the date that the Amending Act was passed, there would have been many actions pending in the Courts filed after 20.7.62 for ejectment on grounds not permitted under Section 12A(1) so that, in order to give effect to its retrospective operation, it was necessary that such pending actions should be declared null and void: Section 4(1) provides that *accordingly* an action instituted on or after 20.7.62 and pending at the time the Amending Act came into force should be deemed to have been null and void.

In my opinion the provisions of this Section are applicable to pending actions for ejectment (where the rental value of the premises is under Rs. 100/- per month) on grounds other than those set out in Section 12A(1).

The learned Commissioner has dismissed the plaintiff's action, and merely stated that he holds that the action pending before him is null and void by virtue of the Amending Act without specifying any reason why he had reached that conclusion. I am of the view that this was an action which the plaintiff, the landlord, could have filed even after the Amending Act came into operation retrospectively, as he claimed the right to eject the defendant on the ground of sub-letting as well. Section 4(1)a therefore does not render this action null and void.

I set aside the decree dismissing the plaintiff's action and send the case back for trial by the learned Commissioner.

It was submitted by counsel for the defendant that the pleadings are not clear as it has been stated in the plaint that notice to quit was given to the defendant *for the reason* that the premises were reasonably required by the plaintiff and that he had sub-let the premises. The plaintiff should be given an opportunity of amending the plaint if he so desires. He is entitled to the costs of this appeal.

Set aside and sent back.

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

L. A. MENDIS SILVA *v.* H. DAVID SILVA*

S.C. No. 245/66 (*F*) — *D.C. Balapitiya* — *L*/1178

Argued and decided on: 25th June, 1967

Civil Procedure Code, section 84— *Absence of plaintiff on trial date — Application for postponement by plaintiff's proctor — Refusal — Participation of plaintiff's Proctor in proceedings—Decree Nisi dismissing action — Application to set aside decree nisi within* 14 *days — Inquiry held after* 14 *days — Dismissal of application as* 14 *days had lapsed—Validity of order nisi—Whether proceedings inter partes.*

On the trial date the plaintiff was absent and his proctor applied for a date on the production of a medical certificate which the defendant challenged. The learned District Judge refused a postponement and entered decree *nisi*. Plaintiff sought to show cause within 14 days but after the inquiry which took place after the 14 days, the District Judge refused the application on the ground that the decree *nisi* had become absolute.

Held: (1) That as the plaintiff's proctor appeared in court to make the application for a date, it was not open to him to withdraw from the case at that stage and the proceedings on that day were *inter partes*. Therefore, the learned Judge had erred in entering a decree *nisi*.

Case referred to: *Andiappa Chettiar v. Sanmugam Chettiar* 33 NLR 217.

K. Shinya, for the plaintiff-appellant.

No appearance for the defendant-respondent.

Sirimane, J.

When this case was taken up for trial, the plaintiff was absent. His Proctor who was present in Court moved for a date and presented a medical certificate to Court. I think it is settled law now, that when a Proctor appears in Court when a case is called, such appearance would constitute an appearance for the party for whom he appears unless the Proctor expressly informs the Court that he does not, on that occasion appear for the party. (Vide *Andiappa Chettiar v. Sanmugam Chettiar* 33 NLR 217). The medical certificate was challenged and some evidence was led. The record shows that the Proctor participated in the proceedings for he was asked to cross-examine the witness although he chose not to put any questions to him. Having appeared for his client it was not open to the Proctor to withdraw from the case at that stage; and the proceedings have been inter partes.

The learned Judge, however, has entered a decree nisi, against which the plaintiff had sought to show cause within 14 days, but the inquiry itself appears to have been held after the 14 days had elapsed. The learned Judge has refused the plaintiff's application, not on its merits, but on the ground that the decree *nisi* had become absolute. We think that the order of the learned District Judge, made on 6.2.66 entering decree *nisi* and all orders consequent on that order should be set aside and the case sent back for trial. The plaintiff will however pay the defendant the costs of the abortive trial date, 6.2.66. All other costs will be costs in the cause.

Siva Supramaniam, J.

I agree.

Order set aside and sent back.

*For Sinhala translation, see Sinhala section, Vol. 19, part 1, p. 2.

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

J. A. WIMALAWATHIE *v.* A. D. J. GOONERATNE*

S.C. No. 494/65 (*F*) — *D.C. Panadura* — 8409/*LD*

Argued on: 10th and 14th May, 1969
Decided on: 1st June, 1969

Delict — Damage by falling tree — Tree standing on defendant's land, not overhanging but slanting towards plaintiff's house and land adjoining — Failure on part of defendant to take steps to prevent tree falling, though aware of dangerous condition of tree — Negligence — Tree falling on plaintiff's house — Damage caused — Is defendant liable ?

Where an arecanut tree standing on the defendant's land, which did not overhang the plaintiff's house but stood 14 feet away from it, and was slanting towards it, crashed on it causing damage thereto, and where the evidence established that the defendant had been aware of the dangerous condition of the tree for about three years prior to the said damage.

Held: That although the tree did not overhang the plaintiff's house, the principles laid down in *Jinasena v. Engeltina* (1919) 21 N.L.R. 445 are applicable to the facts of this case, and as the defendant had been guilty of negligence in that he failed to take any steps to prevent the tree falling despite his knowledge of the potential danger therefrom, he was liable for the damage caused.

Cases referred to: *Jinasena v. Engeltina* (1919) 21 N.L.R. 445.
Darlis Appu v. David Singho (1948) N.L.R. 241.
Podihamy v. Jayaratne (1946) 47 N.L.R. 484.

H. W. Jayawardene, Q.C., with *L. W. Athulathmudali* and *G. S. Samaraweera*, for the defendant-appellant.

G. P. J. Kurukulasuriya, for the plaintiff-respondent.

Alles, J.

The plaintiff instituted this action against his neighbouring landowner to recover damages sustained in consequence of an arecanut tree which admittedly stood on the defendant's land falling across the concrete roof of the plaintiff's house resulting in some cracks being caused to the roof.

The house was built in 1957 but was not in occupation and the colour washing and plastering had not been completed when the tree fell on the roof on 6th August, 1962. On 26th November, 1959 the plaintiff by P2 wrote to the Government Agent that there were three very old arecanut trees and two coconut trees which seriously endangered the safety of her house and seeking the intervention of the authorities to have them cut. It was however not possible to arrive at an amicable arrangement with the defendant to have these trees cut. In spite of some confusion in regard to the identity of the tree which fell on the plaintiff's house, the learned District Judge has accepted the evidence of the plaintiff that the tree that crashed on the house was one of the arecanut trees referred to in P2. The defendant was therefore aware of the dangerous condition of the tree from 1959. The evidence of the plaintiff was that the tree was standing 14 feet away from the house and slanting towards the house. It was however not overhanging the plaintiff's land or the house.

Although the tree did not overhang the plaintiff's house, I think the principles laid down in *Jinasena v. Engeltina* (1919) 21 N.L.R. 445 are applicable to the case of a tree which causes damage to the property of a neighbouring landowner, provided the owner of the tree is aware of the dangerous condition of the tree. Thus in *Darlis*

*For Sinhala translation, see Sinhala section, Vol. 19 part 1, p. 1

Appu v. David Singho (1948) 50 N.L.R. 241, the defendant who took no steps to prevent a coconut tree, which to his knowledge, was a potential source of danger, from falling on his neighbour's house was held to be guilty of negligence. In similar circumstances in *Podihamy v. Jayaratne* (1946) 47 N.L.R. 484, Soertsz, A.C.J., held that in respect of a dangerous tree (it was not clear on the evidence that the tree was overhanging the plaintiff's land or house) "apart from the principle involved in the maxim *sic utere tuo ut alienum non laedas* there devolved on the defendant a duty to take care at least from the times his attention was drawn to the dangerous nature of the tree".

We are therefore satisfied in the circumstances of this case that the defendant was liable for the damage caused to the concrete roof of the plaintiff's house.

There only remains the question of the quantum of damages to which the plaintiff would be entitled. The plaintiff originally claimed Rs 3,000/- as damages, then asked for Rs 1,577/77 in her letter of demand and finally was awarded Rs 1,000/- which was the sum she claimed in the plaint. Her expert Philipiah, a Chartered Civil Engineer described the cracks on the roof as lines with no appreciable width. The width he said was only a pinpoint. Of the three cracks only one had gone through the entire width. The learned District Judge has remarked that "Philipiah has not given evidence which we expect from an expert though there is no reason to doubt his *bona fides*". The defendant's expert Ahangama was a licenced Surveyor and estimated the damage at only Rs 50/- because in his view it was unnecessary to remove the entire roof. The only reason which the Judge gives for not accepting Ahangama's estimate is because he was not an expert on buildings. We think however having regard to the damage caused a reasonable estimate would be Rs 250/-. We therefore enter judgment and decree in favour of the plaintiff in a sum of Rs 250-/. It was that plaintiff's exaggerated claim that necessitated this action being instituted in the District Court and in the circumstances we direct that each party should bear their own costs. We do not propose to interfere with that part of the Judge's order in which he had directed that the defendant should cut down an arecanut tree and two coconut trees which overhang the plaintiff's house as the defendant has agreed to have these trees cut.

Pandita-Gunawardane, J.

I agree.

Appeal dismissed.
Decree varied.

Present: **de Kretser, J.**

R. PEDURU FERNANDO *v.* BINGIRIYE SRI SOMALOKA NAYAKE THERO

S.C. 123/67 — *C.R. Kuliyapitiya* 1427/*L*

Argued on: 17th November, 1968
Decided on: 12th March, 1969

Evidence Ordinance, Section 57 — *Judicial notice — Proclamation published under Section* 3 *of Buddhist Temporalities Ordinance—Contents of such proclamation embodied in law Book—Authors stating that such contents based on a certified copy issued by Public Trustee — Is the court entitled to take judicial notice of such Proclamation*?

Where the authors of the book entitled "Kandyan Law and Buddhist Ecclesiastical Law" gave a list of the temples brought under the operation of section 4(1) of the Buddhist Temporalities Ordinance stating that it is based on a certified copy issued by the Public Trustee of a proclamation published under section 3 of the said Ordinance and the Court on the invitation of counsel took judicial notice of it,

Held: (1) That the court was entitled to take Judicial notice of the said work as an appropriate book of reference to be resorted to for its aid under section 57 of the Evidence Ordinance.

(2) That therefore, the courts must take notice of such proclamation.

Mark Fernando, for the defendant-appellant.

W. D. Goonesekera, for the plaintiff-respondent.

De Kretser, J.

The plaintiff sued the defendant claiming to be the lawful Viharadhipathi of Sri Pushparama Vihara at Tawalle for a declaration of title to the land called Pinkumbura described in the schedule to the plaint alleging the land was Sangika property and for ejectment damages and costs alleging that the defendant between 23.3.61 and 16.4.61 had encroached upon that land and was in unlawful possession of it.

The learned Commissioner (Mr R. Paramaguru) in a carefully considered judgment gave judgment for the plaintiff declaring him as controlling Viharadhipathi of the temple entitled to the premises in dispute and ordering the ejectment of the defendant from them and awarding the plaintiff costs and damages as set out in the judgment. The defendant has appealed. I reserved order as I wished to consider the submission made by Counsel for the appellant that it has not been proved as required by law that the temple in question was one exempted from the operation of section 4 of the Buddhist Temporalities Ordinance Cap 318 of Vol 10 of the LEC. His submission was that that could only be proved by the production of the relevant proclamation published in the Government Gazette.

"In view of the number of temples to be exempted being far in excess of the number to be regulated by this Ordinance the various proclamations published under section 3 stated that all temples other than those mentioned in the respective schedules annexed to the proclamations were exempted from the operation of section 4(1) of the Ordinance" say the authors of "Kandyan Law & Buddhist Ecclesiastical Law " who in this work give a list of the temples brought under the operation of section 4(1) and state it is based on a certified copy issued by the Public Trustee on the 28th November, 1962. Counsel for the plaintiff invited the Commissioner to take judicial notice of this work. Section 57 of the Evidence Ordinance provides that a Court may resort for its aid to appropriate books or documents of reference. It is not contended that this treatise on Buddhist Ecclesiastical Law is not an appropriate book of reference. The Commissioner has referred to this book and in consequence has become aware of the proclamations published in the Government Gazette in terms of section 3 of the Ordinance. The Court must take notice of such proclamations. What is more important Counsel for the defendant was aware of what the Court was being asked to do. No attempt was made to show that there was any other proclamation dealing specifically with the temple presumably because there was none. In my view on the material placed before the Court the Court correctly came to the conclusion that this Tawalle temple is a temple exempted from the operation of section 4 of the Buddhist Temporalities Ordinance. The appeal is dismissed with costs.

Appeal dismissed with costs.

Present: **de Kretser, J.**

PERIYATHAMBI BALASUBRAMANIAM *v.* THE COMMISSIONER OF INLAND REVENUE

Application in revision S.C. 305/69 — M.C. Pt. Pedro 2492

Argued on: 19th July, 1969
Decided on: 28h August, 1969

Stamps Ordinance (Cap. 247) — Application under Section 54 to recover deficiency of stamp duty and penalty on deed of donation from person accepting the gift on behalf of donee — Is person accepting liable to pay such deficiency — Test to determine "person executing a document".

Held: That a person, who signed a deed of donation to show that he accepted the gift on behalf of his brother who did not have the mental capacity to accept, could not be said to be a person who executed the deed of donation. Consequently he is not liable to pay any deficiency of stamp duty due thereon or to any penatly arising therefrom.

Per **de Kretser, J.** "As Viscount Sumner has pointed out in *Puranchand v. Manmothunath*, 1928 A.I.R. (P.C.) at Page 38 a person who executes a document is not merely someone who signs the document, but means something more *namely the person who by a valid execution enters into an obligation under the instrument.*"

Case referred to: *Puranchand v. Manmothunath*, 1928 A.I.R. (P.C.) p. 38

S. Ambalavanar, with *M. Radhakrishnan* and *W. H. Perera*, for the respondent-petitioner.

Kumar Amarasekera, Crown Counsel for the Attorney-General.

de Kretser, J.

The Commissioner of Inland Revenue had made this application under section 54 of the Stamps Ordinance Cap. 247 of the L.E., seeking to recover Rs. 618 — being Rs. 309 deficiency and Rs. 309/- penalty from P. Balasubramaniam the present petitioner who on behalf of his brother Siva Subramaniam had signed Deed No. 16920 of 25.2.61 — a deed of donation by which Parupathipillai the widow of Periyathambi had gifted to her son Sivasubramaniam the properties in the schedule to the deed for the reason set out — in the deed "as the donee Periyathambi Sivasubramaniam appears to be mentally deranged at present, I Periyathambi Balasubramaniam have accepted the donation on his behalf."

The Magistrate of Point Pedro (Mr. K. Viknarajah) allowed the application holding that the respondent Balasumbramaniam was a person "who had executed P1 (the deed of donation) by signing to accept the donation and I further hold that he is liable to pay the deficiency of Stamp Duty Rs. 309/- and the penalty Rs. 309/- both aggregating to Rs. 618/-.

P. Balasubramaniam has sought the revision of this Order.

The rule of Law which requires acceptance by a competent person is based on the principle that donation is a contract to which there must be two parties. As in the case of other contracts no obligation arises until acceptance by the donee or by some person qualified to act on his behalf. But acceptance of a donation is a mere matter of proof and acceptance on the face of the deed by some person or other is not necessary. It will then be seen that the Magistrate is wrong in coming to the conclusion that because P. Balasubramaniam has signed to show that he accepted the gift on

behalf of his brother who did not have the necessary mental capacity to accept he was therefore a person who had executed the deed P 1. As Viscount Sumner has pointed out in *Puranchand v. Manmothunath*, 1928 A.I.R. (P.C.) at page 38, a person who executes a document is not merely someone who signs the document, but means something more, **namely the person who by a valid execution enters into an obligation under the instrument.** Tried by this test too, it will be seen that Balasubramaniam cannot be said to be a person who has executed the deed. The application in revision is allowed and the order of the learned Magistrate is set aside.

Appeal allowed and Order set aside.

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

THE ATCHUVELY MULTI-PURPOSE CO-OPERATIVE SOCIETY LTD.

v.

SELLATURAI BALASINGHAM & OTHERS

S.C. No. 106/67 (*Inty*) — *D.C. Jaffna Case No.* 268/*A*

Argued on: 25h August, 1968.
Decided on: 11th July, 1969

Co-operative Societies Ordinance— Award made thereunder — Enforcement of award in terms of Section 53A of the Co-operative Societies (Amendment) Act No. 27 of 1964 — Issue of Writ by Court— Is judgment-debtor's dwelling house liable to be seized and sold?— Civil Procedure Code, section 218 proviso, as amended by Section 2(2) of Act No. 49 of 1958.

Held: That where a court directs a writ to issue for the enforcement of an award under section 53A(4) of the Co-operative Societies Ordinance, the judgment-debtor is not entitled to the benefit of the exemption of his dwelling house from seizure and sale conferred under section 218 of the Civil Procedure Code as amended by section 2(2) of Act No. 49 of 1958.

Per **Pandita Gunawardene, J.** " It is pertinent to note in this regard that section 53A(4) (Co-operative Societies Ordinance) expressly provides that sections 226 to 297 Civil Procedure Code shall apply. These would, therefore, be the only sections of the Civil Procedure Code in the Chapter dealing with 'executions' which would become operative. They are sections which deal with, 'the duties of the Fiscal on receiving writ; modes of seizure;' 'claim to property seized;' and 'sale of movable and immovable property;'

A. C. Gooneratne, Q.C., with *S. Sharvananda*, for the petitioner-appellant.

No appearance for the respondent-respondent.

Pandita-Gunawardena, J.

The provision in the Co-operative Societies Ordinance which stipulates for enforcement of awards is Section 53A (Co-operative Societies (Amendment) Act 27 of 1964).

Section 53A (4) empowers the Registrar upon an award being made in the matter of a dispute that a sum of money due by one party to another has not been paid, to issue a certificate to the District Court "and the Court shall thereupon direct a writ of execution to issue to the Fiscal authorizing and requiring him to seize and sell all or any of the property movable and immovable of the defaulter, or such part thereof as he may deem necessary for the recovery of such sum, and the provisions of sections 226 to 297 of the Civil Procedure Code shall, *mutatis mutandis*, apply to such seizure and sale."

In this case upon application made to him under section 53A(4) the Learned Additional District Judge directed writ of execution to issue to the Fiscal for seizure and sale of properties belonging to the respondent for default of payment on the award. Pursuant to the Court's direction the Fiscal seized the dwelling house of the respondent.

The respondent's contention is that in view of section 218 Civil Procedure Code as amended by section 2(2) of Act No 49 of 1958, his dwelling house is not liable to seizure and sale. The Learned Additional District Judge has accepted this contention and ordered that the property seized be released from seizure. The appellant, the Atchuvely Multi-purpose Co-operative Society Ltd. appeals from this Order.

Chap. 22 Civil Procedure Code deals with executions. Section 217 enacts, "A decree or order of court may command the person against whom it operates —

(A) to pay money;
(B)
(C)
(D) } not relevant

Under section 218 where the decree to pay money remains unsatisfied the judgment-creditor is entitled to seize and sell, among others, the immovable property of the judgment-debtor. There is however the proviso to this section which gives a list of items of property which shall not be liable for seizure or sale. By section 2(2) of Act 49 of 1958, the dwelling house of the judgment-debtor has been added to the list of excepted property.

It has been argued for the appellant that section 218 and its amendment only applies to seizure and sale in enforcement of a decree or order of Court; that what is sought to be enforced here is not a decree or order of a Court but an award under the Co-operative Societies Ordinance.

It would appear to me that there is substance in this argument. In terms of section 53A(4) of the Co-operative Societies Ordinance the Court does not enter a decree or make any order upon the award submitted to it. The court has no option but to direct that writ of execution do issue, not upon a decree or order entered by Court but on the award filed before it. In that view of the matter the proviso to section 218 cannot be said to apply. It is pertinent to note in this regard that section 53A(4) (Co-operative Societies Ordinance) expressly provides that sections 226 to 297 Civil Procedure Code shall apply. These would, therefore, be the only sections of the Civil Procedure Code in the Chapter dealing with 'executions' which would become operative. They are sections which deal with, 'the duties of the Fiscal on receiving writ: modes of seizure;' 'claim to property seized:' and 'sale of movable and immovable property:'

Had the Legislature intended that the judgment-debtor be entitled to the benefit of the proviso to section 218 Civil Procedure Code in the enforcement of an award under section 53A(4) (Co-operative Societies Ordinance) it would, I expect, have so provided. In the absence of such a provision I find myself unable to agree with the order of the Learned Additional District Judge releasing the respondent's property from seizure. The order directing the Fiscal to release the property from seizure is set aside.

Samerawickrame, J.

I agree.

Appeal allowed.

Privy Council Appeal No. 1 *of* 1969

Present: **Lord Morris of Borth-y-Gest, Lord Hodson, Lord Upjohn, Lord Wilberforce and Lord Diplock**

VELAYUTHAMPILLAI MANDIRAMPILLAI & ANOTHER

v.

THE ATTORNEY-GENERAL OF CEYLON

From

THE SUPREME COURT OF CEYLON

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

Delivered on: 28th July, 1969

Customs Ordinance (*Cap.* 235) — *Importation of prohibited goods — Forfeiture — Liability to forfeiture also of goods "made use of in any way in the concealment" of such prohibited goods— Meaning of "concealment" in Section* 125,

The Appellants (father and son) carried on business in partnership in Jaffna as general merchants and importers and exporters. In May 1961, the father on behalf of the firm ordered 50 bags of Fenugreek seed from a firm in India of which the son was sole proprietor. The Indian firm shipped 50 packages described on the Bill of Lading as being "Bags Fenugreek" and having the marks "Mani" for carriage to Jaffna, and the son as sole proprietor of this firm made an export application in India in respect of a consignment of goods described as Fenugreek seed and consisting of 50 bags with the marks "Mani". When the 50 bags arrived in Jaffna, the agent of the appellants, as importers of the goods, signed a Bill of Entry in respect of the goods wherein they were described as 50 bags Fenugreek seeds (Mathe Seeds). Fenugreek seeds are free of duty on importation. At the request of the Customs, the appellants' Agent produced for inspection samples of Fenugreek seeds. The Assistant Collector of Customs independently took samples and found that 20 bags did not contain Fenugreek seeds but contained poppy seeds the importation of which is prohibited. It was further found that though all 50 bags had the mark 'Mani' there was a distinction between the bags containing Fenugreek seeds and those containing poppy seeds in that on the former there was an additional mark (218X). The Assistant Collector thereupon (*a*) Ordered the confiscation of the 20 bags containing poppy seeds imposing also a penalty under Section 127 of the Customs Ordinance; which he later mitigated and (*b*) ordered the confiscation of the 30 bags containing Fenugreek seeds. The appellants contested the validity of the latter order.

Held: That the order confiscating the bags containing the Fenugreek seeds was lawful in that these were made use of in contravention of section 125 of the Customs Ordinance in the concealment of bags containing poppy seeds liable to forfeiture under the Ordinance.

Their Lordships were of the view that the word "concealment" was not limited in the context of section 125 to cases where there was something in the nature of a *secret* disposition having the result that goods were hidden or were in some way removed from observation or were placed somewhere as to avoid detection.

T. O. Kellock, Q.C. with *Endene Cotron* and *M. I. Hanavi Haniffa* for the appellant.

E. F. N. Gratiaen, Q.C. with *R. K. Handoo* for the respondent.

Lord Morris of Borth-y-Gest

The appellants who are father and son carried on business at all relevant times in partnership at Jaffna under the business or firm name of Sana Mana Rawanna & Co. The business was that of wholesale and retail general merchants and importers and exporters. In May, 1961 the father, on behalf of the firm, ordered 50 bags of Fenugreek seed from a firm in Tuticorin. The son was the sole proprietor of that firm. They were exporters and importers. The goods were to be shipped direct to Jaffna. The firm in Tuticorin shipped packages, 50 in number, described on the Bill of Lading as being "Bags Fenugreek", and having the marks "Mani", for carriage to Jaffna. The son as the sole proprietor of the firm in Tuticorin made an export application there in respect of a consignment of goods described as Fenugreek seed and consisting of 50 bags with the marks "Mani".

When the vessel on which the 50 bags had been shipped (the *Nooraniah*) reached its destination at Jaffna, an agent of the appellants, as importers of the goods, signed a Bill of Entry in respect of the goods. They were described as 50 bags Fenugreek seeds (Mathe seeds): the goods were entered as having a value of Rs. 5,644 Cts. 65. The agent, at the request of the sub-collector of Customs, went to the Customs warehouse into which the 50 bags had been carried and looked at them and took a sample of Fenugreek seeds which he produced for inspection. Fenugreek seeds are free of duty on importation. What then happened was that the Assistant Collector of Customs sent his officers to take samples from the 50 bags. They found that some of the bags did not contain Fenugreek seeds. Thirty of the bags did but 20 of them contained poppy seeds. The importation of poppy seeds is prohibited. It was further found that though all 50 bags had the mark MANI there was a distinction between the 30 bags and the 20 bags in that on the 30 but not on the 20 there was the additional mark "218X".

As a result of what was discovered the Assistant Collector of Customs made certain orders. He ordered the confiscation of the 20 bags of poppy seed. He had full power to make that order. It has not been contended otherwise. Furthermore, under section 127 of the Customs Ordinance (Chapter 185) now section 129 he imposed a penalty of Rs. 45,000, which penalty however, he mitigated to Rs. 15,000. No question arises in the present proceedings in regard to the imposition of that penalty. But furthermore he made an order stated to be under section 123 of the Customs Ordinance now section 125 of Chapter 235 for the confiscation of the 30 bags of Mathe seed. The appellants contest the validity of that order. They claimed that they were entitled to have delivery of those 30 bags and claimed that there was illegal and wrongful detention of them by the Assistant Collector of Customs. Having given notice to the Collector of Customs that they intended to commence proceedings for the restoration to them of the goods or to recover their value, which was stated to be Rs. 3,600, the appellants gave security to the satisfaction of the Collector in the sum of Rs. 5,000 (see section 154 of the Customs Ordinance Chapter 235) and received the 30 bags. After due notice given, the appellants, by their Plaint dated 1st August 1961, commenced their proceedings. Claiming that they had been entitled to take delivery of the 30 bags, their claim was in substance for a refund of the security of Rs. 5,000 which they had deposited with the Collector of Customs. The issue in the action was therefore whether the detention and confiscation of the 30 bags was lawful.

The action was tried in the District Court of Jaffna. The first appellant, the father, gave evidence: the second appellant, the son, did not give evidence. The learned judge dismissed the action with costs. In his judgment (in March 1965) his conclusions were definite. He considered that the facts clearly showed that the two appellants had planned to introduce into the consignment of what should have been 50 bags of Fenugreek seeds, 20 bags which, instead of containing such seeds, in fact contained poppy seeds. He held that that was what the second appellant (the son) had done. He rejected an explanation which had been suggested by the first appellant (the father) in a statement to the Assistant Collector to the effect that a mistake had been made by the exporter in India. "The evidence in this case points to only one conclusion namely that the plaintiffs had planned to conceal poppy seeds in the consignment that was sent by the second plaintiff as sole proprietor of Velautham Pillai and Company."

The learned judge further held as follows: "The burden was on the Crown to prove beyond reasonable doubt that the plaintiffs and their agents had put together the 50 bags sent by Velautham Pillai and Company on the *Nooraniah* to the plaintiff in such a way that 50 bags of Fenugreek seeds were used to conceal 20 bags of poppy seeds. I hold that sufficient evidence has been led to satisfy the Court beyond reasonable doubt that this is exactly what happened." There had been submissions made to the learned

judge in regard to the onus of proof and as to whether section 152 of the Customs Ordinance Chapter 235 was or was not applicable. In this appeal counsel for the respondent was prepared to make a submission that the onus of proof as to whether the forfeiture by the Crown of the 30 bags of Fenugreek (or Mathe) seeds was lawful was not upon the Crown but that it was for the plaintiffs in the action to prove that the forfeiture was unlawful and that they had not done so. Their Lordships did not find it necessary to hear submissions in regard to these matters and express no opinion in regard to them.

Following his conclusions as summarised above the learned judge answered the first of the issues on which the case went to trial by saying that the refusal by the Customs to deliver the 30 bags and the detention of the 30 bags were lawful. The contention which the appellants submit in this appeal has relevance to that answer. In answering another of the issues the learned judge stated that under section 47 of the Customs Ordinance (Chapter 235) there was entitlement to forfeit the 30 bags for the reason that the goods which the plaintiffs had claimed (*i.e.*, the 50 bags lying in the warehouse) did not agree with the particulars in the Bill of Entry; those particulars referred to 50 bags Fenugreek seeds whereas actually only 30 contained such seeds while 20 contained poppy seeds.

The concluding words of section 47 are as follows: "but if such goods shall not agree with the particulars in the Bill of Entry the same shall be forfeited, and such forfeiture shall include all other goods which shall be entered or packed with them as well as the packages in which they are contained." The learned judge held that though in his order the Assistant Collector, had not expressly referred to section 47 it was open to the Crown to justify the forfeiture because in any event section 47 had been contravened. The answer which the defendant had filed in the action had made no mention of section 47 and by an Order made in March, 1963 the District Court rejected an Amended Answer in which it was sought to introduce section 47. The trial proceeded on the original answer and no issue had been based on section 47. The appellants submitted that the learned judge was wrong in holding that the 30 bags could be forfeited under section 47 inasmuch as they were not in fact forfeited under that section and they submitted that matters had proceeded on the basis that the forfeiture of those bags was under section 125 and not under section 47 and furthermore they submitted that section 47 was not contravened. The respondent was prepared to make a submission to the effect that the District Court had been in error in rejecting the Amended Answer and in rejecting certain issues which had been framed by defendant's counsel. Their Lord ships did not find it necessary to hear the respondent's submission and accordingly express no opinion on any of these matters. Nor does any occasion arise to consider any of the contentions referable to section 47 if on the findings of fact of the learned judge the confiscation of the 30 bags was lawful under the provisions of section 125.

From the judgment of the learned judge the plaintiffs appealed to the Supreme Court of Ceylon. On 27th November, 1967 the appeal was dismissed with costs. No oral or written judgments were delivered.

The central contention of the appellants was that the forfeiture and continued detention of the 30 bags was not lawful. In his order the Assistant Collector of Customs stated that the forfeiture was made under section 123. That is now section 125 of the Customs Ordinance Chapter 235. It is in the following terms:

> "125. All goods and all ships and boats which by this Ordinance are declared to be forfeited shall and may be seized by any officer of the customs; and such forfeiture of any ship or boat shall include the guns, tackle, apparel, and furniture of the same, and such forfeiture

of any goods shall include all other goods which shall be packed with them, as well as the packages in which they are contained; and all carriages or other means of conveyance, together with all horses and all other animals, and all other things made use of in any way in the concealment or removal of any goods liable to forfeiture under this Ordinance, shall be forfeited."

The finding of the learned judge having been that the appellants had "planned to conceal poppy seeds in the consignment and that the 30 bags were used to conceal 20 bags of poppy seeds", it was submitted on behalf of the appellants that the learned judge had misconceived the meaning in the section of the word "concealment" and that the facts of the case did not warrant a finding that there had been "concealment". It was submitted that the word concealment, in its context, involved that there should be something in the nature of a secret disposition having the result that goods were hidden or were in some way removed from observation or were placed somewhere so as to avoid detection. Reference was made in support of this submission to the wording in certain sections of the Customs Ordinance Chapter 235 (such as sections 30, 75, 107, 129, 132 and 150). Accordingly it was argued that on the facts of this case there was no concealment of the 20 bags: that they were fully exposed to view: that they were in no way hidden or placed in any such way that would not be seen or observed: that accordingly even if the appellants had planned in the way that the learned judge thought that they had planned even so the 30 bags were not used in the concealment of the goods which were liable to forfeiture.

While the word concealment in its context may fully embrace the conceptions above noted their Lordships cannot accept that it does not cover the situation that existed in the present case. On the findings of the learned judge the appellants planned to import prohibited goods which were liable to forfeiture. The prohibited goods consisted of the poppy seed which would be contained in some of the bags of a group of bags which were described as all containing duty free permitted imports. In the normal course of event there would be every chance that the plan would succeed. Provided that a sample was taken from a bag described as containing Fenugreek seeds and in fact containing them there would be every likelihood that the Customs would readily accept that all the bags contained what they were said to contain. On the facts as found the Customs were induced to believe that the unseen contents of the 50 bags were all the same and were all permissible imports. The whole scheme as found by the learned judge involved that there should be an intentional suppression of the true facts.

The means employed in the scheme to smuggle in the poppy seed which was in the 20 bags involved that there should be 50 bags all having the one mark and all purporting to contain the same kind of goods and therefore goods of the same value and involved that the 30 bags should truly contain what they were said to contain. The use in that way of the 30 bags was an essential part of the plan. It was made to appear that the contents of the 20 bags were the same as those of the 30 so that all 50 would seem to be the same with the result that the prohibited goods could pass through with the others and under the cloak or protection of apparent legality. The addition of a special mark (218X) to the 30 bags, would enable samples to be taken from these bags and so avoid detection of the illegal contents of the remaining 20 bags. If then the question is posed whether the 30 bags and their contents were "made use of in any way in the concealment" of poppy seeds liable to forfeiture their Lordships consider that the answer must be in the affirmative. For these reasons their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the costs of the respondent.

Appeal dismissed.

Present: **Sirimane, J. and de Kretser, J.**

PREMADASA *v.* IRANE ATAPATTU

S.C. 263/66(*F*)—*D.C. Colombo Case No.* 50/*R.E.*

Argued on: 5th July, 1968
Decided on: 22nd July, 1968

Landlord and tenant—Rent Restriction Act, sections 5 *and* 7*—Original premises assessed prior to November,* 1941 *— Premises divided after November,* 1941 *and separately assessed — Computation of "authorised rent" of new premises — Interpretation of proviso to section* 5(1).

The premises in question were originally part of a larger premises which had been assessed prior to November 1941, and bore assessment No. 53. The original building was subsequently divided into two premises, renumbered 53 and 55 and assessed as such for the first time in 1948. What was the "authorised rent" of the newly constituted premises was the question at issue.

Held: (1) When premises which have been assessed prior to November, 1941 are divided and re-assessed after that date, the new premises take the place of the old as separate entities.

(2) The authorised rent for each of the newly assessed premises should be based upon the annual value fixed when they are first assessed as separate premises and not on the annual value of the original premises.

Per **Sirimane, J.** "The proviso" (to Section 5(1) of the Rent Act) "was enacted for the benefit of the tenant who, if he finds that the first assessment of a building or a part of it, after the appointed date, is such that it compels him to pay a high rent, then he may seek the assistance of the Board to obtain relief. It is no authority for the proposition that where premises (as defined in the Act) are first assessed or first separately assessed after the appointed date, and the tenant chooses not to make any application to the Board, then the provisions of section 5(1) relating to assessments made after the appointed date become inoperative."

Cases referred to: *Chettinad Corporation Limited v. Gamage,* (1960) 62 N.L.R. 86.
Sally Mohamed v. Syed Mohamed, (1962) 64 N.L.R. 486.

C. *Ranganathan, Q.C.,* with *S. W. Jayasuriya* and *W. Karthigesu,* for the defendant-appellant.

E. A. G. de Silva, for the plaintiff-respondent.

Sirimane, J.

The only question we were called upon to decide in this appeal was whether the learned District Judge was right in basing his calculation of the "authorised rent" for the premises in question on an assessment made in 1948. On that basis the authorised rent (it was conceded) was Rs. 252.72, and the defendant was in arrears of rent and liable to be ejected.

The Defendant's case is that the premises had been assessed prior to November, 1941 and the correct basis for calculation of the authorised rent was the assessment made in that year. It was conceded again that had the premises in question been assessed in 1941, the correct authorised rent would be Rs. 171.92, and the Defendant would not be in arrears. According to Counsel for the Defendant he would have paid rent in excess of the authorised rent calculated on that basis, and after setting off the excess so paid for the period during which he was in arrears (1.6.61 to 31.8.63) there would still be due to him from the plaintiff a sum of Rs. 723.40 after taking into account various payments he had made. These figures were not disputed.

The premises in respect of which this action has been brought and described in paragraph 2 of the plaint bearing Assessment No. 53, is *part* of an old building. Any doubts as to the exact meaning of the word "premises", have now been

dispelled by the definition of that word in section 11 of the Rent Restriction (Amendment) Act 10 of 1961. "Premises" mean any building *or part of a building* together with the land appertaining thereto.

The evidence led in the case which the learned District Judge has accepted shows that the old building consisted of two such premises Nos. 53 and 55, which had been assessed as such for the first time in 1948. (No. 55 had later been sub-divided, but that fact is not material for the decision of this case). In fact, an agreement entered into between the parties on 25.2.57 referred to the two different "premises" Nos. 53 and 55.

The learned District Judge was therefore right, in my opinion, when he reached the conclusion that the subject matter of the present action "as it exists today was not in existence as a separate entity in 1941."

The old building had been assessed prior to 1st November, 1941. It then bore the No. 53. The argument for the Defendant is that once this had been done, the standard rent could never be changed by subsequent assessments of different parts of the building. It was submitted that the standard rent remained the same as in 1941, for each one of the different parts of the building which were assessed as separate entities in 1948. The argument was based entirely on the second proviso to section 5 of the Rent Restriction Act Cap. 274 which reads as follows:—

> Provided, further, that in the case of any such premises which are first assessed or first separately assessed after the appointed date, the Board may, on the application of the tenant, fix as the standard rent of the premises such amount as may in the opinion of the Board be fair and reasonable."

As the tenant had made no such application, it was submitted that the standard rent was that of the whole building as it stood in 1941.

I cannot accede to this argument.

If one applies the proviso in that manner, then, where a building (premises) are first assessed after the appointed date such premises would have no standard rent unless the tenant chooses to get that rent fixed.

The proviso, in my view, was enacted for the benefit of the tenant, who if he finds that the first assessment of a building or a part of it, after the appointed date is such, that it compels him to pay a high rent, then he may seek the assistance of the proposition that where premises (as defined in the Act) are first assessed or first separately assessed after the appointed date, and the tenant chooses not to make any application to the Board, then the provisions of section 5(1) relating to assessments made after the appointed date become inoperative.

Our attention was drawn to two decisions of this Court. The first is the case of *Chettinad Corporation Limited v. Gamage*, 62 N.L.R. 86. In that case the subject matter of the action bore assessment No. 273/2 and was assessed for the first time in November, 1948 at an annual value of Rs. 850/-. There was a tenement adjoining it bearing assessment No. 275. In 1951 the two premises were consolidated and assessed together at an annual value of Rs. 425/-. The court held that the annual value of premises No. 273/2 remained at Rs. 850/-. It will be seen that (unlike in the present case) these premises existed as a separate entity and were assessed as such when the first assessment was made. Basnayake, C.J., in the course of his judgment said that the annual value remained at Rs. 850/- "as the annual value of the *premises in question* was fixed at that figure when the assessment was made for the first time in 1948."

The second is the case of *Sally Mohamed v. Syed Mohamed*, 64 N.L.R. 486. There, there were three premises bearing three different assessment Nos. 102, 104 and 100. They were so numbered and in existence on 1st November, 1941 and had been assessed together. In 1945 the premises bearing Nos. 102 and 104 were assessed together again, but separately from No. 100. The subject matter of the action consisted of the

premises bearing these two numbers. In 1955 separate assessments were made for each of the two premises bearing Nos. 102 and 104. The court expressed the view that despite the separate asessssments in 1945 and 1955 the standard rent of the premises bearing Nos. 102 and 104 was and is, the amount of the assessment made for the premises jointly with premises No. 100 in November 1941. The case was, however, decided on a different point, and the learned District Judge looked upon these dicta as obiter.

Though, with respect, I would have been inclined to take a different view in that case, I think, the facts there can be distinguished from the facts here. The "premises in question" in that case were, in fact, in existence as separate entities bearing separate assessment numbers, and had been assessed (though in conjunction with other premises) in 1941. In the present case the premises in question were not in existence as a unit that had been assessed, prior to 1948. They were assessed for the first time only in that year.

I would affirm the judgment of the learned District Judge and dismiss the appeal with costs.

de Kretser, J.

The facts are set out in the judgment of Sirimane, J. with whom I agree. It appears to me that Section 7 of the Rent Restriction Act throws some light on the matter in dispute. It says:

"Where any premises to which this act applies are let or occupied in separate parts (whether furnished or unfurnished) *which are not separately assessed for the purpose of rates*, and the aggregate of the amount demanded or received as the rent of such separate parts exceeds the authorised rent of the premises of the landlord shall be deemed to have contravened the provisions of Section 3 of this Act" — in other words there is only one assessed premises despite several parts of it being let.

Why is there a difference when the several parts are assessed? The answer appears to be that then they become separate premises. It would be well to remember that a premises according to the definition is a building or part of a building. Mr. Renganathan for the Defendant submits that what remains of the original premises after parts of it become separate premises would still command only a rent in accordance with the 1941 (or first) assessment. But that appears to me can only be correct if what remains has not been assessed at the break up into units as a separate premises — which would be a question of fact. If a building assessed as a premises in 1941 is divided and each portion is separately assessed then it appears quite impossible to claim that one such division in preference to another remains the original premises. The numbers that each separate unit carried must not be allowed to cloud the issue.

The resulting position is then that a number of new premises take the place of the old and the basis of the authorised rent for each of them is the amount of annual value fixed when they are assessed as separate premises for the first time. The proviso to Section 5(1) allows a tenant to apply to the board to fix a standard rent for any such premises if the Board agrees with the tenant's submission that the authorised rent of such a separate premises that has come into being is unfair and unreasonable. It therefore appears to me that the object of the Rent Restriction Act which is to safeguard the tenant is in no way thwarted when a premises dies in giving birth to others.

Mr. Renganathan cited the case of the *Chettinad Corporation Ltd. v. Gamage* reported in 62 N.L.R. at page 86. There a tenement which bore the number 273/2 was assessed for the time in 1948 at an annual value of Rs. 850/00. In 1951 the same tenement with the adjoining tenement No. 275 were consolidated and assessed together at the annual value of Rs. 425/00 and given the number 56. Basnayake, C.J. with whom H. N. G. Fernando J. agreed said: "whatever may have been the result of the consolidated assessment and the alteration of the number of the premises, the annual value of the premises for the purposes of the Rent Restriction Act remains Rs. 850.00 as the annual value of the premises in question was fixed at that figure when the assessment was made for the first time in 1948." Here it is to be noted that what was let to the Defendant was old number 273/2 now bearing a new number 53 and sharing an assessment with No. 275. It seems clear that in terms of Section 5 the amount of the annual value of this building as specified in the assessment of November, 1941 must govern the authorised rent. This decision then hardly helps at all in the solution of the present problem. Mr Renganathan invited our attention to the case of *Sally Mohammed v. Seyd Mohammed* reported in 64

N.L.R. at page 486. The facts as gathered from the judgment are as follows:

Premises 100, 102 and 104 in 2nd Cross Street, Pettah in 1941 were assessed together in a single assessment. In 1945 No. 100 was assessed separately but Nos. 102 and 104 were assessed together. In 1955 Nos. 102 and 104 were each separately assessed. The question that arose for determination was what was the authorised rent the defendant who had taken both on rent would have to pay. In appeal, the case turned on another matter which is not relevant to the present case but in it H. N. G. Fernando, J. with whom L. B. de Silva, J. agreed in an obiter dictum gave their opinion on what should be the correct authorised rent and how it should be arrived at. I regret to find that I cannot, agree with them. It is correct that the proviso to Section 5(1) does not state that any assessment is to determine the standard rent on which the authorised rent is based. It does not need to, for that is found in Section 5 itself and the proviso only helps a tenant with regard to a premises assessed after 1941 or first separately assessed after 1941 to ask the Board to fix a standard rent which is fair and reasonable if they considered the authorised rent calculated on the basis of the assessment too high. I entirely agree that if two parts have been assessed jointly whether before or after 1941, that the authorised rent would have to be calculated in terms of Section 5(1)(a) by reference to that assessment. But I cannot agree that if thereafter separate assessments are made for each part that it is the board that would have to fix a standard rent for each or both parts. It will be seen that the proviso makes provision only for application by a tenant for the fixing of a fair rent. That presupposes that otherwise the tenant will have to pay a rent which is in accordance with the new assessment. If he thinks that rent unfair and unreasonable he can apply to the Board and if the Board agrees with him, the Board will fix a rent which it thinks is fair and reasonable in lieu of the rent calculated on the basis of the assessment now made for the first time. It will be noted no provision is made for a reference to the Board by a landlord — presumably because he has been heard by the assessors and is thereafter bound by the assessment made for the premises. It is my view that when a premises, that is in terms of the definition of premises, a building or part of a building, has been assessed in 1941 that the authorised rental has to be calculated in terms of that assessment. If it is assessed for the first time after 1941 then that first assessment is the one which governs the authorised rent, but that is subject to the right of a tenant to get a rent which is in the opinion of the Board fair and reasonable, fixed in lieu of such authorised rent.

In the instant case for the reasons I have already set out, I am of the opinion that the trial Judge has correctly decided that judgment should be for the Plaintiff as prayed for and I dismiss the appeal with costs.

Appeal dismissed.

Present: **Wijayatilake, J.**

K. P. PUNCHINONA *v.* T. HENDRICK PERERA*

S.C. 119/67 *(R.E.)* — *C.R. Colombo* 88705

Argued on: 15th September, 1968.
Decided on: 10th October, 1968.

Landlord and tenant—Attornment— Plaintiff averring that defendant was his lessor's tenant, and that he informed her of the lease and requested her by letter to pay rent — Defendant silent on receipt of letter and failing to pay rent — Action for ejectment — Defendant denying tenancy and averring lessor kept her as his mistress undertaking to execute a deed in her favour — Failure to call lessor.

The plaintiff as lessee of one D on Indenture (P1) of 1963 sued the defendant alleging

(*a*) that she was a tenant of his lessor;
(*b*) that the plaintiff, by his Proctor's letter dated 4/3/63 (P2) informed the defendant of the lease and requested her to remit rent to the plaintiff from February, 1963;
(*c*) that she failed to remit rent for about a year;
(*d*) that plaintiff gave defendant notice to quit on 31/5/64;

*For Sinhala translation, see Sinhala section, Vol. 19, part 3, p. 5.

The defendant in her answer while denying any tenancy agreement averred that she was kept by D as his mistress and that D put her in possession of the premises undertaking to execute a transfer deed in her favour.

The learned Commissioner held that the plaintiff was not entitled to a decree for ejectment but was entitled to rent as from February, 1963. It was in evidence that the defendant did not send any reply to the said letter P2.

Held: That although silence on the part of the defendant on receipt of letter P2 may be recognised as an attornment notwithstanding her failure to pay rent, inasmuch as the plaintiff has failed to prove that the defendant was a tenant of the lessor, by calling the lessor the action based on attornment in respect of a monthly tenancy is misconceived.

Per **Wijayatilake, J.** "Thus it would seem that it is now a well established principle that a tenant who remains in occupation *with notice* of the purchaser's election to recognise him as a tenant may legitimately be regarded as having attorned to the purchaser so as to establish *privity of contract* between them."

Cases referred to: *Wijayaratne v. Hendrick*, (1895) 3 N.L.R. 158
Aranolis v. Mohideen Pitche, (1907) 3 Bal. Reps. 159
Ukkuwa v. Fernando, (1936) 38 N.L.R. 125
Rajapakse v. Cooray, (1924) 2 Times of Ceylon 209
Sabapathipillai v. Ramupillai, (1956) 58 N.L.R. 367
Charles Perera v. de Costa, (1955) 57 N.L.R. 283
de Alwis v. Perera, (1951) 52 N.L.R. 433
Silva v. Silva, (1913) 16 N.L.R. 315
Zackariya v. Benedict, (1950) 53 N.L.R. 311

J. W. Subasinghe, with *T. H. N. Richards*, for the defendant-appellant.

S. C. E. Rodrigo, for the plaintiff-respondent.

Wijayatilake, J.

In this case the plaintiff sued the defendant for ejectment from premises No. 567, Madiwela Road and for the recovery of arrears of rent. After trial the learned Commissioner held that the plaintiff is not entitled to a decree of ejectment. However, he held that the plaintiff is entitled to rent at Rs. 15/- from February, 1963 till the end of January, 1965.

The principal question in this case is whether there was a contract of tenancy between the defendant and the plaintiff's lessor and if so whether the defendant has attorned to the plaintiff. Admittedly one K. Dharmadasa Fernando is the owner of the premises in question. According to the plaintiff the defendant was in occupation of these premises as a tenant of the said Fernando on the basis of a monthly tenancy and the plaintiff by deed No. 306 of 8/2/63 (P1) had taken a lease of these premises from Fernando for a period of two years. Thereafter on 4.3.63. his proctor by letter (P2) had informed the defendant of the lease and requested her to remit to the plaintiff, the lessee on (P1) all rents from February, 1963 at Rs. 15/- per month. Despite this letter no rent whatever had been paid by the defendant and on 8.2.1964 nearly an year later, by letter (P3) the plaintiff's proctor had given her notice to quit and deliver possession on 31.5.64. In her answer the defendant admitted the receipt of notice (P3) and at the commencement of the trial her counsel had referred to (P2) and the plaintiff had been allowed to amend the plaint. The proctor who wrote these two letters has also given evidence.

The position of the defendant is that she is the mistress of the said Fernando who is the owner of these premises and he had put her in possession of the premises sometime in October, 1960 undertaking to execute a deed of transfer in her favour and since then she has been in possession of these premises *ut dominus*. She denies that there was any contract of tenancy with the said Fernando.

The plaintiff in his evidence has stated that after the deed of lease was attested he had gone along with the lessor and told the defendant to pay the rent to him and she had agreed to do so. However, it is noteworthy that the plaintiff has failed to call his lessor in support. Apart from the

plaintiff's Proctor the only witness called by the plaintiff was one Dayananda who has spoken to his paying rent in respect of another house in this same garden to the plaintiff. However, he has failed to produce any receipts in support. Furthermore he has spoken to a period after the expiry of the lease (P1).

Learned counsel for the plaintiff relies strongly on the letter (P2) as the defendant had failed to send any communication to the contrary. It is evident that the defendant had ignored the letter (P2) of 4.3.63 and the plaintiff appears to have slept over his rights if any for nearly one year till he thought of sending the quit notice on 8.2.64. I should think that his conduct in this situation points to the truth of the defendant's version. It is also significant that the original plaint in this case was on the basis that the plaintiff let out the premises in question to the defendant direct and there was no reference to the lease. The plaint was amended only after this came up for trial on the production of (P2) by counsel for the defendant.

Mr. Subasinghe, learned counsel for the appellant has submitted that even if it is assumed that the defendant was a tenant of the plaintiff's lessor the plaintiff has failed to prove an attornment. He relies on the following cases:—

Wijayaratne v. Hendrick, 3 N.L.R. 158
Aranolis v. Mohideen Pitche, 3 Bal. Reps. 159.
Ukkuwa v. Fernando, 38 N.L.R. 125
Rajapakse v. Cooray, 2 Times of Ceylon Reps. 209

On the other hand Mr. Rodrigo, learned counsel for the respondent relies on the principle that when leased premises have been sold by the landlord, the tenant who receives notice of the purchaser's election to recognise him as tenant is not entitled to deny his attornment to the purchaser if he continues to be in occupation without informing the purchaser that he does not elect to attorn to him. He relies on the following cases:—

Sabapathipillai v. Ramupillai, 58 N.L.R. 367
Charles Perera v. de Costa, 57 N.L.R. 283
de Alwis v. Perera 52 N.L.R. 433 at 445
Silva v. Silva, 16 N.L.R. 315
Zackariya v. Benedict, 53 N.L.R. 311

Thus it would seem that it is now a well established principle that a tenant who remains in occupation *with notice* of the purchaser's election to recognise him as a tenant may legitimately be regarded as having attorned to the purchaser so as to establish *privity of contract* between them.

In the instant case silence on the part of the defendant on the receipt of letter (P2) may be recognised as an attornment although she in fact did not pay any rent at all. Be that as it may, in my opinion, the plaintiff has failed in the present case to prove that the defendant was a tenant of the plaintiff's lessor at any stage. The best evidence would have been that of the lessor himself who had been summoned as a witness but the plaintiff failed to call him. I do not think there was a burden on the defendant.

On a scrutiny of the facts in this case it is evident that the story as related by the defendant is the more likely, although she was not truthful when she was questioned about the receipt of (P2). The defendant has very boldly pleaded in her answer that the owner of these premises was keeping her as his mistress. Despite this allegation the owner has failed to controvert it by supporting the plaintiff's case. The conclusion is irresistible that he has sought to get rid of an amatorial problem he has created for himself by executing the lease (P2) in favour of the plaintiff, and thereby adopted this circuitous method of ousting this woman.

In my opinion this action on the basis of an attornment in respect of a monthly tenancy is clearly misconceived. I would accordingly allow the appeal. I vacate the order of the learned Commissioner and dismiss the plaintiff's action with costs. The defendant shall be entitled to the costs of appeal.

Appeal allowed.

Present: **Siva Supramaniam, J.**

T. W. CHARLES SILVA *v.* MRS. DONA CAROLINE MANCHANAYAKE

S.C. No. 125/66(*R & E*) — *C.R. Colombo* 90762

Argued on: 10th June, 1969
Decided on: 31st July, 1969

Rent Restriction Act (as amended by Act No. 12 *of* 1966) *section* 12*A — Tenant of rent controlled premises whose standard rent does not exceed Rs.* 100/- *per month—Erection of temporary buildings with landlord's consent — Subletting such premises to third party — Does it amount to letting of a jus superficiarum — Is the tenant liable to be ejected?*

Rent Restriction Act (*Cap.* 274) *sections* 9(1), (2)— *Rent Restriction* (*Amendment*) *Act No.* 10 *of* 1961, *section* 11 — *Definition of word "premises" — Whether subletting of part of premises sufficient— Variation in language between Section* 9 *of Act and Section* 12*A of the amending Act of* 1966.

Held: (1) That a tenant of premises to which section 12A applies who sublets a part of the premises without the written authority of the landlord is liable to be ejected from the premises.

(2) That permission that is granted by a landlord to a tenant to erect a temporary building on a land which is the subject matter of the tenancy, subject to the condition that the building is dismantled on the termination of the tenancy and the materials removed, is not a jus superficiarum.

Case referred to: *Ahamado Natchia* v. *Muhamado Natchia* (1905) 8 N.L.R. 330

H. W. Jayawardene, Q.C., with *P. Nagendran, B. Eliatamby* and *M. Devasagayam*, for the defendant-appellant.

C. Ranganathan, Q.C., with *D. T. P. Rajapakse*, for the plaintiff-respondent.

Siva Supramaniam, J.

The question that arises for decision on this appeal is whether a tenant of rent controlled premises, the standard rent of which does not exceed Rs. 100/- per month, who, after erecting with the consent of the landlord, certain temporary buildings on the land which forms part of the said premises lets those buildings to a third party without the landlord's written authority is liable to ejectment on the ground that he has sublet the premises in terms of section 12A of the Rent Restriction Act (Cap. 274) as amended by Act No. 12 of 1966.

The defendant took on rent from the plaintiff's husband premises No. 46 (renumbered later as No. 128), Subadrarama Road, Nugegoda which consists of a tiled house and land appurtenant thereto at a monthly rental of Rs. 20/-. The defendant erected on the appurtenant land, with the permission of the plaintiff's husband certain temporary buildings. The defendant undertook to demolish the said buildings on termination of the tenancy and to remove the materials without causing any damage to the land. On the death of the plaintiff's husband, the defendant became the tenant of the plaintiff on the same terms and conditions.

During the pendency of the tenancy, the local authority assessed separately for rating purposes the temporary buildings and the land on which they stood and numbered that portion as No. 128/1. The rates in respect of No. 128/1 were paid by the defendant while the plaintiff continued to pay the rates in respect of No. 128. It is admitted that the defendant, without the consent of the plaintiff, gave on rent the portion numbered 128/1 to one Subramaniam at a monthly rental of Rs. 90/- and that Subramaniam continued to be the tenant of that portion even after the date of the commencement of the instant case.

The plaintiff's case is that the defendant sublet the premises of which he was the tenant without her written consent and is consequently liable to be ejected therefrom in terms of section 12A of the Act. The word "premises" was not defined in the Act as it originally stood but by an amendment effected by section 11 of the Rent Restriction

(Amendment) Act No. 10 of 1961, it was defined as follows:—

> "Premises mean any building or part of a building together with the land appertaining thereto."

It was submitted by Mr. Jayawardene that the buildings which bore the assessment No. 128/1 were erected by the defendant at his own expense with the permission of the plaintiff and what was let to Subramaniam was the right of a superficiary and that there was no subletting of the premises of which the defendant was the tenant. Jus superficiarum is a servitude recognised by our common law. Quoting Grotius 2. 46. 9. Layard, C.J. in *Ahamado Natchie v. Muhamadu Natchie* (8 N.L.R. 330 at p. 331) explained the right as follows:—

> "The jus superficiarum is the right which a person has to a building standing on another's ground .... It is the right to build on the soil and to hold and use the building so erected until such time as the owner of the soil tenders the value of the building, if the amount to be paid has not been previously agreed upon."

Lascelles, C.J. commenting on this right, stated as follows in the same case when it came up on appeal after a retrial:—

> "It is however, clear that agreement between the land-owner and the person who acquires the right is the foundation of the right. Voet 43. 17 defines "superficies" as denoting things such as trees, plants and especially buildings, growing or built on the surface of the soil which anyone has erected on land belonging to another with the consent of the owner on the condition that he may keep them in perpetuity or for a considerable period and generally as payment of rent."

It is unnecessary for the decision of this case to consider the question whether in Ceylon the servitude of jus superficiarum can be created otherwise than by a notarial agreement.

The permission that is granted by a landlord to a tenant to erect a temporary building on a land which is the subject matter of the tenancy, subject to the condition that the building is dismantled on the termination of the tenancy and the materials are removed, is not a jus superficiarum. The nature of the permission in such a case negatives the grant of a right to the builder to remain in possession of the building in perpetuity or for a considerable period or until the owner tenders the value of the building. The submission, therefore, that what was let by the defendant to Subramaniam was the jus superficiarum must fail.

It is common ground that the defendant did not sublet the entirety of the premises of which he was the tenant. But when he let the temporary buildings, he necessarily let also the land on which the said buildings stood, and that land was unquestionably part of the "premises" of which he was the tenant under the plaintiff. The question, then, is whether the subletting by the tenant of a part of the premises without the written authority of the landlord entitles the latter to institute an action for ejectment of the tenant. Section 12 A of the Act permits a landlord to institute an action to eject the tenant of any premises the standard rent of which for a month does not exceed one hundred rupees where "such premises have been sublet without the written authority of the landlord of such premises." Mr. Jayawardene submitted that it is only where the entirety of the premises have been sublet that the landlord has a right of action, as the words "such premises" in section 12A do not include "part of the premises." He argued that since section 9 of the Act which imposes a general prohibition on subletting by a tenant without the authority of the landlord specifies "the premises or any part thereof", the legislature must have deliberately intended to exclude the subletting of a part of the premises from the ambit of the prohibition in cases where the standard rent does not exceed Rs. 100/- per month. In further support of the argument it was said that section 12A was enacted to give additional protection to tenants of small premises and that, therefore, the legislature had intentionally narrowed down the grounds for ejectment by omitting certain grounds applicable to other premises under section 13. The question, then, is whether the legislature, by implication, intended to permit tenants of premises to which section 12A applies, to sublet part of the premises, despite the express prohibition contained in section 9(1) against the subletting of any part of any premises to which the Act applies.

If a prohibition is imposed on alienation by way of sale, gift or lease of any premises, such prohibition would ordinarily apply to alienation of any part of the premises. If the provisions of section

12A had been contained in an independent statute and not in an amending Act, there would have been little room for the argument that the prohibition against subletting does not apply to the subletting of part of the premises. The difficulty in the present case arises from the fact that there is a variation of language between the principal Act and the amending Act and according to the ordinary canons of construction, the variation would be deemed to have been made deliberately.

Section 9(1) of the Act prohibits the subletting by the tenant without the written consent of the landlord of the whole or any part of any premises irrespective of the rental value and under section 23 a contravention of the prohibition constitutes an offence. Mr. Ranganathan submitted that section 9(1) has not been repealed by any provision in the amending Act and that it would be unreasonable to impute to the legislature an implied intention to permit under section 12A(b) what had been prohibited under section 9(1). Mr. Jayawardane, however, argued that subsections (1) and (2) of section 9 refer to "any premises or any part thereof" and if the legislature intended section 12A(b) also to apply to the whole or part of the premises, section 12A(b) was superfluous as section 9(1) and (2) would have covered the case. He submitted that the legislature would not have enacted a superfluous provision of law.

Section 12A is so framed as to categorise all the circumstances under which a landlord may institute an action to eject his tenant, in cases where the authorised rent of the premises does not exceed Rs. 100/- per month. The section provides that unless anyone of those circumstances is present, no action may be instituted by the landlord "notwithstanding anything in any other law." If, therefore, the provision relating to subletting had not been included in section 12A, it could have been contended that subletting was not a ground for ejectment in respect of premises to which section 12A applied. Hence the contention of Mr Jayawardene that if Mr Ranganathan's argument is accepted, section 12A would be a superfluity cannot prevail.

The best way to find out the intention of the legislature is to examine in what sense the word "premises" has been used in other similar clauses of the same section. Section 12(1)c authorises an action where "such premises have been used by the tenant thereof or by any person residing or lodging with him or being his subtenant for an illegal or immoral purpose." Can it be argued that the use of a part of the premises for an illegal or immoral purpose will not entitle the landlord to institute an action. Obviously, in this clause the word "premises" includes "part of the premises." Similarly section 12A(d) authorises an action where "wanton destruction or wilful damage to such premises has been caused by the tenant thereof or ....." Does it mean that the landlord should wait till wanton destruction or damage is caused to the entirety of the premises before he can institute an action? Obviously, in this clause too the word "premises" includes "part of the premises." The legislature could not have intended the word "premises" to include "part of the premises" in clauses (c) and (d) but to exclude "part of the premises" in clause (b). It is therefore reasonable to hold that despite the variation in language between section 9 and section 12A, the legislature intended the word "premises" to include "part of the premises" in section 12 A(b). As Maxwell (Interpretation of Statutes, 11th Edition p. 316) says: "Though the statute is the language of the three estates of the realm, it seems legitimate in construing it to take into consideration that it may have been the production of many minds and that this may better account for any variety of style and phraseology which is found than a desire to convey a different intention."

I am therefore of opinion that a tenant of premises to which section 12 A applies who sublet a part of the premises without the written authority of his landlord is liable to be ejected from the premises.

I dismiss the appeal with costs.

Appeal dismissed.

Present: T. S. Fernando, J.

THE CHAIRMAN, URBAN COUNCIL OF BERUWELA

v.

M. C. M. ABDUL HAMEED & FOUR OTHERS

S.C. Application No. 59 *of* 1965 — *M.C. Kalutara* 11685

Argued on: 20th June, 1967
Decided on: 25th June, 1967

Criminal Procedure Code, section 167(2) — *Penal Code, sections* 434, 443 — *Charge of house-breaking — Whether manner of breaking into house must be specified in charge — Charge of house trespass — Whether complainant in occupation of house — Application of decision in Selvanayagam's case.*

Where a Magistrate had acquitted the accused on a charge of house-breaking by night for absence of reference in the charge to the manner in which the house was broken into by the respondents—

Held: That the acquittal on this ground was wrong in view of section 167(2) of the Criminal Procedure Code which enacted that "if the law which creates the offence gives it any specific name, the offence may be described in the charge by that name only."

The accused had also been acquitted of the charge of house trespass. This charge too, as did the former, related to their occupation of a certain house in a Housing Scheme belonging to the Urban Council, Beruwela. This house, along with several others, had been allotted to selected persons and the keys of the houses had been with the Chairman until such time as they could be handed over to the allottees. In the meantime the accused had effected an entrance and got into occupation of this house.

The learned Magistrate had acquitted the accused on the basis that the Chairman of the Urban Council (the present petitioner) had divested himself of occupation inasmuch as an applicant had been selected as tenant for this house and also on his application to the facts of this case of the decision in *The King v. Selvanayagam*, 51 N.L.R. 470.

Hel: That as the Chairman of the Urban Council remained the occupant until occupation was actually given over to the selected tenant, the Magistrate was wrong in acquitting the accused on this ground.

Held further: That the decision in *The King v. Selvanayagam* had no application to the facts of this case as the accused had no right to have this house allotted to them.

Referred to: *The King v. Selvanayagam* (1950) 51 N.L.R. 470.

Nimal Senanayake, with *M. T. M. Sivardeen* and *Miss A. P. Abeyratne*, for the applicant.

D. J. Tampoe, for the respondents.

T. S. Fernando, J.

The respondents were charged with the commission of two offences, viz. house-breaking by night (section 443) and house trespass (section 434). They were all acquitted of both charges. The applicant who is the Chairman of the Urban Council of Beruwela, who was the virtual complainant in the case states in his affidavit presented to this Court that he attempted to persuade the police officer who was the complainant in record to obtain the sanction of the Attorney-General

to appeal from the acquittal and, finding that no appeal has been filed, initiated these proceedings in revision after obtaining the Council's sanction for the expenditure of money for payment of fees of proctor and counsel.

The Urban Council had constructed some eighteen houses after deciding on a Housing Scheme. Eight of these houses had been allotted to selected persons for occupation as tenants of the Council. Keys of the remaining ten houses were with the Chairman until such time as they could be handed over to ten other selected allottees. Meanwhile the respondents got into occupation of one of these houses, most probably by effecting their entrance through a window of the house. The evidence for the prosecution was not seriously challenged. All that the defence attempted to establish was that the selection was not a fair one.

The learned Magistrate acquitted the accused for certain reasons which hardly bear examination. According to him, the house-breaking charge had to fail for want of mention in the charge of the manner in which the house was broken into by the respondents. But this view ignores section 167(2) of the Criminal Procedure Code which enacts that "if the law which creates the offence gives it any specific name, the offence may be described in the charge by that name only". A house-owner or house-holder may often be unable to say in which of the six ways specified in section 431 of the Penal Code entrance has been effected into his house by an intruder. To acquit an accused person solely for the reason set out by the learned Magistrate is to show too much solicitude for the wrong doer and too little for the aggrieved occupant of the house. However that may be, it is sufficient for the purpose of this case to say that the defect in the charge, as the learned Magistrate calls it, is really not a defect at all. The acquittal on the first charge of house-breaking was wrong and, in spite of the fact that no appeal was preferred within the time granted, must be set aside.

The acquittal of the respondents on the second charge also calls for attention by this Court. The main ground of such acquittal was a wrong finding of the Magistrate that as an applicant had been selected as a tenant for this very house, the Chairman, who would until selection have been the occupant in law, had divested himself of occupation. Till occupation was actually given over the Chairman remained the occupant.

The Magistrate next misdirected himself by purporting to apply to the facts of this case the decision in *The King v. Selvanayagam*, (1950) 51 N.L.R. 470. In order to invest the respondents with a bona fide claim of right the Magistrate has been constrained to say that they were trying to assert a right they had to have the house allotted to them. They had, of course, no right to an allocation to them of this house. At most they could be said to have had a "right" to apply for such allocation. *Selvanayagam's case* has no application to the facts of this case. I would set aside the acquittal on the second charge as well.

The evidence in this case and the course of these proceedings disclose in a vivid manner the trials which sometimes beset local authorities when they attempt to implement decisions they have seriously reached with the object of improving health and sanitary conditions in their respective areas. That the applicant has pursued the extraordinary legal remedy of revision even when he failed in his attempt to make the complainant on record invoke the ordinary legal remedy of appeal bespeaks his desire to restore to the local authority its undoubted right to carry on with the housing scheme as already decided upon. My only regret is that the Court's powers of revision do not enable it to convert a finding of acquittal into one of conviction. I have therefore to set aside the orders of acquittal and to direct a fresh trial on the same charges, amended if need be. As the respondents have now had unlawful occupation of this house for nearly four years, I trust the fresh trial will be expedited.

Acquittals set aside. Re-trial ordered.

Present: **Wijayatilake, J.**

HERATH RALALAGE RAM BANDA *vs.* I. P., PADUKKA*

S.C. No. 554/68 — *M.C. Avissawella* 84429

Argued and decided on: 2nd September, 1968

Jurisdiction of Magistrate's Court — Charge triable by District Court only — Magistrate proceeding to hear case without assuming jurisdiction under Section 152(3) *of the Criminal Procedure Code — Conviction of accused — Delivery of reasons on subsequent date — Question of jurisdiction considered, but held properly tried — Validity of all proceedings.*

Where an accused person was charged with threatening to do bodily injury to the complainant by shooting with a gun (offence under section 486 of the Penal Code and triable only by the District Court) and the Magistrate having proceeded to hear the case without assuming jurisdiction under section 152(3) of the Criminal Procedure Code, convicted the accused and while delivering reasons two weeks later stated that the question of jurisdiction engaged his attention and that in his opinion he tried the case properly as Magistrate.

Held: That the entire proceedings without assuming jurisdiction under Section 152(3) by the Magistrate at the commencement are not only irregular but illegal.

Sam P. C. Fernando, for the accused-appellant

Priyantha Perera, Crown Counsel, for the Attorney-General

Wijayatilake, J.

Mr. Sam P. C. Fernando, Counsel for the accused-appellant draws my attention to the charge framed against the accused. It would appear that the accused has been charged with threatening to do bodily injury to one R. M. M. B. Wickramanayake of Ayr Estate, Padukka by shooting him with a gun and thereby causing alarm to the said Wickramanayake, an offence punishable under section 486 of the Penal Code. Counsel submits that the charge has been so framed that the Magistrate's Court had no jurisdiction to deal with the matter unless the Magistrate assumed jurisdiction under section 152(3) of the Criminal Procedure Code. The learned Magistrate had not assumed such jurisdiction. However, at the end of the trial, after finding the accused guilty on 14th February, 1968 in his reasons delivered on the 28th February, 1968, he states that a point which engaged his attention was the jurisdiction of that Court to try this case, and that an offence under section 486 is triable only by the District Court where a threat is to cause grievous hurt or death. However, the Magistrate proceeds to state that in his opinion he has tried this case properly as Magistrate even though the threat was to kill without assuming jurisdiction. It would appear that he has arrived at this conclusion on the evidence and he states that according to the evidence, all that the accused did was to break the gun and then to say that he would kill the complainant, his father and the big one, and that both the father of the virtual complainant and the '*Maha Eka*' were not there at the time and more over the accused had the cartridges in his hand but did not put them into the gun. In my opinion, the submission of Counsel is entitled to prevail, as the learned Magistrate should have assumed jurisdiction at the very commencement of these proceedings if he was seeking to act under section 152(3). It would now appear that the Magistrate has recorded evidence in this case without any jurisdiction and only at the stage of reasons delivered two weeks after conviction he has sought to justify his action. It is quite clear that this is not only irregular but illegal.

The learned Crown Counsel agrees with the submission made by the learned Counsel for the appellant. I would accordingly quash these proceedings and send the case back for retrial before another Magistrate.

Re-trial ordered.

*For Sinhala translation, see Sinhala section, Vol. 19 part 4, p. 7

Present: **Viscount Dilhorne, Lord Hodson, Lord Guest, Lord Upjohn and Sir Hugh Wooding**

Privy Council Appeal No. 55 *of* 1964

AMBALAVANAR KANAYSON & OTHERS *v.* ERAGUNATHAR PONNU RASIAH

Privy Council Appeal No. 7 *of* 1965

THANKACHCHIAMMAH *v.* AMBALAVANAR GANESHAN & OTHERS

Privy Council Appeal No. 14 *of* 1965

AMBALAVANAR GANESHAN & OTHERS *v.* RAJARATNAM ARULPRAGASAM & OTHERS

From
THE SUPREME COURT OF CEYLON

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

Delivered on: 7th June, 1967

Fideicommissum — Tacit fideicommissum — Construction of words restricting alienation — Whether prohibition 'nude' — Restriction only for a specified period following donor's death — Whether sufficient to create fideicommissum — Alienation before the expiry of the specified period — Construction of language restricting alienation — Phrase 'by way of mudusom or dowry.'

Civil Procedure Code, section 118, 119— *Translations—Expert evidence— Whether Court should use its knowlege of the language.*

The single issue involved in the three appeals was whether Deed of donation No. 21891 executed on 3rd March, 1921 by one V.M. in favour of his two sons contained words sufficient to create a *fideicommissum.* The donor died on 27th August, 1927, and one of the donees had predeceased him. It was common cause that the half share of the properties donated to the son who predeceased the donor passed on the donor's death absolutely to the other donee. The relevant terms and conditions of the Deed of donation were as follows:—

"For and in consideration of the love and affection which I have and bear unto them, I do hereby give and grant by way of donation unto them in equal shares the aforesaid lands together with their appurtenances valued at the said sum of Rs. 77,500.00, subject to the following conditions:

There should be full authority and power for me to alienate by way of transfer, donation, dowry and any other documents, or to encumber by way of mortgage, otty, security or by way of other instruments, during my lifetime according to my wish, the said properties or to revoke this donation.

I do hereby bind them and declare that they should not alienate the said lands by any instruments such as transfer, donation, dowry or any other document and should not encumber the same by document such as mortgage, otty, security or any other instruments, within 25 years after me except giving and granting the same to their children by way of mudusom or dowry and that the said lands shall not be liable for any debts which may be incurred by them.

I do hereby nominate and appoint their grandfather Ilanthalaivasinga Iragunathamudaliyar Thillainather of Vannarponnai east and Saravanamuttu Ambalavaner of Vaddukkodai east after me and give them power to jointly and severally look after and manage the said properties and to utilize the produce and income thereof for the food, clothing and education of the Kathiravelupillai and Kamaravelupillai and for their wives and children during the said period."

The surviving donee purported to transfer absolutely within the period of twenty five years referred to in the said conditions certain lands comprised in the gift. He died on 20th October 1940, i.e. within twenty five years of the death of the donor. His heirs were his two daughters, the 2nd and 4th appellants in appeals 1964/55 and 1965/14 and the 2nd and 4th respondents in appeal 1965/7. They claimed as *fideicommissaries* to be entitled to the lands alienated on the death of their father. The alleged *fiduciaries* had made improvements on the land.

Held: (1) That the phrase 'by way of mudusom or dowry' in the conditions was used in a colloquial sense as equivalent to dowry or the acquisition of property by a son or daughter before marriage.

Followed: *Nalliah v. Ponnamah,* (1920) 22 N.L.R. 198

(2) That before a disposition can be treated as a *fideicommissum*, whether the disposition be testamentary or *inter vivos*, it must be proved beyond reasonable doubt that there was an intention to create a *fideicommissum*.

Followed: *Brits v. Hopkinson*, 1923 S.A.L.R. 492
Ex p. Sadie, 1940 S.A.L.R. 26
Van Leeuwen: Commentaries (2nd Ed. of Kotze) p. 376
Voet (Gane's Translation) p. 446 Section 72
Lee: Introduction to Roman Dutch Law 5th Ed. p. 376

(3) That once an intention to create a *fideicommissum* is established, mere difficulty of construction of the words used does not prevent its creation.

Followed: *Abdul Hameed Sitti Kadija v. de Saram*, 1946 A.C. 208; XXXII C.L.W. 46; 47 N.L.R. 171

(4) That where there is a prohibition on alienation but there is no express *fideicommissum* it is a question of construction as to its legal effect. If the prohibition is imposed without indicating the purpose of such prohibition or the persons for whose benefit the prohibition is imposed then it is said to be a "nude" prohibition and will be disregarded and the absolute gift to the donee will remain. But on a consideration of the provisions and scheme of the disposition in question, the donor intended the prohibition for the benefit of the donees' children, and consequently it was not "nude".

(5) That the fact that the donor reserved an express power of revocation did not tend against the creation of a *fideicommissum*.

(6) That the words 'or any other documents' in condition 2 were not to be construed *ejusdem generis*. The result was that the prohibition on alienation was wide, and embraced an alienation by testamentary disposition.

Sande: Restraints on Alienation (1892 translation) p. 191 para 21

(7) That the fact that the prohibition was for a limited time (here for 25 years) could not in principle defeat an otherwise valid *fideicommissum*.

Huber: Jurisprudence of My Time (Gane's Translation) p. 192 para 62

(8) That the *fideicommissaries* are bound to compensate the *fiduciaries* for improvements effected by the latter, but the basis of compensation would depend on whether they were *bona fide* or *mala fide*-improvers.

Per **Curiam:** "The Deed was written in Tamil, the local language, but as the language of the Courts is English, the party tendering such a document as evidence must present a translation signed by a translator qualified to do so by sections 118 and 119 of the Civil Procedure Code. However this does not prevent another party from calling expert evidence (not necessarily a person qualified as prescribed by section 118) to challenge that translation nor the propounder of the translation from calling further expert evidence in rebuttal. In practice, their Lordships were informed, the qualified translator is seldom called as a witness and if his translation is challenged it is is a matter for the Court to draw its conclusion as to the proper translation as a matter of fact upon the whole of the evidence tendered to it. It is not a matter on which the Court itself should use its knowledge of the language to assist in the translation of the document. See *Francisco v. Swadeshi Industrial Works, Limited*, 53 N.L.R. 179 at 180/181 where earlier decisions of their Lordships on this point were quoted.

Judgment of Weerasooria, S.P.J. in *Mohideen Hadjiar v. Ganeshan*, (1963) 65 N.L.R. 421 approved and followed on the construction of the deed.

Other Cases referred to: *Francisco v. Swadeshi Industrial Works, Limited* 53 N.L.R. 179 at 180/181
Abeyawardene v. West (1957) A.C. 176
Robert v. Abeywardene (1912) 15 N.L.R. 323
Josef v. Mulder (1903) A.C. 190
Weerasekera v. Peiris, 34 N.L.R. 281

Walter Jayawardena, for the appellants in Appeal No. 55 of 1964.
E. F. N. Gratiaen, Q.C., with *R. K. Handoo*, for the respondent in Appeal No. 55 of 1964

E. F. N. Gratiaen, Q.C., with *R. K. Handoo*, for the appellants in Appeal No. 7 of 1965
Walter Jayawardena, for the respondents in appeal No. 7 of 1965

Walter Jayawardena, for the appellants in Appeal No. 14 of 1965
E. F. N. Gratiaen, Q.C., with *R. K. Handoo* and *Mark Fernando*, for the respondents in Appeal No. 14 of 1965.

Lord Upjohn

These three appeals were heard successively before their Lordships but it will be convenient to deliver one judgment in all three for the principal issue is the same in each of them. This issue is whether a deed executed on 3rd March, 1921 and numbered 21891 (the Deed) by Vinasithamby Murugesapillai (the donor) whereby he gave certain lands to his two sons as donees subject to conditions imposed for a term of 25 years from the death of the donor was effective to create a valid *fidei commissum* binding on those donees, for that term of years.

The relevant facts may be quite shortly stated and where it is necessary to differentiate between the three appeals they will be referred to their number of Record before the Board.

At the date of the Deed, as was recited, the donor had two sons Murugesapillai Kathiravetpillai and Murugesapillai Kumaravetpillai.

He gave to them extensive lands specified in 28 clauses in the Deed and amounting to the total value of Rs. 77,570.00 a very large sum indeed by relevant standards.

Murugesapillai Kumaravetpillai died shortly thereafter without issue in the lifetime of his father, the donor, who himself died on 27th August, 1921.

It is not in dispute that the half share donated to Murugesapillai Kumaravetpillai passed to his father as his heir at law and thence on the father's death to Murugesapillai Kathiravetpillai free of any *fidei commissum* so that this appeal is concerned only with the half share donated to Murugesapillai Kathiravetpillai who will henceforth be referred to as the donee.

It appears that during his lifetime the donee sold some of the lands subject to the Deed to different purchasers absolutely but not subject to the conditions imposed on him by the Deed. The donee died on 20th October, 1940, that is within 25 years of the death of the donor leaving as his heirs two daughters (the daughters) the 2nd and 4th appellants in appeals 1964/55 and 1965/14 and the 2nd and 4th respondents in appeal 1965/7. The parties joining with them in these appeals are their respective husbands, as is required by the rules of procedure in Ceylon. The donee also had a son who, it appears, died in early infancy and nothing arises thereon.

The daughters claim to be *fidei commissaries* under the Deed and as such to be entitled to the lands sold or disposed of by their father, the donee, in his lifetime. They have therefore instituted a number of actions against those in possession of some of such lands, claiming declarations of title as owners accordingly.

Three of such actions are those under appeal before their Lordships. There are others to which reference will be made later.

Before referring to the Deed or the principles of law that must be applied to it there is one troublesome matter to which their Lordships must refer.

The Deed was written in Tamil, the local language, but as the language of the Courts is English, the party tendering such a document as evidence must present a translation signed by a translator qualified to do so by sections 118 and 119 of the Civil Procedure Code. However this does not prevent another party from calling expert evidence (not necessarily a person qualified as prescribed by section 118) to challenge that translation nor the propounder of the translation from calling further expert evidence in rebuttal. In practice, their Lordships were informed, the qualified translator is seldom called as a witness and if his translation is challenged it is a matter for the Court to draw its conclusion as to the proper translation as a matter of fact upon the whole of the evidence tendered to it. It is not a matter on which the Court itself should use its knowledge of the language to assist in the translation of the document. See *Francisco v. Swadeshi Industrial Works, Limited*, 53 N.L.R. 179 at 180/181 where earlier decisions of their Lordships on this point were quoted.

In all the cases except appeal 1964/55 the daughters tendered in evidence translations which corresponded very closely with each other but differed in a material respect from the translation tendered in that appeal.

Their Lordships think this is regrettable but for the reasons which can more easily be explained when their Lordships have examined the relevant principles of law, they propose to accept as the true translation that tendered by the daughters in appeal 1964/55. That translation is, as will appear, less favourable to the daughters than the alternative translation which they submitted in the other proceedings.

The relevant part of the Deed is as follows:

"For and in consideration of the love and affection which I have and bear unto them, I do hereby give and grant by way of donation unto them in equal shares the aforesaid lands together with their appurtenances valued at the said sum of Rs. 77,500.00, subject to the following conditions:

The Conditions are as follows:

There should be full authority and power for me to alienate by way of transfer, donation, dowry and any other documents, or to encumber by way of mortgage, otty, security or by way of other instruments, during my lifetime according to my wish, the said properties or to revoke this donation.

I do hereby bind them and declare that they should not alienate the said lands by any instruments such as transfer, donation, dowry or any other documents and should not encumber the same by document such as mortgage, otty, security or any other instruments, within 25 years after me except giving and granting the same to their children by way of mudusom or dowry and that the said lands shall not be liable for any debts which may be incurred by them.

I do hereby nominate and appoint their grandfather Ilanthalaivasinga Iragunathamudaliyar Thillainather of Vannarponnai east and Saravanamuttu Ambalavaner of Vaddukkoddai east after me and give them power to jointly and severally look after and manage the said properties and to utilize the produce and income thereof for the food, clothing and education of the said Kathiravelupillai and Kamaravelupillai and for their wives and children during the said period."

The word "mudusom" requires some explanation. It is defined quite strictly by section 15 of the Jaffna Matrimonial Rights and Inheritance Ordinance as property devolving on a person by descent at the death of his or her parent or of any other ancestor in the ascending line, but it has a colloquial meaning closely equivalent to dowry or the acquisition of property by a son or daughter before marriage. See *Nalliah v. Ponnamah*, 22 N.L.R. 198 at p. 204 per De Sampayo, J. Having regard to the collocation of the words "by way of mudusom or dowry" their Lordships can feel no doubt that the word "mudusom" was used by the donor in its colloquial sense.

The principles to be applied when considering whether a Deed or Testament creates a valid *fidei commissum* are well settled but it should perhaps be stated that a *fidei commissum* has virtually nothing in common with the law of trusts (see Professor Lee's Introduction to Roman Dutch Law fifth edition p. 374. *Abeywardene v. West* (1957) A.C. 176). Roman Law did not provide for trusts and could only attempt to fetter the enjoyment of the donee in favour of another by putting on him some obligation which in fact cut down the gift to him.

So the first well settled principle is that a *fidei commissum* being essentially the divesting to some extent of an absolute gift so as to cut down that absolute gift is regarded with disfavour by the Court. "Before the Court can construe a testamentary disposition to be a *fidei commissum* it must be satisfied beyond a reasonable doubt that the Testator intended to burden the bequest with a *fidei commissum*" see per Wessels, J.A. in *Brits v. Hopkins* 1923 S.A.L.R. 492 at 495, a principle equally applicable to a Deed and see to the same effect *Ex p Sadie* 1940 S.A.L.R. 26 at 30; so also the civilian writers Van Leeuwen (1625-1682) Commentaries on Roman Dutch Law p. 376 (the 2nd edition of Sir John Kotze), Voet (1647-1713) Commentary on the Pandects (Ganes Translation 1956) p. 446 s. 72. See also Lee (supra) at p. 376. But once the intention to create a *fidei commissum* is established mere difficulty of construction of the words used does not prevent its creation. The law was in their Lordships' view summed up by Lord Thankerton in delivering the judgment of their Lordships' Board in *Abdul Hameed Sitti Kadija v. de Saram* (1946) A.C. 208 at p. 216;

"The authorities as to the rules of construction which apply to the present question are fully quoted by the learned judges of the Supreme Court, and their Lordships do not find it necessary to repeat them, but the following general principles may be derived from them. In the first place, where there is doubt whether a *fidei commissum* has been created, that construction should be preferred which will pass the property unburdened, but, if the language of the will is such as to show clearly an intention to create a *fidei commissum*, mere difficulty of construction will not prevent its being upheld. Doubt as to whether a valid *fidei commissum* has been created includes such doubt as to the identity of the beneficiaries as will prevent their ascertainment by a court of law. However difficult their application may be in a particular case, these general rules of construction appear to be well established."

No special words are necessary to create a *fidei commissum* though it must necessarily start

with some prohibition against alienation of the thing already donated; it may be expressed on the one hand or implied or as it is more usually termed "tacit" on the other.

If express, *e.g.*, "if my heir happens to die without children I wish him to allow the property derived by him from me to pass to such of my next of kin as may then be alive" then no difficulty arises (Huber (1623-1699) Jurisprudence of My Time (Ganes Translation) p. 189 para. 45); it being remembered that such words as "wish" or "desire" were by Roman Law treated as words of command and not of permission (though this seems to be doubtful by Roman Dutch Law).

Counsel for the daughters does not, however, rely on any express *fidei commissum* but founds himself on a tacit *fidei commissum*.

Where there is a prohibition on alienation but there is no express *fidei commissum* it is a question of construction as to its legal effect. If the prohibition is imposed without indicating the purpose of such prohibition or the persons for whose benefit the prohibition is imposed then it is said to be a "nude" prohibition and will be disregarded and the absolute gift to the donee will remain.

But if upon the proper construction of the Deed the purpose of the prohibition can be seen and there is a clear indication of a person or class of person for whose advantage the prohibition is imposed a tacit *fidei commissum* will be created in respect of such person or class of person. See Huber (supra) p. 190 paras. 51-54 also Voet (supra) p. 346-7 who gives a number of examples, the third is particularly relevant.

Van Leeuwen (supra) at p. 377 s. 6 says that a prohibition with the intention that his inheritance shall remain in his blood or family creates a valid *fidei commissum* in favour of the nearest of his family or blood relations. See also Sande (1577-1638) "Restraints on Alienation" (1892 translation) p. 171 para. 7. Lee (supra) at p. 376 sums it up in this way:

> "An implied *fidei commissum* is created in many ways, for example, by prohibition of alienation general or to specified persons, provided that there is some clear indication of a person or class of persons for whose advantage the prohibition is imposed. Where there is such an indication, the prohibition takes effect as a *fidei commissum* in favour of the person or class indicated. Where there is no such indication, the prohibition is 'nude' and wholly inoperative. If the heir is forbidden to alienate the property out of the family the law raises a conditional *fideicommissum* in favour of the intestate heirs, so that the heir is not free to dispose of the property out of the family either by act *inter vivos* or by will."

In one of the earlier cases in Ceylon *Robert v. Abeywardene* (1912) 15 N.L.R. 323 De Sampayo, A.J. said at 324 "Now a prohibition against alienation out of the family of a legatee or donee is itself sufficient to create a *fidei commissum* in favour of members of the family" and that seems to accord with the views of the civilians to some of whose writings reference has already been made.

The decision of their Lordships' Board in *Josef v. Mulder* (1903) A.C. 190 is also consistent with this view.

With these principles in mind their Lordships must examine the conditions contained in the Deed in detail, for it is a pure question of construction, a question which has, however, given rise to much difference of opinion in the Courts of Ceylon, where the Deed has been much litigated. Their Lordships must refer to those decisions upon it.

In so far as their Lordships are aware the Deed was first the subject of litigation in 1949 when in September of that year the Supreme Court in case S.C. 257 (reversing the District Judge) held in effect that the Deed created a valid *fidei commissum* in favour of the donee's children.

Then some years later the daughters mounted attacks against those in possession of other lands disposed of by their father with the following results. On 1st June, 1962 the Supreme Court in appeal 1964/55 affirmed without giving any reasons, the decision of the District Judge that the Deed did not create any valid *fidei commissum*.

The two cases appeals 1965/7 and 1965/14 were heard successively before the same Judge of

the District Court who delivered judgments on 25th August, 1960 and 22nd August, 1960 respectively in nearly identical terms holding that the Deed created a valid *fidei commissum*. In appeal 1965/7 on 13th July, 1962 the Supreme Court upheld his decision without giving any reasons.

In appeal 1965/14 the case was argued nearly a year later and a reserved reasoned judgment was delivered by the Supreme Court (differently constituted from appeal 1965/7) on the 3rd September, 1963 allowing an appeal and deciding that no valid *fidei commissum* was created by the Deed.

Finally although a week earlier in time, on 27th August, 1963 in *Mohideen Hadjiar v. Ganeshan* reported in 65 N.L.R. 421 the Supreme Court yet again differently constituted delivered a reasoned judgment dismissing an appeal from the District Judge holding that the Deed did create a valid *fidei commissum*.

It is to be noted that in two of these cases the Supreme Court dismissed appeals from opposing decisions in the District Court on the legal effect of the Deed without giving any reasons.

Their Lordships must assume that the earlier decisions were not brought to the attention of the Supreme Court in the subsequent cases for it is unthinkable that they would not have been referred to in the later judgments, but even so in a case where there is room for doubt their Lordships think it is regrettable that no reasons were expressed in the Supreme Court in either of those cases. A reasoned judgment gives such guidance for the future, not merely to the parties but to the general public where, as in this case, an important question involving a number of land owners arises.

Nor can their Lordships understand how the advisers of the daughters who were parties to every proceeding mentioned above failed to draw to the attention of the Court all the relevant earlier decisions; this seems to their Lordships most extraordinary, particularly in the case of appeal 1965/14 where appeal 1965/7 and the 1949 case do not seem to have been mentioned.

In this state of affairs their Lordships think that they must approach this matter in the first place without reference to these decisions though they will notice one or two of the reasons given in these judgments *passim*.

The conditions alleged to create the *fidei commissum* are contained in the three paragraphs already set out and may be treated as numbered 1, 2, 3.

By condition 1 the Deed reserved a power of revocation to the Donor during his life, a circumstance relied upon by the District Judge in appeal 1964/55 as tending against the creation of a valid *fidei commissum*. Before their Lordships counsel for the respondents in that appeal did not rely on this circumstance and referred to the case before their Lordships' Board of *Weerasekere v. Peiris* 34 N.L.R. 281 where there was such a power of revocation but no point was taken thereon at any stage in those proceedings. With all respect to the District Judge their Lordships are of opinion that there is no substance in it.

By condition 2, which is the all important condition, the Donor imposed upon the Donee a restriction against alienation for 25 years in terms that "they should not alienate the said lands by any instruments such as transfer, donation, dowry or any other documents".

Upon this, two points are taken against the daughters; first that the reference to "other documents" must be construed as *ejusdem generis* with the other modes of transfer referred to, which were *inter vivos* and so exclude a prohibition against alienation by will during the term of 25 years. If right, this would be strong support for the view that the prohibition was "nude" for the donee could entirely defeat any alleged *fidei commissum* either by surviving 25 years when the condition terminated in any event and he would take the property absolutely or by dying within that time and disposing of the property to any one he pleased by will. As a matter of construction their Lordships cannot accept this view. The words of prohibition could hardly be wider and seem apt and indeed

directed to include a prohibition of alienation by will. This seems to be clear as a matter of words but if authority be wanted for it it is to be found in Sande (supra) p. 191 para. 21.

The second point taken was that in a tacit *fidei commissum* the limitation of 25 years is so short that the condition cannot have been intended to have been imposed for the benefit of the donee's children. This limitation of time was, it appears, the principal ground upon which the Supreme Court in appeal 1965/14 reached the conclusion that no *fidei commissum* was created but their Lordships cannot agree. In the case of an express *fidei commissum* it had, on authority, to be conceded that such a limitation would not defeat an otherwise valid *fidei commissum* (see for example Huber (supra) p. 192 para. 62) and their Lordships cannot see how a tacit *fidei commissum* (if otherwise valid) can fail to be such because of that limitation of time.

Those points being out of the way the question for their Lordships is therefore whether these conditions were imposed:

(1) merely as a "nude" prohibition or

(2) merely for the purpose of supporting the powers of the appointed persons in regard to the disposition of income during the term or

(3) for the purpose of benefiting the donee's children so that there is a tacit *fidei commissum* in their favour on their father's death within 25 years.

Having regard to the general structure of the clauses of conditions their Lordships cannot accept the view that the restriction was imposed solely to support condition 3 (alternative 2 just mentioned). It would have been quite unnecessary for this purpose to empower the donee to make grants to his children by way of mudusom or dowry.

The whole scheme of the Deed, as it appears to their Lordships, was to provide for the donee's family for the term of 25 years. During that term the income was available for the support of the donee, his wife and children. He could only dispose of the property by giving or transferring it to his children. The property was, during this period, not to be liable for the donee's debts; that provision is quite inconsistent with the hypothesis that the condition was "nude".

In their Lordships' opinion the plain inference is that in the event of the donee's death within 25 years the donor intended that the property should devolve on the donee's children and that he created a valid tacit *fidei commissum*. Nor with all respect to the judgment of the District Judge in appeal 1964/55 can their Lordships see any doubt or uncertainty as to the designation or description of the children who are to take on the donee's death within 25 years. Had it not been for the divergence of opinion upon the construction of this Deed in Ceylon their Lordships would have been content to say merely that they agree with the very careful judgment of Weerasooriya, S.P.J. in *Mohideen Hadjiar v. Ganeshan* (supra). Starting with *Robert v. Abeywardene* (supra) he discussed the subsequent cases in Ceylon and reached the conclusion, by a process of reasoning with which their Lordships entirely agree, that the authority of that case is unimpaired by subsequent decisions; applying it, he reached the correct conclusion. He treated the matter as one of a tacit *fidei commissum* although at a later stage of his judgment it is true that he did state that the Deed *required* the donees to allow the land to devolve on their children. Their Lordships however do not read this as being the decisive point in the learned Judge's judgment and indeed it is inconsistent with his treatment of the Deed as conferring only a tacit *fidei commissum* on the donee's children.

However before concluding their judgment their Lordships must return to the matter of differences in translations of the Deed in the various cases.

In appeals 1965/7 and 1965/14 condition 2 was translated as follows:

"2. I do hereby declare and enjoin that the donees shall not within a period of 25 years from the date of my death alienate the said lands by way of transfer, donation, dowry or by any other document that they should allow the said lands to devolve on their children by way of mudusom and may only give the said lands to their children by way of donation or dowry, that they shall have no power to encumber the said lands by way

of mortgage, otty or security or by any other document and that the said lands shall not be liable to be executable for any debts incurred by them."

The principal difference is the introduction of the phrase "that they should allow the said lands to devolve on their children by way of mudusom" which does not appear in the translation in appeal 1964/55.

The phrase "should allow" is ambiguous: it may mean "must allow" or "may allow". If the former, this would be a most material difference for it would convert the disposition into one of an express *fidei commissum.*

But for this construction Counsel for the daughters does not contend. Moreover upon the expert evidence of translators before them the Supreme Court in appeal 1965/14 reached the conclusion, with which their Lordships agree, that "should" ought to be read as "may" so this difference of translation makes no difference to the sense of the condition in that it remains, as a matter of express language, merely the conferment of a power or permission upon the donee and does not expressly require or compel him to do anything; the rules of the ancient Roman Law already mentioned being no longer acceptable. Accordingly upon this construction there is no material distinction between the translation in appeal 1964/55 and the other cases.

In their Lordships' judgment the daughters are entitled to succeed in their claim that as their father died within 25 years of the Donor the purchasers held their respective properties as fiduciaries for the daughters as *fidei commissaries.*

It is not in doubt that, upon the footing that the daughters establish a *fidei commissum,* they are bound to make compensation to the fiduciaries for improvements the latter have made to the lands. The basis of such compensation however depends on whether the fiduciaries were *bona fide* or *mala fide* improvers. It is however unnecessary to pursue this further for during the hearing of these appeals the parties have been able to come to certain terms upon this aspect of the matter as follows.

In appeal 1964/55 compensation is agreed at Rs. 9,000. In appeal 1965/7 compensation was not claimed and the point does not arise.

In appeal 1965/14 Counsel for the daughters did not feel able to support the District Judge's conclusion that compensation should be assessed on the footing that the fiduciaries were *mala fide* as in fact they purchased *bona fide* under an order of the Court and it has been agreed that the question must go back for assessment by the District on the footing that they were *bona fide* improvers.

Accordingly their Lordships will humbly advise Her Majesty that:

In appeal 1964/55 the appellants' appeal be allowed; the second and fourth appellants be declared entitled to the land agreed between the parties to be the subject matter of the action namely Lot 3, mentioned in the District Judge's judgment; the respondent be ejected from the said lot and the second and fourth appellants be placed in peaceful possession thereof; and there be judgment on the counter claim for agreed compensation in the sum of Rs. 9,000.

In appeal 1965/7 the appeal be dismissed.

In appeal 1965/14, the appellants' appeal be allowed, and the decree dated 22nd August, 1960 of the District Judge restored, save that on the respondents' counter claim it be referred to a District Judge to ascertain the compensation payable to the respondents for improvements on the footing that they were *bona fide* improvers.

As to costs.

In appeal 1964/55 the respondent must pay to the appellants their costs here and in the courts below, save that the appellants must pay the costs of the counter claim before the District Judge.

In appeal 1965/7 the appellant must pay to the first four respondents (who alone appeared) their costs of this appeal.

In appeal 1965/14 the first two respondents (who alone appeared) must pay to the appellants their costs here and in the Supreme Court. The costs of the reference to be reserved to the District Judge.

Appeals Nos. 55 *of* 1964 *and* 14 *of* 1965 *allowed.*

Appeal No. 7 *of* 1965 *dismissed.*

Present: **G. P. A. Silva, A.C.J. and Siva Supramaniam, J.**

A. GINADASA FERNANDO *v.* W. W. DON DHARMASIRI

S.C. No. 116/69 — *D.C. Kandy Case No. L.* 7547

Argued on: 11th & 12th June, 1969
Order Delivered on: 26th July, 1969.

Mandamus, Writ of— Petitioner applying for Certificate of Conformity in respect of building duly completed before its occupation — Failure to grant certificate — Appeal to District Court — Order by appellate tribunal directing issue — Certificate issued, but not in terms of section 15 *of the Housing and Town Improvement Ordinance — Application for Writ of Mandamus to Supreme Court — Does it lie in view of remedy prescribed by section* 95 *of the Ordinance to enforce award of District Court — Housing and Town Improvement Ordinance (Cap.* 265) *sections* 10(*a*), 15(1), (2), 16, 88 *and* 95.

The petitioner, the owner of certain premises at Wattegama submitted a plan of a proposed building to the respondent, the Chairman of the Wattegama Urban Council, for his approval as the competent authority under the Housing and Town Improvement Ordinance (Cap. 268). After giving due notice in terms of section 10(a) of the said Ordinance, the petitioner commenced building operations in June, 1963 and completed the building in February, 1964. On 24.2.1964 in terms of section 15(2) of the said Ordinance the petitioner applied to the respondent for a certificate of conformity to occupy the said building and as he did not receive a reply the petitioner appealed to the District Court, being the tribunal of appeal constituted for the purpose under section 68 of the said Ordinance.

On 23.11.1964 the District Judge allowed the appeal directing the respondent to issue a certificate of conformity. On 30.11.1968 the respondent in terms of the order of the appeal tribunal issued a document purporting to be a Certificate of Conformity permitting the occupation of the house but deleting the words "conforms with the requirements of the Urban Council". As the most material words had been deleted the petitioner wrote to the respondent requesting him to issue a Certificate of Conformity in terms of section 15 of the said Ordinance. There being no reply to this letter, the petitioner applied to the Supreme Court for a Writ of Mandamus on the respondent directing him to issue a Certificate as required by section 15 of the said Ordinance.

Held: (1) That the petitioner was not entitled to succeed inasmuch as he had admittedly not sought the aid of section 95 of the Housing and Town Improvement Ordinance which provides for the enforcement of the award of the appeal tribunal.

(2) That it was incumbent on the petitioner to follow the procedure laid down in the Civil Procedure Code for the purpose as prescribed by the said Ordinance. Inasmuch as this Ordinance created a right in favour of the petitioner and the correlative obligation on the part of the respondent and at the same time prescribed the remedy to which the petitioner was entitled on a breach of the obligation, this remedy must be resorted to by the petitioner as the party seeking to enforce the right.

(3) That it would be premature and undesirable to consider argument that such a procedure is inapplicable to an order of the type the petitioner is seeking to enforce until he has failed to achieve his object by following the procedure.

Cases referred to: *Sirisena v. Kotawera-Udagama Co-operative Stores Limited,* (1949) 51 N.L.R. 262
Rex v. Wandsworth Justices, ex parte Reid (1942) 1 A.E.R. 56
The Queen v. The Victoria Park Company (1841) 1 Q.B. 288
Wolverhampton New Waterworks Company v. Hawkesford, 6 Common Bench Reports (N.S.) 336
Pasmore et al v. The Oswaldtwistle Urban Council (1898) Appeal Cases 387.
Wilkinson v. Banking Corporation (1948) 1 K.B. 721.
Hendrick Appuhamy v. John Appuhamy, (1966) 69 N.L.R. 29

Nimal Senanayake, with *Sam Silva,* for the petitioner.

H. Wanigatunga, with *J. Weerasekera* and *N. Tiruchelvam,* for the respondent.

*For Sinhala translation, see Sinhala section, Vol. 19 part 5, p. 9

G. P. A. Silva, A.C.J.

The petitioner in this application is the owner of certain premises at Wattegama which is within the area of authority of the Wattegama Urban Council and the respondent is the Chairman of the Urban Council. On the 26th December, 1962 the petitioner submitted a plan of a proposed building consisting of a row of five tenements for approval by the respondent as the competent authority under the Housing & Town Improvement Ordinance (Ch. 268 of the New Legislative Enactments). After giving due notice on 2nd June, 1963 in terms of section 10(a) of the said Ordinance, the petitioner commenced building operations and completed the building in February, 1964. On 24th February, 1964 in terms of section 15(2) of the said Ordinance, the petitioner applied to the Chairman for a Certificate of Conformity to enable him to occupy the said buildings. As there was no response to this application the petitioner preferred an appeal to the District Court, which was constituted the tribunal of appeal for the purpose by section 88 of the said Ordinance with a view to obtaining an order from the District Court requiring the respondent to issue the said Certificates of Conformity. On the 23rd November, 1968 the parties appear to have arrived at a settlement and the District Judge made the following order.

"By consent it is now agreed that the Chairman of the Defendant-Council will issue a certificate of conformity to the Plaintiff in respect of the building which is the subject matter of this application on or before 30.11.68. .....

In view of the above I allow the appeal of the plaintiff as aforesaid and direct the Chairman of the Defendant-Council to issue the certificate of conformity as stated above.

This, however, is without prejudice to the rights of parties in respect of the land."

On the 30th November, '68 the respondent issued in terms of the order of the tribunal a document which purported to be a Certificate of Conformity which permitted him to occupy the house but in which certificate the words, "Conforms with the requirements of the Urban Council" were deleted by the respondent. As the words which were deleted were themselves the most material words which the petitioner required if the Certificate was to have the effect of the Certificate of Conformity, the petitioner wrote to the respondent a letter informing him that he should issue a Certificate of Conformity in terms of section 15 of the Housing & Town Improvements Ordinance which was the only Certificate contemplated by the tribunal of appeal. To this letter the respondent did not reply. These were the facts that led up to the application made to this Court for a Writ of Mandamus on the respondent directing him to issue a Certificate of Conformity in accordance with the provisions of section 15(1)(*sic*) of the Housing and Town Improvements Ordinance in respect of the building referred to.

Generally speaking the remedy by way of mandamus, which in any event is a discretionary remedy granted by this Court, would be available where there is a specific legal remedy without a mode of enforcing it. In such an instance the absence of a mode of enforcement would be a defect in the law and the procedure by way of Writ would step in to supply that defect. Counsel for the petitioner has submitted that this remedy would be available not only in cases where there is no provision for the enforcement of a public right but also where the remedy provided by law is not equally effective. In other words he argues that in order to exclude the remedy by way of a Writ of Mandamus there must be an alternative and effective remedy. In the case of *Sirisena v. Kotawera-Udagama Co-operative Stores Limited*, 51 N.L.R. 262, it was held by Gratiaen J. that even though an alternative remedy was also available a Writ of Certiorari would lie to quash the proceedings of a tribunal which flagrantly exceeded the limited statutory powers conferred on it. This case has only a very remote bearing on the principle involved in the present application. Gratiaen, J. was considering in that case the legality of a purported award made by an arbitrator under the Co-operative Societies Ordinance. The award was challenged by the petitioner on the ground that he had ceased to be an officer of the Society at the relevant date and that the purported reference to arbitration was *ultra vires* the powers of the Registrar of Co-operative Societies under Rule 29. As Rule 29 did not empower the compulsory reference to arbitration of a dispute between a registered Co-operative Society and a person who had ceased before the purported reference to be an officer of the Society, it was clear that the award which was challenged by the petitioner was one which was made in excess of the statutory jurisdiction which the second respondent purported to possess. Gratiaen, J. in deciding that case appears to have been guided by the observations made by Caldecote

L.J. and Humphreys, J. in the case of *Rex v. Wandsworth Justices, ex parte* Reid (1942) 1 A.E.R. 56 in regard to the availability of an order of Certiorari even where an appeal lay. In allowing the application Gratiaen, J. observed:

> "It is not in dispute that a public officer and an extra judicial tribunal, acting no doubt, through ignorance have flagrantly exceeded the limited statutory powers conferred on them by the provisions of the Co-operative Societies Ordinance ..... I consider that there is no compelling principle of law which fetters this Court's discretion to quash the illegal award ....."

From a close examination of the judgment of Gratiaen, J. and the observations of Caldecote, L.J. and Humphreys, J. it would appear that the principle that they intended to enunciate was that a Writ of Certiorari was an appropriate remedy in cases where there was a clear excess of jurisdiction by an inferior tribunal. This is a special remedy intended to grant relief to a person who has suffered by reason of the decision of a tribunal which had no jurisdiction to make any order at all. What the superior court in fact does in that situation is not to set aside or revise the actual finding of the inferior tribunal but to declare the order made to be null and void. Although it has been customary for appellate courts to deal with excesses of jurisdiction, a careful analysis of the provisions of the Courts Ordinance relating to the exercise of appellate jurisdiction may well justify the view that Courts of Appeal can properly correct only errors in fact or in law committed by an inferior court in the lawful exercise of its powers and that, where there is no lawful exercise of such powers, that is, where it acts without jurisdiction the appropriate remedy is by way of a Writ of Certiorari. For, there is a clear distinction between an error committed by a Court in assuming a jurisdiction which it does not possess, resulting in subsequent proceedings being a nullity, and an error committed by a Court in matters of law or of fact after a proper assumption of jurisdiction. According to what I have referred to as a justifiable view the correction of the former would fall within the scope of a Writ of Certiorari and the latter within the scope of the appellate court. It does not appear from the judgments of Caldecote, L.J. or Humphreys, J. or that of Gratiaen, J. that any argument on the basis of such a distinction was advanced for consideration by them. In that event they may well have reached the same conclusion they did but through a different approach. Thus no right of appeal being available to revise a nullity committed by a tribunal acting in excess of jurisdiction, that is, without jurisdiction, the decision would have been in favour of Certiorari on the basis of the general principle that was expressed in their judgments, namely, that as a rule Certiorari lay only where the remedy of appeal was not available. A consideration of the converse case would also support the view I have taken. For, in the cases referred to, if the application for Certiorari was against an error of law committed by the tribunal after a proper assumption of jurisdiction, I should imagine that such application would have been refused on the ground that the applicant should have sought his appropriate remedy by way of appeal. If the view that I have expressed is correct, it seems to me that the general principle that Certiorari will not lie where there is an alternative remedy would still prevail because an appeal proper will not lie where there is an excess of jurisdiction. A further reason that inclines me to treat that as the more reasonable view is because it is generally accepted that remedies by way of Writs are extraordinary remedies which have been evolved from their inception to meet situations where no other remedy was available and it is very doubtful whether remedy would have been extended to cases where there was an alternate remedy.

It is to be noted that even while coming to the conclusion he did in that case Gratiaen, J. conceded the general principle that a superior court will not as a rule make an order of Mandamus or Certiorari where there is an alternative and equally convenient remedy. Even if the question adverted to earlier is a matter of doubt, such doubt can arise only in respect of a Writ of Certiorari but not in respect of a Writ of Mandamus, the issue of which is goverend by the general principle that the applicant must be without any other remedy. Where such other remedy is not merely one at common law but is one prescribed by the statute itself which created the right, there is no escape for an aggrieved party from pursuing the remedy laid down in the statute.

In the present application there are some further difficulties, even assuming that the existence of an alternative remedy does not preclude the remedy of Mandamus. For, it has been made to this Court not in the first instance but after proceeding half way and obtaining an order form the appropriate tribunal which granted the petitioner's prayer. As counsel for the respondent has submitted with justification, I think, the application is in effect for the execution or enforcement of the order obtained from the tribunal of appeal. I am not

aware of, nor has counsel for the petitioner brought to the notice of this Court, any decision which supports the view that a Writ of Mandamus is available for this purpose. Document A which contains the order of the tribunal and Document B which is the purported Certificate of Conformity issued in compliance with that order demonstrate that the petitioner has sought the Writ of Mandamus only because the certificate issued is not the certificate contemplated by section 15 of the Housing & Town Improvement Ordinance or, as it is submitted by counsel, because the respondent has refused to comply with the Order.

Section 95 of the Ordinance provides that any award of the tribunal shall be enforced by the District Court as if it had been a decree or order of that Court. In view of this provision, it was incumbent on the petitioner to follow the procedure laid down in the Civil Procedure Code for the enforcement of a decree. He should therefore follow that procedure in the first instance with a view to enforcing an award made by the tribunal of appeal. It was sought to be argued that that procedure was inapplicable to an order of the type that the petitioner had to enforce. It would, I think, be premature and undesirable for this Court to decide that question at this stage. If for any reason the petitioner exhausted this procedure and, having failed to achieve his object owing to a hiatus in the procedure provided, thereafter approached this Court the problem of course would be different. The petitioner has admittedly not sought the aid of these provisions but instead has come to this Court applying for a Writ of Mandamus for enforcement of an order which should be executed as a decree of the District Court. Not only is this procedure unknown to law but the procedure is being resorted to in the teeth of specific provision for the enforcement of an order by the tribunal having been made by the statute which created the rights and obligations involved. Counsel for the respondent cited to us the case of *The Queen v. The Victoria Park Company* (1841) 1 Q.B. 218 in which this precise question was considered. In the course of the judgment Lord Denman C.J. observed:— "But, assuming the judgment to be correctly entered up in that form, and we think it does not lie in the mouth of the plaintiff to contend that it is not, it seems to us to form a decisive answer to the first part at least of the application: because the plaintiff then has the ordinary legal remedy of an execution; and we cannot direct a Mandamus to go ordering the payment to be made, merely because, under the circumstances the execution may produce no fruits." The answer which Lord Denman considered to be decisive on the question raised in that case would apply with greater force to the present in view of the special statutory provision making it obligatory on the District Court to enforce an award of the tribunal as if it had been its own order or decree. By necessary implication, this provision also directs the holder of the award to seek the assistance of the District Court for its enforcement.

Counsel for the petitioner has submitted to us a number of other decisions in support of his contention. On an examination of these decisions it would appear that they lend some support to his contention only in a limited way and in relation to certain special situations. They do not however support a general proposition that Mandamus will also lie despite the presence of other remedies. It is hardly necessary to embark on a detailed consideration of these decisions as they do not persuade me to take a view contrary to what I have already expressed.

The application is accordingly dismissed with costs.

Siva Supramaniam ,J.

I agree to the order proposed by My Lord the Acting Chief Justice. The facts are fully set out in his judgment.

The right, which the petitioner seeks to enforce in this case and the corresponding duty imposed on the respondent, arise, not under the common law, but under section 15 of the Housing and Town Improvement Ordinance (Cap. 268). The same statute prescribes the remedy for default or breach of that duty. It provides as follows under Section 16:—

> "Any person aggrieved ..... by any refusal of a certificate of the Chairman ..... or by any delay of the Chairman ..... in complying with the provisions under section 15, may appeal to the tribunal of appeal, and the tribunal on any such appeal (subject always to the provisions of this Ordinance or any other enactment) may make such order as it may deem just."

Section 95 provides that:

> "any award or order of the tribunal shall be enforced by the District Court as if it had been a decree or order of that Court."

When the respondent failed to issue the certificate of conformity, the petitioner proceeded under the statute and appealed to the District

Court of Kandy which, in terms of section 88(1) of the Ordinance, is the tribunal of appeal for the area in question. He obtained an order from that Court directing the respondent to issue a certificate of conformity in terms of section 15 of the said Ordinance. His substantial complaint is that the respondent has not complied with that order.

In paragraphs 17 and 18 of his petition he has averred as follows:—

> "17. The petitioner respectfully submits that the respondent is under a statutory duty to issue a certificate of conformity in accordance with the provisions of section 15 of the Housing and Town Improvement Ordinance and is under a duty to comply with the order made by the tribunal of appeal in D.C. Kandy No. 7547/Land.
>
> 18. The petitioner respectfully submits that it is illegal and unlawful for the respondent to fail to carry out the order of the tribunal of appeal."

The petitioner, however, failed to take the further steps available to him under the statute to have the order of the tribunal of appeal enforced. He has, instead, applied to this Court for a mandate "directing the respondent to issue the certificate of conformity in accordance with the provisions of section 15(1) of the Housing and Town Improvement Ordinance."

The learned counsel for the petitioner conceded that he is not entitled to apply to this Court for a writ of mandamus to compel the respondent to carry out the order of the District Court. He submitted, however, that it was open to the petitioner to have applied to this Court in the first instance for a mandate when the respondent failed to comply with his statutory duty under section 15 of the said Ordinance and the fact that he followed the procedure under section 16 up to a certain stage is no bar to his present application.

The question, however, is whether the petitioner could have applied to this Court in the first instance for a mandate. In the case of *The Wolverhampton New Waterworks Co. v. Hawkesford*, 6 Common Bench Reports (N.S.) 336 at p. 356, Willes J. said:—

> "There are three classes of cases in which a liability may be established founded upon a statute. One is, where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law: there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, the party suing has his election to pursue either that or the statutory remedy. The second class of cases is, where the statute gives the right to sue merely, but provides no particular form of remedy: there, the party can only proceed by action of common law. But there is a third class, viz. where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. ..... The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class."

The present case falls within the third class referred to by Willes, J.

The case of *Pasmore et al v. The Oswaldtwistle Urban District Council*, (1898) Appeal Cases 387 is in point. By section 15 of the Public Health Act 1875, "every local authority shall keep in repair all sewers belonging to them, and shall cause to be made such sewers as may be necessary for effectually draining their district for the purposes of this Act." By section 299, "Where complaint is made to the Local Government Board that a local authority has made default in providing their district with sufficient sewers ..... the Local Government Board, if satisfied after due inquiry that the authority has been guilty of the alleged default, shall make an order....." The plaintiff who was not satisfied with the adequacy of the sewers to carry the liquids proceeding from his factories made no complaint to the Local Government Board but claimed a mandamus commanding the local authority to cause to be made such sewers as may be necessary for effectually draining their district. Charles, J. allowed the writ on the ground that section 299 had no application to a case where the question was whether the defendants were bound to provide sewers for liquids flowing from the plaintiff's factories at all, and that, unless excluded expressly, the plaintiff had a right to the judgment of a court of law upon the matter. He also held that the section introduced by the words "Where complaint is made" did not make it imperative on the plaintiff to make a complaint to the Local Government Board and to submit to their interpretations of the statute, (1897) Appeal Cases p. 384. The Court of Appeal, however, reversed the decision and dismissed the application for mandamus on the ground that the plaintiff's only remedy was under section 299 of the Act, ibid p. 625. The decision of the Court of Appeal was affirmed by the House of Lords. In the course of his speech (1898) Appeal Cases p. 394. Lord Halsbury said:—

> "The principle that where a specific remedy is given by a statute, it thereby deprived the person who insists upon a remedy of any other form of remedy than that

given by the statute, is one which is very familiar and which runs through the law. I think Lord Tenterden accurately states that principle is the case of *Doe v. Bridges* (1831) 1 B. & Ad. 847, 859. He says: 'where an Act creates an obligation and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner.'"

In the case of *Wilkinson* v. *Banking Corporation* (1948) 1 K.B. 721. Asquith L.J. observed:

"It is undoubtedly good law that where a statute creates a right and, in plain language gives a specific remedy or appoints a specific tribunal for its enforcements, a party seeking to enforce the right must resort to that remedy or that tribunal and not to others."

The principle laid down in the aforesaid cases was adopted by this Court in the case of *Hendrick v. John Appuhamy*, 69 N.L.R. 29.

In the present case, as stated already, the same statute which creates the right in favour of the petitioner and the correlative obligation on the part of the respondent has prescribed the remedy to which the petitioner is entitled on a breach of the obligation by the respondent. The rule of law enunciated above provides a sufficient answer to the petitioner's claim for mandamus. The application fails and must be dismissed with costs.

Appeal dismissed.

Privy Council Appeal No. 8 *of* 1969

Present: **Lord Morris of Borth-y-Gest, Lord Hodson, Lord Upjohn, Lord Wilberforce & Lord Diplock**

VISWANATHAR KANAGARATNAM SUBRAMANIAM *v* KANAGARATNAM KADIRGAMAN

From

THE SUPREME COURT OF CEYLON

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

Delivered on: 6th October, 1969

Thesawalamai — Husband acquiring lands for valuable consideration during the subsistence of marriage — Tediatetam within the meaning of section 19 *of Jaffna Matrimonial Rights and Inheritance Ordinance of* 1911 *— Death of wife intestate in* 1948 *— Amending Ordinance No.* 58 *of* 4*th July*, 1947 *repealing sections* 19, *which provided that property so acquired shall be "tediatetam" and common to both, And section* 20, *which provided for devolution of such joint property — Substitution of two new sections — Common ground that subject of this appeal did not fall within the new definition — How did the wife's share devolve upon her death intestate? Jaffna Matrimonial Rights and Inheritance Ordinance of* 1911 *(Cap.* 5) *sections* 19, 20, 21 *and* 22 *Wills Ordinance, section* 7.

The plaintiff as the administrator of the estate of a deceased wife, who died intestate in 1948 sought to recover a half-share of lands out of the estate belonging to the husband of the deceased wife on the ground that they were acquired at various times by the husband for valuable consideration during the subsistence of their marriage and therefore constituted '*tediatetam*" within the meaning of section 19 of the Jaffna Matrimonial Rights and Inheritance Ordinance of 1911, the parties being Jaffna Tamils and subject to *Thesawalamai.*

Section 20(1) of the said Ordinance provided that the "*tediatetam*" property referred to in section 19 (as being acquired for valuable consideration by either spouse) shall be property common to the two spouses and section 20(2) provided *inter alia* that on the death intestate of either spouse one-half of the joint property shall remain the property of the survivor and the other shall vest in the heirs of the deceased.

On 4th July, 1947, during the wife's lifetime Ordinance No. 58 of 1947 came into force amending the said Ordinance of 1911, which repealed the said sections 19 and 20 and substituted in their places two new sections.

The new section 19 excluded from the definition of "*tediatetam*" property, which had previously been included in the definition of the same word in the former section 19. It is common ground that the subject of this appeal did not fail within the new definition.

The new section 20 in contrast to the former section 20 does not deal with any legal incidents thereafter to attach to *tediatetam* as newly defined other than its devolution upon the death of a spouse intestate.

Held: (1) That, agreeing with the Supreme Court decision in *Akilandanayaki v. Sothinagaratnam* 53 N.L.R. 385 (5 Judges), at the date of the wife's death in 1948 the wife was still entitled to an undivided half share in the land in suit, although it would not be correct after 4th July, 1947 to attach either to the land in suit or to the half-share in it the label "*tediatetam*" in view of the new definition of the word in the said Amending Ordinance.

Approved: *Akilandanayaki v. Sothinagaratnam*, 53 N.L.R. 385.

(2) That the new section 20 which applies only to property within the new definition of *tediatetam* in section 19 did not apply either to the land or to the wife's half-share in it which had vested in her before the Amending Ordinance was passed.

(3) That inasmuch as by the date of wife's death the former section 20 had been repealed, it could no longer affect the devolution of her half share, but as the half-share formed part of the property to which she was entitled at the date of her death, its devolution was accordingly regulated by the general provisions as to inheritance contained in section 21 *et seq.* of the said Ordinance of 1911, none of which was amended by the Amending Ordinance.

(4) That under the said sections 21 *et seq.* the wife's half-share in the lands in suit devolve upon her children upon her death and the plaintiff as administrator is entitled to recover the share from the estate of her husband.

Followed: *Kumaraswamy v. Subramaniam*, 56 N.L.R. 44.

M. P. Solomon, for the appellants.

Walter Jayawardena, Q.C., with *R. K. Handoo* and *G. Candappa*, for the respondents.

Lord Diplock:

This appeal is about land which was acquired by a husband, the original defendant, at various dates between 1919 and 1945 during the subsistence of his marriage with a wife who died intestate in 1948. Her administrator is the plaintiff in the action. The husband died during the lengthy pendency of this action and his son by an earlier marriage was substituted as defendant.

Husband and wife were Tamils originating from the Jaffna area and the law which governed their matrimonial rights and inheritance is known as *Thesawalamai*. At the date of acquisition of the various parcels of land which are the subject of this suit *Thesawalamai* was regulated by the Jaffna Matrimonial Rights and Inheritance Ordinance of 1911 (herein called "the Principal Ordinance"); but on 4th July. 1947 after the land had been acquired and before the death of the wife the Principal Ordinance was amended.

Under the customary law of *Thesawalamai* as it was before 1911 profits arising from the separate estate of either spouse during the subsistence of the marriage and property acquired out of those profits were known as *tediatetam*. It is unnecessary for the purposes of the present appeal to consider precisely what property was comprised in *tediatetam* before 1911 or what were the legal incidents attaching to it. Section 19 of the Principal Ordinance defined what property should *thereafter* constitute the *tediatetam* of each spouse and section 20 provided what legal incidents should attach to it.

Section 19 of the Principal Ordinance was as follows:

> "19. The following property shall be known as the *tediatetam* of any husband or wife —
>
> (*a*) property acquired for valuable consideration by either husband or wife during the subsistence of marriage;
>
> (*b*) profits arising during the subsistence of marriage from the property of any husband or wife."

Paragraph (*a*) of this section brought within the definition of the expression "*tetiatetam*" as used in that Ordinance property which was not included in *tetiatetam* under the customary law of *Thesawalamai*. It is common ground that the land which is the subject of dispute fell within this extended definition though it would not have been included in the *tetiatetam* of either spouse under the previous customary law. It would have been the separate property of the husband.

Section 20 of the Principal Ordinance was as follows:

> "20. (1) The *tediatetam* of each spouse shall be property common to the two spouses, that is to say, although it is acquired by either spouse and retained in his or her name, both shall be equally entitled thereto.
>
> (2) Subject to the provisions of the *Tesawalamai* relating to liability to be applied for payment or liqui-

dation of debts contracted by the spouses or either of them on the death intestate of either spouse, one-half of this joint property shall remain the property of the survivor and the other half shall vest in the heirs of the deceased; and on the dissolution of a marriage or a separation *a mensa et thoro*, each spouse shall take for his or her own separate use one-half of the joint property aforesaid."

It is common ground that the effect of sub-section was to vest in the non-acquiring spouse from the moment of acquisition an undivided half-share in the property acquired by the other spouse during the subsistence of the marriage. Sub-section (2) provided *inter alia* for the devolution of this half-share upon the death intestate of each spouse. Although referred to indifferently in the section as "joint property" and "property common to the two spouses", section 7 of the Wills Ordinance provides in effect that property owned jointly shall be held in common and in particular that the undivided share of a deceaesd co-owner shall form part of his estate.

It follows from this that the wife acquired an immediate undivided half-share in each of the parcels of land to which this appeal relates from the moment at which they were acquired; and that this proprietary right had vested in her before 4th July, 1947. It is not in their Lordships' view necessary to consider the precise legal incidents attaching to it under the Principal Ordinance save to note that her undivided half-share would have devolved upon her heirs upon her death intestate.

Upon 4th July, 1947 during the wife's lifetime. Ordinance No. 58 of 1947 therein called "the Amending Ordinance") came into force. Among the amendments to the Principal Ordinance it repealed sections 19 and 20 and substituted therefor new sections in the following terms:

"19. No property other than the following shall be deemed to be the *thediatheddam* of a spouse;

(*a*) Property acquired by that spouse during the subsistence of the marriage for valuable consideration not forming or representing any part of the separate estate of that spouse.

(*b*) Profits arising during the subsistence of the marriage from the separate estate of that spouse."

"20. On the death of either spouse one half of the *thediatheddam* which belonged to the deceased spouse, and has not been disposed of by last will or otherwise, shall devolve on the surviving spouse and the other half shall devolve on the heirs of the deceased spouse."

The new section 19 excluded from the definition of *tetiatetam* property which had previously been included in the definition of the same word in the former section 19 of the Principal Ordinance. It is common ground that the land which is the subject of this appeal did not fall within the new definition of *tetiatetam*. The new section 20, in contrast to the former section 20 of the Principal Ordinance does not deal with any legal incidents which were thereafter to attach to *tetiatetam* as newly defined other than its devolution upon the death of a spouse intestate. Important amendments to earlier sections, 6 and 7, of the Principal Ordinance, however, altered the legal incidents attaching during a spouse's lifetime to property which fell within the new definition of *tetiatetam*, though in their Lordships' view it is unnecessary for the purpose of the present appeal to consider those alterations in detail.

It is a potential source of confusion that the single expression "*tetiatetam*" has been used to describe property falling within a definition of which the scope has been different at different periods viz. before the Principal Ordinance was enacted in 1911; between 1911 and 4th July, 1947; and after 4th July, 1947. Property such as the land at present in suit which was correctly described is "*tetiatetam*" during the period from 1911 to 4th July 1947 may cease to be entitled to that label after the latter date. But the loss of the label does not divest either spouse of the proprietary rights in the land which had already vested in them by virtue of its status as "*tetiatetam*" at the date at which it was acquired before the definition of "*tetiatetam*" was altered by the Amending Ordinance. This was the decision of the Supreme Court of Ceylon composed of five judges in *Akilandanayaki v. Sothinagaratnam*, 53 N.L.R. 385. In that case it was held that section 6(3) of the Interpretation Ordinance prevented sections 19 and 20 of the amending Ordinance from affecting any proprietary right of a spouse which had been already acquired under the repealed sections 19 and 20 of the Principal Ordinance before the date of their repeal.

It has not been contended in the present appeal that the decision in the Akilandanayaki case was wrong. Their Lordships accept it as correct. It therefore follows that at the date of her death in 1948 the wife was still entitled to an undivided half-share in the land in suit. But in their Lordships' view it would no longer be correct after the 4th July, 1947 to attach either to the land in suit or to her half-share in it the label "*tetiatetam*". It is common ground that the land in suit itself did not fall within the definition of "*tetiatetam*"

in the new section 19 because it was acquired by the husband for valuable consideration which formed or represented part of his separate estate. Neither in their Lordships' view did the wife's half-share in it fall within the new definition because her half-share was not acquired by her for valuable consideration nor was it profits arising during the subsistence of the marriage. The new section 20, which applies only to property within the new definition of "*tetiatetam*" in section 19, accordingly did not apply either to the land or to the wife's half-share in it which had vested in her before the Amending Ordinance was passed.

How then did her half-share devolve upon her death intestate? By the date of her death section 20 of the Principal Ordinance had been repealed and could no longer affect the devolution of her half-share. But it formed part of the property to which she was entitled at the date of her death. Its devolution was accordingly regulated by the general provisions as to inheritance contained in sections 21 *et seq* of the Principal Ordinance none of which was amended by the Amending Ordinance. As the deceased wife left children surviving her the relevant sections are sections 21 and 22, which are in the following terms:

> "21. Subject to the right of the surviving spouse in the preceding section mentioned, the right of inheritance is divided in the following order as respects (*a*) descendants, (*b*) ascendants, (*c*) collaterals.
>
> 22. Children, grandchildren, and remoter descendants are preferent to all others in the estate of the parents. All the children take equally *per capita;* but the children or remoter issue of a deceased child take *per stirpes.*"

Under these sections the wife's half-share in the lands in suit devolve upon her chidren upon her death intestate and the plaintiff as administrator of her estate is entitled to recover her share from the estate of her husband who is now also deceased.

In so deciding their Lordships are following the decision of the Supreme Court of Ceylon in *Kumaraswamy v. Subramaniam,* 56 N.L.R. 44 about other land in respect of which the plaintiff claimed that the deceased wife had similar proprietary rights to those asserted in the present appeal. The grounds of that decision were succinctly stated by Gratien, J. at p. 47 as follows:

> "the new sections 19 and 20 have no bearing on the present problem. A half share of the *tediatetam* property acquired by (the husband) in 1933 and 1943 and automatically vested in (the wife) (as the non-acquiring spouse) under the old section 20, and the subsequent repeal of the old Section 20 did not operate to divest her of that share. The devolution of (the wife's) share upon her death in 1948 was regulated solely by Section 21 of the principal Ordinance because the new section 20 has no application to the case."

Their Lordships are, in effect, asked in the present case to over-rule this decision; but in their view its reasoning is sound and decisive of the present claim also. They will accordingly humbly advise Her Majesty that this appeal should be dismissed. The appellant must pay the respondent's costs of the appeal.

Appeal dismissed with costs.

Present: **de Kretser, J.**

MOHAMED THAMBI MOHAMMED MUSTAPHA

v.

SUB-INSPECTOR OF POLICE, BATTICALOA

S.C. 1070/68 — *M.C. Batticaloa* 24128

Argued on: 28th April, 1969
Decided on: 28th May, 1969

Price Control Act — Sale of one pound tin of Nespray above controlled Price — Can the prosecution succeed without proving that tin contained a pound of milk food known as Nespray but relying on the label on it — Evidentiary value of label — Need to ascertain whether what is controlled is a pound of milk food or tin of milk food.

Charge of failing to exhibit conspicuously on a notice board the maximum retail price—Failure to produce notice board — Can conviction be sustained?

Where the evidence established that the accused sold a pound tin of milk food labelled Nespray, for Rs. 3/-, when such a tin is price controlled at Rs. 2/90.

Held: (1) That the conviction should stand as an examination of the relevant Price Order confirms the submission that the price is fixed per tin and not per pound.

(2) That therefore the question whether what is stated in the label is factually true does not arise.

(3) That a conviction for failing to exhibit conspicuously on a notice board the maximum retail price could not be sustained where the prosecution failed to produce the notice board to enable the Magistrate to form his own opinion.

Per **de Kretser, J.** "From the evidentiary point of view the legend Nespray 1 lb. nett on the label is hearsay and the case of *Myers v. Director of Public Prosecutions*,(1964) 2 A.E.R. 881 cited with approval in *Patel v. Controller of Customs*, (1965) 3 A.E.R. 593, "makes clear beyond doubt that the list of exceptions to the hearsay rule cannot be extended judicially to include such things as labels or markings'."

Cases referred to: *Myers v. Director of Public Prosecutions*, (1964) 2 A.E.R. 881
Patel v. Controller of Customs (1965) 3 A.E.R. 593
Jalaldeen v. Jayawardene, (1968) 70 N.L.R. 476

G. E. Chitty, Q.C., with *T. W. Rajaratnam* and *G. E. Chitty, (Jnr.)*

Tyrone Fernando, Crown Counsel, for the Attorney-General

de Kretser, J.

The Magistrate of Batticaloa, (Mr. O. S. M. Seneviratne) convicted the accused of the two charges laid against him; viz. selling a pound tin of Nespray which is price controlled at Rs. 2/90 for Rs. 3/- and failing to exhibit conspicuously on the Price Board the controlled price of Nespray. He sentenced the accused to 6 weeks R.I. and a fine of Rs. 1,000/- in default 6 weeks R.I. on Count 1, and a fine of Rs. 50/- in default 2 weeks R.I. on Count 2. The accused has appealed.

The Magistrate who had the advantage of seeing the school-boy witness Marso giving evidence has accepted that evidence after carefully weighing all that was urged by Counsel against that course. I see no reason to disagree with him. Marso's evidence established that the accused asked him for Rs. 3/- for a one pound tin of Nespray, and when Marso gave him the Rs. 10/- note of which the number has been noted, in payment, the accused gave him the tin of Nespray produced as P3 and a balance of Rs. 7/-. The accused's defence was that he had no ten cent bit at the cashier's table he was at, and that he had intended giving it, taking it from another table in the boutique but that he was arrested before he could do so. It appears to have been a foolish thing to do — so foolish that I find myself unable to believe it happened that he, a trader dealing in Price Controlled goods should have handed over only a balance that established guilt when he could have given the true balance in a minute or two. The fact that I have observed in appeals from convictions in other Price Control cases similar claims of having intended to hand over the balance, which make all the difference between guilt and innocence, but not having had the time to do so, makes me all the more sceptical. The Magistrate did not accept his testimony and I am of the view that the Magistrate was correct in doing so. On the facts, then, it is established that the accused sold to Marso as a one pound tin of Nespray, the production P3 which the Magistrate notes was untampered with and which bore the label "Nespray nett weight 1 pound (454. grams.)."

Mr. Chitty for the appellant submits that the prosecution to succeed must prove that the tin P3 contained a pound of the milk food known as Nespray and that the prosecution does not prove that by proving that the accused sold a tin of milk food bearing a label, Nespray nett. weight one pound (454 grams.).

Counsel for the Crown relying on the case of *Jalaldeen v. Jayawardene*, 70 N.L.R. 476 submits that the accused when he sold to a customer the

tin so labelled "adopted the specification on the label and admitted by conduct the weight and contents stated in the label."

If by this is meant that the accused must be held to have admitted that what was stated on the label was the truth, I must with all respect disagree, for the evidence is that the tin was untampered with. Therefore, the accused relied as much as anyone else on what was stated on the label. The fact that he pinned his faith on what was stated on the label does not mean that his faith could not be misplaced.

From the evidentiary point of view the legend Nespray 1 lb. nett on the label is hearsay and the case of *Myers v. Director of Public Prosecutions*, (1964) 2 A.E.R. 881 cited with approval in *Patel v. Controller of Customs* (1965) 3 A.E.R. 593, "makes clear beyond doubt that the list of exceptions to the hearsay rule cannot be extended judicially to include such things as labels or markings."

Counsel for the Crown further submits that it is common knowledge that the milk food known as Nespray is marketed by its manufacturer in tins of which the contents weigh 1 pound, 2 1/2 pounds and 5 pounds respectively. His submission is that the Price Order fixes prices for milk food in tins so labelled, and in the instant case, the prosecution having proved that the accused sold the tin P3 bearing such a label for Rs. 3/- when the controlled price was Rs. 2/90, the accused is guilty of the charge laid against him.

It then becomes necessary to decide what it is that is price controlled. Is it a pound of the milk food of the brand known as Nespray, ordinarily marketed in tins or is it a tin of milk food labelled Nespray 1 pound nett. weight (454 grams.)? The relevant price order is No. 407 of 1.3.66, published in G.G. (Extraordinary) 14684 of 1.3.66, and what is relevant in it to this case is: (ii) fixes with immediate effect the prices specified in columns 2 and 3 of the Schedule hereto to be the maximum wholesale price per dozen tins and the maximum retail price per tin respectively above which the brand of milk food specified in the corresponding entry in column 1 of the Schedule shall not be sold within the island of Ceylon ..... What is relevant in the Schedule reads:

Column 1 **Brand of Milk Food**	*Column* 3 **Maximum Retail Price per tin**
	Rs. cts.
Nespray 1 lb.	2.90
Nespray 2 1/2 lbs.	7.00
Nespray 5 lbs.	13.25

In my view an examination of the Price Order confirms the correctness of the submission of Counsel for the Crown. Milk food is marketed in tins and what the Price Order controls is the price at which such tins can be sold. It is to be noted that the price is fixed per tin and not per pound. So *a tin* of milk food described under column 1 of the Schedule as "Nespray 1 pound" for the reason that that is how it is labelled by its manufacturers, is controlled at Rs. 2/90. *A tin* of milk food described under column 1 as Nespray 2 1/2 lbs. is controlled at Rs. 7/- and so on. In these circumstances, it appears to me the question of whether what is stated on the label is factually correct does not arise, and there is no need to comfort oneself with the thought that "it would be absurd to suppose that manufacturers of Nespray adopt any uncommon course of conduct to understate in their labels the weight of the milk food they sell." The evidence having established that the accused did sell P3 *a tin* of milk food labelled Nespray 1 pound for Rs. 3/-, when such a tin is Price Controlled at Rs. 2/90, he is in my opinion rightly convicted of the charge.

There remains the conviction on the charge which should be that the accused failed to exhibit conspicuously on a notice board the maximum retail price of Nespray. Apart from the fact that the charge is wrongly drafted in that what it alleged is that he failed to exhibit conscpicuously the notice board, I find that the notice board in question has, for some careless reason, not been produced to enable the Magistrate to decide whe-

ther what was stated on it was conspicuous or not. I, therefore, set aside the conviction on this count.

The next question is what the sentence on count 1 should be. As the accused is a first offender, I do not think a prison sentence is called for. Counsel for the Crown concedes that this is a case in which the right of the Court to apply the provisions of Section 325 of the Criminal Procedure Code has not been taken away by law. I set aside the sentence imposed and direct the accused to enter into a bond in Rs. 1,000-/ (personal) to be of good conduct and to come up for conviction and sentence if called on within a period of three three years, and to pay Rs. 1,000/- as Crown costs within one month of entering into the bond. Subject to these variations the accused's appeal is dismissed.

Conviction on 1st count affirmed, but sentence set aside and accused ordered to enter into bond to be of good conduct. Conviction on 2nd count set aside.

Present: **De Kretser, J.**

THE MANAGER, NAKIADENIYA GROUP *v.* THE LANKA ESTATE WORKERS' UNION

S.C. 201/68 — *L.T. No. G.* 354

Argued on: 27th September, 1969
Decided on: 28th September, 1969

Labour Tribunals — Dismissal of Kangany and 67 labourers — Their re-employment on a settlement between Management and Trade Union — Whether dismissed Kangany should be re-employed on same Division of Estate — Interference with discretion of the Management — Requisites of just and equitable order.

Rainis, a Kangany of the Udagama Division of Nakiadeniya Group, was dismissed along with 67 labourers as a consequence of being involved in a shooting incident. In furtherance to a settlement between the management and the Respondent Trade Union whereby it was agreed that the estate would give employment to all the labourers dismissed provided they applied for it to the Superintendent or Manager, Rainis was offered employment as a Kangany, but not on the Udagama Division. He refused employment and sought redress from a Labour Tribunal which ordered, *inter alia*, that he be re-employed on the estate as Kangany on his old Division, on the ground that there was an "unexpressed decision" in the settlement that the workers would be given employment in the same sections in which they had earlier worked.

Held: (1) That the President of the Labour Tribunal had misdirected himself on the evidence which clearly showed that there was no agreement between the management and the Trade Union as to the divisions on the estate in which the labourers would be employed.

(2) That, therefore, the demand that the Kangany Rainis should be re-employed on his old Division was not one that the Tribunal should have granted.

Per **de Kretser, J.** "To grant the demand that the management of the estate cannot transfer a Kangany from his division in such circumstances is to interfere with the discretion of the management as to where in the interest of the estate — and it may be of the man himself — the workman should be best employed. Such interference in the management of estates is not in the best interests of their productivity and therefore not in the interest of the country. In the making of a just and equitable order one must consider not only the interest of the employees but also the interest of the employers and the wider interest of the country for the object of social legislation is to have not only contented employees but also contented employers."

H. W. Jayawardene, Q.C., with *A. M. Coomarasamy*, and *G. M. S. Samaraweera*, for the appellant.

No appearance, for the applicant-respondent.

De Kretser, J.

M. H. Rainis was the Kangany of the Udagama Division of Nakiadeniya Group, when on the 19th of January, 1963 there was an incident which resulted in 67 labourers including Rainis being dismissed. In consequence of discussions with the Trade Union to which these men belonged a settlement was arrived at.

That settlement has been produced marked B. 3. What is relevant in it is that it was agreed that the management would give employment to all the labourers provided they applied for it to the Manager or Superintendent. Rainis duly applied but when he found that he would get employment as a Kangany but it would not be on the Udagama Division of the Estate, he refused employment and filed this action in the Labour Tribunal. The President (Mr. Dahanayake) ordered that Rainis should be re-employed in his employment as Kangany of the Udagama Division and paid Rs. 500/- as arrears of salary, holding that there was 'an unexpressed decision in the agreement for the workers to be given employment in the same section they had worked'. He based this conclusion on the fact that he found a large number of the dismissed employees had been given the same employment in the same places they had worked earlier, and the fact that the evidence of the Superintendent showed that there was an undertaking at some stage to give Rainis work in the section he had worked earlier and that the management had failed to show good cause why they did not honour that promise. It appears to me that the President has lost sight of the fact that when 67 labourers are taken back some of them might necessarily have to go back to the same Divisions in which they had worked but that would be quite fortuitous. What was more important was to note that all of them had not been given employment in the Divisions in which they had worked earlier for that would point to there being no "unexpressed decision" in the agreement that those who sought employment would be given it in the same sections in which they had worked earlier. It also appears that he has misunderstood a poorly framed question and in consequence the answer when the Superintendent was giving evidence. In his judgment he has noted the question as, was a promise made to Ackmon Ariyadasa Rainis and others to give work on the very places they worked? The question should read Ackmon Ariyadasa and Rainis — others were promised work in the same place they worked — is it not so? This appears to indicate that the cross-examiner began his question in reference to the men he named but changed it before he completed it and that the witness answered 'Yes' to the question as changed. An examination of the evidence of the witness makes it clear that there was no agreement in regard to where the labourers were to be employed.

There is for example the question, was it not decided for these employees to be given work from 1st February in the blocks on which they had worked. The answer was it is true there was an agreement but there was no talk in regard to the blocks. Again there was the question. In respect of the Bandiyahena Division every worker who was concerned in the other cases got back work in the same places they worked — is it not so? and the answer was not all. Apart from this the President has failed to note that it was no part of the case of Rainis when he came into Court that there had been a promise to re-employ him in the Udagama Division. In my view when Rainis was offered employment in the same capacity which he held at the time of his dismissal viz. a Kangany, it was in strict accord with the agreement marked B. 3.

No evidence has been led of any special reason why Rainis should be Kangany of Udagama Division in which post he so far forgot his responsibility that he was involved in a shooting incident over which criminal charges were framed against him. To grant the demand that the management of the estate cannot transfer a Kangany from his Division in such circumstances is to interfere with the discretion of the management as to where in the interest of the estate — and it may be of the man himself — the workman

should be best employed. Such interference in the management of estates is not in the best interests of their productivity and therefore not in the interest of the country. In the making of a just and equitable order one must consider not only the interest of the employees but also the interest of the employers and the wider interest of the country for the object of social legislation is to have not only contended employees but also contented employers. The order made by the President in consequence of his mis-directing himself on the evidence is set aside and the appeal of the employer is allowed. I make no order as to costs.

Appeal allowed.

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

C. SUNTHERALINGAM *v.* R. HERATH, H.Q.I. POLICE, KANKESANTURAI

S.C. 1192/68 — *M.C. Mallakam* 4700

Argued on: 14th February, 1969
Decided on: 13th May, 1969

*Social Disabilities Act, No.*21 *of* 1957 — *Conviction for preventing or obstructing low caste Hindu from entering or worshipping at Hindu Temple — Defence that this Act necessarily operated to prevent poojahs at temple and therefore altered constitution of a religious body in violation of section* 29 (2)(*d*) *of Ceylon Constitution Act and the Act could not be regarded as superseding section* 4 *of the Thesawalamai—Validity of such defence.*

The appellant who was convicted by a magistrate with having in contravention of the Social Disabilities Act, No. 21 of 1957 prevented or obstructed a low caste Hindu from entering or worshipping at a Hindu temple in Jaffna, appealed against the conviction on the ground (*a*) that the above Act in penalising the prevention of entry of persons of low caste into the temple in question necessarily operated to prevent the High priest from performing *poojahs* in the temple and, thus, altered the constitution of a religious body in violation of Section 29(2)(d) of the Ceylon Constitution and, (*b*) that the above Act being general in character cannot be regarded as having superseded section 4 of the *Thesawalamai* which regulates the rights and privileges between the Vellala castes and the lower castes in the Northern Province according to the ancient customs and usages of the Province. The Supreme Court rejected both contentions and affirmed his conviction.

Per **Fernando, C.J.** "(i) Section 29(2)(d) of the Constitution of Ceylon would in my opinion apply only to a law which purports alter the rule by which a religious body is elected, appointed or otherwise set up, or to commit any power or function of such a body to some other person, or to change the principles governing the relationship *inter se* of members of the body."

(ii) "If as is manifest section 183 of the Penal Code covers any obstruction to the discharge of functions committed to a public servant both before and after the enactment of the Code, the Social Disabilities Act of 1957 equally covers obstruction to any entry to which the Act refers, whether or not a right to such entry had existed before the Act was passed."

The *dicta* of T. S. Fernando J. in *Sevvanthinathan v. Nagalingam* (1960) 69 N.L.R. 419 at 420 dissented from and not followed.

C. Suntheralingam with *S. N. Rajadurai, R. R. Nalliah, P. Nagendran* and *V. Shanmuganathan* for the accused-appellant.

L. D. Guruswamy, Crown Counsel, for the Crown.

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

This is an appeal against the conviction of the appellant on a charge that in contravention of the Prevention of Social Disabilities Act, No. 21 of 1957, he did prevent or obstruct one Sinniah, being a follower of the Hindu religion, from or in entering or being present in or worshipping at a place of worship to which followers of that religion have access.

The appellant did not at the trial deny that he prevented or obstructed Sinniah from entering the inner court yard of a Hindu Temple, or that Sinniah is a follower of the Hindu religion. The grounds of his appeal are based on matters of law.

The appellant firstly referred to a decree of Court declaring this Temple and its appurtenances to be a public religious trust, and declaring the High Priest of the Temple to be its hereditary trustee, responsible *inter alia* for the proper conduct and performance of *poojahs* in the Temple. The High Priest had by the document D 6 authorised the appellant to act on his behalf in taking steps to secure that the customs and ancient usages of this Temple are observed, and the appellant's position was that his act of prevention or obstruction (in relation to Sinniah) was necessary to prevent defilement of the Temple by the entry of a person of low caste; if there had been such defilement, he argued, *poojahs* could not be thereafter performed in the Temple. On this basis, the apellant urged that the Act of 1957, in purporting to penalise the prevention of the entry of persons of law caste into this Temple, has the consequence that its operation can prevent the High Priest from performing *poojahs* in this Temple, and that it is thus a law which alters the constitution of a religious body; not having been passed with the consent of the governing body, this law offended the provisions of section 29(2)(d) of the Constitution of Ceylon, and was therefore void.

I agree with the learned Magistrate in rejecting this argument. Even if all the "facts" on which the appellant's argument is based be correct, the question whether some person may or may not enter, or be prevented from entering, premises controlled by a religious body, is not one which relates to the "constitution" of that body. Section 29(2)(d) of the Constitution of Ceylon would in my opinion apply only to a law which purports to alter the mode by which a religious body is elected appointed or otherwise set up, or to commit any power or function of such a body to some other person, or to change the principles governing the relationship *inter se* of members of the body.

The appellant relied also on section 4 of the *Thesawalamai* (Cap. 63) which provides as follows:

> "All questions that relate to those rights and privileges which subsist in the said province between the higher castes, particularly the Vellales, on the one hand, and the lower castes, particularly the Covias, Nalluas, and Palluas, on the other, shall be decided according to the said customs and the ancient usages of the province".

The appellant's contention was that it was a custom or ancient usage of the Northern Province that persons belonging to certain alleged "low" castes were not permitted entry into or beyond the inner court-yards of certain Temples, including the Temple to which this case relates, and that this custom or usage is a special law relating to Temple entry. This special law, he urged, was not superseded by any provision of the Act of 1957 because of the operation of the maxim "*generalia specialibus non derogant.*" The simple answer to this argument is that the Act contains several provisions directly intended to afford to persons of all castes the freedom to enter places of several specified descriptions; these provisions thus constitute a special law which prohibits the obstruction of the entry of persons into such places on the ground of their caste. Even therefore if section 4 of the *Tesawalamai* can be regarded as a special law regulating Temple entry, the later special law contained in the Act must prevail over the former.

The appellant also relied heavily on an observation in the judgment in *Sevvanthinathan v Nagalingam* (69 N.L.R. 419) to the following effect:—

"I am inclined to agree also with the argument of Mr. Ranganathan that sections 2 and 3 of the Prevention of Social Disabilities Act, No. 21 of 1957 do not have the effect of conferring on the followers of any religion a right of entering, being present in or worshipping at any place of worship which they did not have before the Act came into force; in other words, the Act penalised only the prevention or obstruction of the exercise of a right which was an existing right at the time the Act became law."

This observation was made *obiter* in the case under reference, but it is directly in point in the instant case. The Magistrate has found as a fact that people of the caste to which Sinniah belongs used to worship at this Temple only from the outer courtyard, and were not permitted to enter the inner yard. On that finding, the obstruction offered by the appellant did not interfere with rights which people of that caste used to enjoy before the enactment of the Act of 1957.

With the utmost respect, I am unable to agree with the very narrow construction which was given to the Act in the cited case. Let me consider the first of the "rights" in respect of which the Act prohibits discrimination on the ground of caste, namely the admission of a student to a school. If admission is refused on the ground of the student's caste, there is nothing whatsoever in the Act which even by implication can permit the school management to plead, as a defence to a charge under the Act, that students of that caste were excluded from that school before the Act was passed. Nor is there anything in the Act from which it may be implied that in such a case the prosecution must establish that students of the complainant's caste had prior to the Act enjoyed a right of admission to the school.

Having regard to the terms of the Act, a person commits an offence if "*he prevents or obstructs another person in entering*" any of several specified places. The terms are substantially the same as those which occur in a provision like section 183 of the Penal Code:— "Whoever voluntarily obstructs any public servant ..... in the discharge of his public functions". If, as is manifest, section 183 covers any obstruction to the discharge of functions committed to a public servant both before and after the enactment of the Code, the Act of 1957 equally covers obstruction to any entry to which the Act refers, whether or not a right to such entry had existed before the Act was passed.

The judgment in the 69 N.L.R. case appears to regard the Act of 1957 as having been intended merely to prevent the imposition of "new" social disabilities; if that be the intention, then the Act has achieved nothing in practice, for in my understanding the social evil arising from distinctions of caste in this country at the present time is only that undemocratic and anti-social forms of discrimination still persist in some areas and communities despite popular opposition to such discrimination. I much prefer the construction, plainly appearing from the Act, that Parliament did intend to prevent forms of discrimination which prevailed in the past.

The reasons stated by the learned Magistrate in this case deal adequately with the other matters urged by the appellant in support of his case. The appeal is dismissed.

Appeal dismissed.

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

SUJATHA KUMARIHAMY *v.* DINGIRI AMMA & TWO OTHERS

S.C. 121/1965 — *D.C. Kurunegala No.* 1432/*P*

Argued on: 29th and 30th November, and 2nd and 5th December, 1968
Decided on: 28th October, 1969

Kandyan law — Classification of property — Person subject to Kandyan law dying intestate leaving two children—Several lands devolving on said children—Division of such inheritance by the two children on a Deed—One child becoming sole owner of a land **P** *thereby — Is such land partly acquired property and partly paraveni in his hands — Effect of such division by heirs.*

The question that had to be determined in this appeal arose as follows:—

One Appuhamy, a person subject to the Kandyan law died intestate leaving two children Kiribanda and Dingiri Amma. The several lands belonging to Appuhamy then devolved upon these two persons and they by deed P1 of 13th October, 1893 divided their inheritance in such a manner that Kiribanda became sole owner of 16 lands and Dingiri Amma the sole owner of 20. They also agreed that the other lands inherited from Appuhamy were to be possessed in common.

One of the lands known as Paragahapitiyahena fell to Kiribanda upon this division and the question that had to be decided in this case was whether this land was entirely paraveni in his hands or whether it was only paraveni in part.

The question arose as a partition action was instituted by certain illegitimate children of Kiribanda who claimed interests in Paragahapitiyahena as on intestacy. The present appellant who was a transferee from some of Kiribanda's legitimate children sought the dismissal of this action on the ground that this land was entirely paraveni property in the hands of Kiribanda and that the plaintiffs being illegitimate children were not entitled to any land therein.

The learned Trial Judge held that the land was paraveni only in regard to an undivided half share and was acquired property in regard to the other undivided half.

This conclusion he reached on the basis that as each of Appuhamy's two children became entitled on his death to an undivided half share in each of his lands and as Kiribanda's title to the other half share of this land rested solely on the deed P1, such latter half share was derived by acquisition from a collateral and not by inheritance from a parent and thus constituted acquired property in his hands.

It was submitted on behalf of the appellant that this land was entirely paraveni in Kiribanda's hands inasmuch as it was property coming to him by right of paternal inheritance and attributable to no other source despite the execution of P1.

It is to be noted that question is not affected by the Kandyan Law Declaration and Amendment Ordinance of 1938 as it arose prior to the enactment of this Ordinance.

Held: (Wijayatilake, J. *dissentiente*) That the land Paragahapitiyahena was paraveni property in the hands of Kiribanda despite the fact of the execution of the deed P1. It was property coming to him by right of paternal inheritance.

Per **Fernando, C.J.** "I think therefore that when heirs who are subject to the Kandyan Law do possess in common the lands of the deceased, there is a presumption that they have decided to hold shares in common. But if a division into separate portions takes place within a reasonable time after the death, then the division is referable to an antecedent intention to take separate portions, and the presumption of common ownership is thus displaced."

Per **Weeramantry, J.** (*A*) "Mr. Perera for the appellant rightly submits that what paraveni in effect means is that which each heir gets in his capacity as heir, and that the Kandyan law in considering what property was paraveni and what acquired, would consider the concrete thing to which a person so succeeds rather than indulge in an abstract analysis of legal concepts.

This view fits all the more readily into the framework of a law of succession which did not operate through the elaborate processes of modern administration or the precise logic of an immediate vesting. Against this background it is difficult to think that the Kandyan law in every case treated every item of property of a deceased person as vesting immediately in undivided shares in his heirs. If this be so it would lead to the curious result that there would be no single item of property to which a person could become entitled exclusively as paraveni where the deceased has left more than one child, for since death would precede division even by a moment of time, a separate item of property falling to one heir upon a division would always come to him partly by succession and partly by acquisition. This is indeed a situation too far removed from reality to command acceptance when one considers such common examples as the mulgedera which had so much significance for that society."

(*B*) "Furthermore the concept of paraveni evolved and had its being in the informal setting where deeds were not requisite, and it is against that setting that it is necessary to view the question before us. The requirement of a deed is no doubt essential today for a conveyance of legal title upon such a division, but to lay too much stress on this modern and adventitious requirement is to obscure the practical simplicity of the Kandyan law of inheritance by a reliance on alien concepts and technical modes of thought. "

Per **Wijayatilake, J.** (*dissentiente*); "The character of 'paraveni' is not something that the property acquires at the the time of the death of the owner, but it is a character that the property assumes at the time that a person becomes entitled to it. In the instant case when the two children succeeded to Appuhamy's properties they assumed the character of 'paraveni' but when the children sought by the deed P 1 to put an end to the common ownership of 36 lands of this inheritance clearly Kiribanda became entitled to the half-share owned by Dingiriamma in the 20 lands not by virtue of succession from his father but by virtue of the deed P 1. On this deed Kiribanda has, in my view, clearly acquired the rights of Dingiriamma to the 20 lands dealt with, of which the corpus in this action is the first. In this context we have to recognise the significance of only a portion of the inheritance being dealt with in P1. With great respect in my view the legal effect of P1 is the crucial point in this case. The question is not what the parties intended to do by entering into this deed, but what is the meaning of the words used in the deed and what their legal effect."

Authorities cited: Hayley — *Sinhalese Laws and Customs.*
Modder — *Kandyan Law.*
Sawers — *Memoranda and Notes.*
Maine — *Ancient Law.*
Voet, 10.2.2

Cases referred to: *Lebbe v. Banda*, (1928) 31 N.L.R. 28
Komalee v. Kiri (1911) 15 N.L.R. 371
Kiri Menika et al v. Mutu Menika (1899) 3 N.L.R. 376.
Kalu Banda v. Mudiyanse, (1926) 28 N.L.R. 463
Ukkuwa v. Banduwa, (1916) 19 N.L.R. 63.
Tennekoongedera Ukkurala v. S. W. Tillekeratne, (1882) 5 S.C.C. 46.
Jinaratana Thero v. Somaratana Thero (1946) 47 N.L.R. 228.

H. V. Perera, Q.C., with *T. B. Dissanayake, Sepala Moonesinghe* and *Nalin Obeysekera*, for the 2nd defendant-appellant.

H. W. Jayawardene, Q.C., with *W. D. Gunasekera, M. Sanmuganathan*, and *W. S. Weerasooriya*, for the plaintiffs-respondents.

Fernando, C.J.

I have had the advantage of considering the drafts of the two judgments prepared by the other members of this Bench. I agree entirely with the reasons which have been stated by my brother Weeramantry for his conclusion that the appeal be allowed and the plaintiff's action be dismissed with costs in both Courts. I need only to add some brief observations of my own.

The proposition that in ancient societies a physical division or distribution of property was made among the heirs of a deceased person is so reasonable that one scarcely needs for it the support furnished by the references cited in my brother's judgment. In the earliest times, chattels were probably the sole subject of such a division or distribution, for the concept of ownership of land developed only at a later stage. That being so, the custom of a physical division of chattels would probably have been followed and applied subsequently in the case of land as well.

The right which an heir in early times enjoyed on the occurrence of a death was the right to take a portion of the deceased's chattels or land, and his ownership or title would in reality have commenced only after he came into possession of the portion in the exercise of his right to a division. The concept that at a moment of a death each heir became the owner of some portion of a deceased's chattels or land, would in my opinion be too sophisticated for recognition in an ancient society, for physical possession was the distinctive mark of ownership.

In the case of land, a division among heirs could take different forms, but it is easy to envisage that ordinarily the division took one or two forms. *Firstly*, that each heir took for himself some separate lands, or separate portions of land, and *secondly*, that instead of a physical division the heirs decided that each of them should own a share of all the lands. But in either case each heir ultimately held his separate lands or separate portions, or else his shares in each land, by virtue of the fact of division. If this was not the case, then upon the death of every person leaving a plurality of heirs, the stage of separate ownership would invariably have been preceded by some interval, however long or brief or momentary, during which each heir had a right of ownership over all the property of the deceased. In the case

where the heirs ultimately held only shares in one or more lands, the legal position in my understanding is that the right of ownership in common flowed either from an actual decision for the holding of property in such shares, or else from an implication, arising upon the known facts, that such a decision had actually been made. Such an implication could well arise even from the single fact that the heirs did not exercise their rights to take separate portions on a physical division. I think therefore that when heirs who are subject to the Kandyan Law do possess in common the lands of the deceased, there is a presumption that they have decided to hold shares in common. But if a division into separate portions takes place within a reasonable time after the death, then the division is referable to an antecedent intention to take separate portions, and the presumption of common ownership is thus displaced.

I accordingly agree that the lands which Kiribanda took separately under the division by P1 of 13th October, 1893 were lands which he inherited from his father and were therefore paraveni property.

Weeramantry, J.

One Appuhamy, a person subject to the Kandyan law, died intestate leaving two children, Kiribanda and Dingiri Amma. The several lands belonging to him thereupon devolved upon these two persons, who by deed P1 of 13th October, 1893 divided their inheritance in such a manner that Kiribanda became the sole owner of sixteen lands and Dingiri Amma the sole owner of twenty. It was further agreed that the other lands inherited from Appuhamy were to be possessed in common.

The question arising on this appeal is whether a particular land, known as Paragahapitiyehena, which fell to Kiribanda upon this division, was entirely paraveni in his hands or whether it partook of this character only in part. The question assumes importance in the context of a partition action instituted by certain illegitimate children of Kiribanda who claim interests in Paragahapitiyehena on intestacy. The appellant, a transferee from some of Kiribanda's legitimate children, seeks the dismissal of this action on the ground that this land was entirely paraveni property in the hands of Kiribanda, and that the plaintiffs, being illegitimate children, are not entitled to any share therein.

The learned District Judge has held that these lands were paraveni only in regard to an undivided half share therein, and acquired in regard to the other undivided half. This conclusion was reached on the basis that inasmuch as Kiribanda and Dingiri Amma each became entitled on Appuhamy's death to an undivided half share in each of his lands, and inasmuch as Kiribanda's title to the other half share of this land rested solely on the document, P1, such latter half share was derived by acquisition from a collateral and not by inheritance from a parent and thus constituted acquired property in his hands.

On behalf of the appellant it is argued that Paragahapitiyehena was entirely paraveni in Kiribanda's hands inasmuch as it was property coming to him by right of paternal inheritance and attributable to no other source, despite the fact of the execution of P1.

The question before us is one which arose long anterior to the enactment of the Kandyan Law Declaration and Amendment Ordinance of 1938, and is not therefore affected or governed by the definition of paraveni property therein contained. Moreover this definition is partly declaratory of the pre-existing law and partly amending and the Ordinance by itself would hence be an uncertain guide in regard to the pre-existing law. It is hence necessary to examine the nature of the concept of paraveni in the Kandyan law independently of this statute.

The expression 'paraveni' carries varying connotations in varying contexts. For example Hayley enumerates a number of paraveni tenures in relation to lands alienated in fee simple (*Sinhalese Laws and Customs*, p. 249). So also the word is sometimes used in contradistinction to maruvena tenure (Modder, *Kandyan Law* p. 100, 491; *Kirimenike v. Muthumenika*, (1899) 3 N L.R. 376) Again, the expression may bear different meanings depending on the class of heir who claims a share in the property. (Hayley, *Sinhalese Laws and Customs*, p. 221). However, in the context with which we are concerned, the word is used in a sense opposed to acquired property, the word paraveni carrying the contrasting connotation of that which is inherited (*Lebbe v. Banda* (1928) 31 N.L.R. 28 at 31.)

Property derived by any other source of title or by any other means than inheritance was regarded as acquired, (see also paragraph 122, Report of the Kandyan Law Commission; *Komalie*

v. Kiri (1911) 15 N.L.R. at 374; *Kiri Menika et al v. Mutu Menika* (1899) 3 N.L.R. 376), and the average Kandyan spoke of paraveni property as contrasted with 'athmudalatagath' or purchased property (Report of the Kandyan Law Commission, paragraph 118). So important was this distinction that the Kandyan Law Commission observes in its Report that it is the pivot on which the whole law of succession turns, and, according to Hayley, it was rooted in the desire to keep the family property in the hands of those who bore the family names (p. 347).

I must stress that the problem we are here considering is one relating simply to the classification of property into one or other of the broad categories of paraveni and acquired, and not the question of the precise manner of devolution of property under the Kandyan law today. The concepts of paraveni and acquired property come down to us from the past and since their meaning has, so far as we are aware, been constant, the ancient bases of classification must still hold good. In order to decide the matter before us it seems necessary therefore to view the transaction as it would have been viewed under the Kandyan law, before the advent of modern notions of testamentary law and procedure; and if in the instance before us the Kandyan law would have regarded the property in the hands of Kiribanda as paraveni, rather than acquired, or *vice versa*, the fact that we are considering the problem, in modern times should not be permitted to affect this result, or to cause property falling within one category to move over into the area of the other.

Hayley reminds us that "before the introduction of British ideas the formal administration of estates, the appointment of administrators, filing of accounts and all the paraphernalia of modern testamentary or partition proceedings were practically unknown" (pages 350-1). In view of this the learned author observes that a vagueness of legal ideas and terminology was only to be expected and that the administration of justice was largely empirical, often taking the form of equitable settlement. The respect paid to the mother and the desire to keep the family property together would in many cases lead to a common enjoyment of the estate under the direction of the mother or elder brother until such time as one or the other of the heirs wished to have his portion divided off. At this stage the sons and the binna-married daughters took the property to themselves absolutely, while the acquired property was given to the widow for life (p. 351).

There are also many other passages in the texts indicating that the notion of physical division of an inheritance among intestate heirs was one with which the Kandyan law was quite familiar. Thus Sawers (Memoranda at p. 5 — see Hayley Appendix at p. 8) speaks of the division of an inheritance into two or more shares when a man has children by different wives, and goes on to speak of estates which are enjoyed undividedly by two or three brothers. In this context it is clear that in certain instances there was division and in certain others there was not (see also Sawers pages 12-13). Physical division of an inheritance is also implicit in the passage to which I shall shortly refer, relating to the assignment of the mulgedera to the eldest son. Again, Hayley, while observing that there did not appear to have been any proceeding among the Kandyans in the nature of formal administration, notes that certain practices were recognised regarding management of assets, payment of debts and division of the property (Hayley, 492. See also pp. 359-1).

If upon such a division between two heirs of a person who left two parcels of land, each heir took the entirety of one land, would the Kandyan law have regarded such land in the hands of one heir as partly paraveni and partly acquired from his co-heir or as entirely paraveni? If the contention of the respondent is to succeed, we must be able to say that the Kandyan law looked upon this situation by considering that the estate devolved in such a manner as to give equal undivided shares in each property to each heir and that the heirs notionally went through a process of cross conveyances to each other. It accords far more with reality to expect this situation to be viewed as one of simple inheritance by each heir to the property of his choice.

Much light is thrown upon this by the reference we find in Hayley (op. cit., p. 331) to the practice by which the eldest son out of respect for his age was generally allowed the "mulgedera" or the ancestral home. Upon the contention of the respondent this home would in every case where there are more children than one be held by such eldest child only as paraveni in regard to such undivided shares of his father's estate as have devolved upon him and acquired in regard to such undivided shares as have come to him by exchange from his brothers and sisters. Thus a mulgedera falling to the eldest of five children upon such a family division would, in his hands, be paraveni only in regard to an undivided one fifth share thereof and the other four fifths would upon his

death pass outside the legitimate line. It seems manifest that such a situation does not accord with the spirit of Kandyan law or with the nature of division that must have been so common a feature in ancient times; and it seems inconceivable that the mulgedera should be permitted so easily to pass out of the family by reason of its paraveni content being rendered subordinate to its acquired content in the very act of division of an inheritance.

Mr. Perera for the appellant rightly submits that what paraveni in effect means is that which each heir gets in his capacity as heir, and that the Kandyan law in considering what property was paraveni and what acquired, would consider the concrete thing which to a person so succeeds rather than indulge in an abstract analysis of legal concepts.

This view fits all the more readily into the framework of a law of succession which did not operate through the elaborate processes of modern administration or the precise logic of an immediate vesting. Against this background it is difficult to think that the Kandyan law in every case treated every item of property of a deceased person as vesting immediately in undivided shares in his heirs. If this be so it would lead to the curious result that there would be no single item of property to which a person could become entitled exclusively as paraveni where the deceased has left more than one child, for since death would precede division even by a moment of time, a seperate item of property falling to one heir upon a division would always come to him partly by succession and partly by acquisition. This is indeed a situation too far removed from reality to command acceptance when one considers such common examples as the mulgedera which had so much significance for that society.

Moreover under the Kandyan law no deed of transfer was essential in order to pass title to land, so that the question whether a particular heir succeeded to a particular land was dependent not on legal formalities such as deeds executed by the heirs but on practical facts such as actual possession and enjoyment, whether following upon an actual division, or upon a division which might fairly be presumed from known facts. The authorities show that upon a division, which would usually be by mutual agreement, each heir might take particular lands or parts of land for his inheritance, or that alternatively the heirs may take undivided shares in one or more lands which would then be held in common ownership. The title of each heir would thus depend on mutual agreement either actual or presumed, as to the succession. Such lands or separate portions or alternatively each such share, would to the mind of the heir so succeeding and to the society in which he moved be attributable to no other source of title than succession. Furthermore the concept of paraveni evolved and had its being in the informal setting where deeds were not requisite, and it is against that setting that it is necessary to view the question before us. The requirement of a deed is no doubt essential today for a conveyance of legal title upon such a division, but to lay too much stress on this modern and adventitious requirement is to obscure the practical simplicity of the Kandyan law of inheritance by a reliance on alien concepts and technical modes of thought.

Mr. Perera, in the course of his submissions, stressed the concept of a unity of title in the heirs as a group. In so doing he drew our attention to the fact that Hayley commences his discussion of the Kandyan law of intestate succession (Hayley op. cit. p. 330) by citing a significant passage on this principle from Maine's Ancient Law (p. 227). In this passage that distinguished jurist observes: "We know of no period of Roman jurisprudence in which the place of the heir or universal successor might not have been taken by a group of co-heirs. This group succeeded as a single unit, and assets were afterwards divided among them in a separate legal proceeding .... The mode of distribution is the same throughout archaic jurisprudence...."

This passage contains the idea which seems in early systems of law to have characterised intestate succession and may well contain the basic idea underlying intestate succession among the Kandyans as well.

Indeed, though the modern law of Ceylon is entirely different, the same idea seems not unfamiliar even to the Roman-Dutch law. In discussing the *actio familiae orciscundae*, the action for the division of a family inheritance, Voet observes (10.2.2) that division may take place by consent among co-heirs and that such division is fettered by no fixed rules but is carried out in the manner appearing most advantageous and convenient to the persons dividing. They may decide for example that the elder divides the property and the younger chooses, or settle by lot to whom each share ought to fall, or let each single property go to the highest bidder, or plan that the whole inheritance should stay with one person and that he shall pay the rest a fixed sum of money.

Moreover interesting traces of the concept of the heirs' unity of title are still discernible in such provisions of modern law as Item 29 of Schedule A, Part 1 of the Stamps Ordinance, and section 741 of the Civil Procedure Code. The former renders deeds of exchange between co-heirs subject to only a nominal stamp duty, while deeds of exchange even between co-owners attract the stamp duty appropriate to the value of the property exchanged. The latter provides for delivery of items of movable or immovable property to persons entitled to distribution of an estate, where all interested parties consent in writing to such arrangement.

It would thus appear that in attributing to the Kandyan law the notion that an heir taking a particular property takes it by inheritance, we give effect to no principle which is unfamiliar to the law but rather to one which accords with the mode of thinking of many a legal system and which one of the foremost authorities on the Kandyan law thought fit to set out in the forefront of his discussion of the Kandyan attitude to intestate succession.

Had the matter before us been then a division of paternal property under the Kandyan law prior to the superimposition on that system of modern testamentary and conveyancing rules, Paragahapitiyehena would unquestionably have been considered as paraveni in Kiribanda's hands. Considering as I do that the same classification must apply to the same type of division occurring at the present day, I have little difficulty in concluding that the appellant's contention is entitled to succeed. I would therefore allow this appeal and dismiss the plaintiff's action with costs both here and in the court below.

Wijayatilake, J.

The principal question in this appeal is one of the Kandyan Law of inheritance. The answer to this question involves the construction and interpretation of the deed 15496 of 13.10.1893 (P1)/(2D13).

It is common ground that the parties are subject to the Kandyan Law. One Sri Ratnayake Mudiyanselage Appuhamy was the owner *inter alia* of the 36 lands dealt with in P1. He had died intestate in respect of these lands leaving as his heirs his children Kiri Banda and Dingiri Amma who became entitled to all these lands in equal shares. Admittedly, the lands they so inherited constituted their paraveni property. Thereafter they had executed the deed in question P1 in 1893. According to the plaintiff's translation it recites that "the undermentioned lands were possessed by the said two persons in common by right of paternal inheritance from their father Sri Ratnayake Mudiyanselage officer and the said Kiribanda and Dingiri Amma have divided the said lands in the following manner: The undermentioned lands are allotted to the said Kiri Banda (20 lands set out). The following lands are allotted to the said Dingiri Amma (16 lands set out)".

It would appear that the land called Paragahapitiyehena which is the corpus sought to be partitioned in this case is the first of the 20 lands allotted by deed P1 to Kiribanda. This deed further provides that the other lands be held in common by the said Kiribanda and Dingiri Amma. The relevant clause in the translation 2D13 reads as follows: "The said Kiribanda and Dingiri Amma by right of paternal inheritance from Sri Mudiyanselage Appuhamy officer are held and possessed in common of the following lands and they have amicably agreed to divide the said lands between them in the following manner:— And that in the said division the following lands were given to the said Kiribanda, to wit (20 lands set out). The following lands were given to the said Dingiri Amma (16 lands set out)".

The question which has arisen for adjudication is whether on the execution of deed P1 the half share of Dingiri Amma in the 20 lands, of which the corpus is one, to which Kiribanda became entitled shed its 'paraveni' character and became his 'acquired' property.

Therefore, it would appear that the crucial question for consideration is the effect of this transaction in the context of the Kandyan law of inheritance. Mr. H. V. Perera, learned Queen's Counsel, appearing for the 2nd defendant-appellant stressed the necessity to take a realistic view of this "amicable division" of family property and not to give too legalistic an interpretation to this transaction by permitting the deed P1 to nullify the intentions of the parties. He submits that although these properties were acquired by Appuhamy on deed No. 3741 of 15.5.1881 they were paraveni in hands of his children on his death intestate and they continued to be paraveni despite the deed P1 of 1893 whereby they sought to make a 'distribution' of some of the properties they had inherited from their father. Mr Perera very stre-

nuously submits that it would be quite contrary to the spirit of the Kandyan Law of intestate succession to permit the deed P1 to destroy the essential character of these paraveni properties. He has drawn our attention to the observations made by the Kandyan Law Commission as to the meaning of 'paraveni' property. See Sessional paper 24/1935 pages 16 to 19. The Ordinance No. 39 of 1938 which adopted some of these recommendations sought to define the expressions 'paraveni' and 'acquired'. However, as Mr. H. W. Jayawardene, learned Queen's Counsel, appearing for the respondents submits the definition given in this Ordinance is of no relevance in the instant case as section 26 expressly enacts that its provisions shall not have and shall not be deemed or construed to have any retrospective effect except where express provision is made to the contrary. Therefore we have to fall back on the Kandyan Law as it was prior to this Ordinance.

We have to constantly keep in mind that the Kandyan Law classifies property with reference to the manner in which a person becomes entitled to property. The distinction would really be between inherited property and property acquired otherwise that by inheritance. Vide *Kalu Banda v. Mudiyanse* 28 N.L.R. 463. *Lebbe v. Banda* 31 N.L.R. 28. It has even been held that a gift or sale by a father of his inherited property to his son becomes acquired property in the hands of his son. Vide *Ukkuwa v. Banduwa* 19 N.L.R. 63. *Tennekoongedera Ukkurala v. S. W. Tillekeratne* 5 S.C.C. 46. No doubt, section 10 of the Ordinance No. 39 of 1938 seeks to bring a change on the lines of Mr. Perera's submission but I am inclined to agree with Mr. Jayawardene that it has no application to the facts before us. Section 27 makes it quite clear that it is not retrospective in operation. In my view the Report of the Kandyan Law Commission and the subsequent legislation are of little avail to the appellant. In fact, in the light of section 27 they appear to confirm the position of the respondents.

Mr. Perera has very cogently argued that on a first appraisal of the question before us one may be led to an erroneous conclusion by the intervention of the deed P1 and he has therefore submitted that the background of this transaction has to be kept in mind and we should take a realistic view of this 'distribution' of family property. With great respect if appears to me that there is a two-fold fallacy in his submission; firstly in regard to the character of the property and secondly in regard to the nature and effect of the deed P1.

The character of "paraveni" is not something that the property acquires at the time of the death of the owner, but it is a character that the property assumes at the time that a person becomes entitled to it. In the instant case when the two children succeeded to Appuhamy's properties they assumed the character of "paraveni" but when the children sought by the deed P1 to put an end to the common ownership of 36 lands of this inheritance clearly Kiribanda became entitled to the half-share owned by Dingiri Amma in the 20 lands not by virtue of succession from his father but by virtue of the deed P1. On this deed Kiribanda has, in my view, clearly acquired the rights of Dingiri Amma to the 20 lands dealt with, of which the corpus in this action is the first. In this context we have to recognise the significance of only a portion of the inheritance being dealt with in P1. With great respect in my view the legal effect of P1 is the crucial point in this case. The question is not what the parties intended to do by entering into this deed, but what is the meaning of the words used in the deed and what is their legal effect. Vide *Jinaratana Thero v. Somaratana Thero* 47 N.L.R. 228.

As Mr. Jayawardene submitted the simple question is how Kiribanda became entitled to the half-share of his sister. The answer is clear that it is by virtue of P1. Therefore this half share on the execution of P1 ceased to be "paraveni" property and it assumed the character of "acquired" property in the hands of Kiribanda. This deed has been called a deed of partition and/or a deed of exchange. However, on a perusal of its terms it would appear that it contains cross-conveyances. Dingiri Amma has parted with her half share in the 20 lands and got in return a half share of 16 lands. These parties may have had good reason to part with these shares in these particular lands. This would, in my opinion, provide the consideration for the cross-conveyances contained in this deed which ultimately vests title in the parties in respect of the half-shares dealt with.

The expressions "ancestral" property and "paraveni" property are not synonymous. It was submitted that the people in the area would continue to refer to these lands dealt with in this deed as the ancestral property of Kiribanda; but here we are concerned with the distinction between "paraveni" property and "acquired" property and we have to face the legal effect of the transaction contained in P1.

Mr. Perera has relied on a passage from Hayley at page 221 dealing with the meaning of "acquired" property, but I do not think it is of much avail or significance in the context of this case where the deed P1 plays such a vital role. In the absence of P1, if there was only an oral arrangement, for instance, the position would have been different.

With great respect I am unable to agree with the judgments of My Lord the Chief Justice and my brother Weeramantry.

I would accordingly dismiss the appeal with costs.

Appeal allowed.

Present: **Weeramantry, J.**

MOHAMED HANIFFA MOHAMED HASSAN *v.* INSPECTOR OF POLICE, PANADURA

S.C. 748/68 — *M.C. Panadura* No. 5169

Argued on: 5th & 6th September, 1969
Decided on: 12th November, 1969.

Control of Prices Act (*Cap.* 173) *as amended, sections* 3, 4 — *Charge of selling beef at rate above maximum price fixed in terms of Act — Offence alleged to be committed within Administrative District of Kalutara — Stall described in evidence both as Keselwatte-Panadura stall and as Sarikkamulla stall — Has prosecution discharged its burden — Administrative Districts Act,* (*Cap.* 392), *Schedule* 1.

Meaning of word 'beef'—Whether prosecution had failed to prove that item sold was beef within the meaning of the Price Order in question — Expression 'beef' to be given normal meaning in English language in absence of definition in Price Order — Meaning in Oxford Dictionary — Consultation of appropriate works of reference — Whether flesh of Ceylon buffalo would be 'beef' — Evidence Ordinance, section 57 — *Butchers Ordinance* (*Cap.* 272) *sections* 2, 24.

The accused-appellant was charged and convicted under section 4(1) read with section 3(2) of the Control of Prices Act with the sale of beef at a rate above the maximum price fixed in terms of the Act and notified in Government Gazette No. 14218 of 7.11.64.

The two main points urged by the appellant were firstly that there was no proof that the offence was committed within the Administrative District of Kalutara to which the Gazette notification applied; and secondly that the prosecution had failed to prove that the item sold was 'beef' within the contemplation of the Order in question. It was strenously urged that the prosecution had failed to exclude the possibility that the meat sold was buffalo meat. The submission was made in view of the report of the Government Analyst which stated that the production was found upon analysis to be beef within the meaning of that term in the Butchers' Ordinance. A perusal of this Ordinance showed that the word beef as used therein included the flesh of tame buffaloes. Thus the only expert evidence before the Court left open the possibility that the flesh in question was that of a buffalo.

In regard to this point, the relevant price order which appeared in the Government Gazette directed that for the purpose of that order the expression 'Beef' did not include imported beef whether frozen, salt ar chilled or any form of offal. Beyond that explanation the order did not seek to propound a definition of the expression 'beef'.

The argument on the first point was based on the fact that the stall at which the sale occurred was described variously in the proceedings as the Keselwatte-Panadura stall and as the Sarikkamulla beef stall. It was submitted that there was no proof that Keselwatte-Panadura or alternatively Sarikkamulla were places falling within the Administrative District of Kalutara.

Held: (1) That it was clear from the evidence and the submissions before the trial Judge that the Stall which the witnesses referred to as Keselwatte-Panadura stall and the Sarikkamulla stall was one and the same stall and that this same stall was known by both descriptions.

(2) That it followed that the evidence of the witness who spoke of having proceeded to the Keselwatte-Panadura meat stall constituted evidentiary material before the Court indicating that the stall was situated in Panadura.

(3) That further, the Alphabetical and Numerical List of Villages in the Western Province (compiled by the Department of Census and Statistics) which was a work the Court could consult and act upon in terms of section 57 of the Evidence Ordinance, showed that the Village of Keselwatte fell within Panadura. It was clear that Panadura itself was within the Administrative District of Kalutara from the Second entry in the first Schedule of the Administrative Districts Act No. 24 of 1955, (Cap. 392).

(4) That the expression 'beef' must be given the normal meaning which it bears in the English language inasmuch as there was no definition to serve as a guide in the present Price Order.

(5) That after consulting appropriate works of reference such as the Encyclopaedia Britannica and W.W.A. Phillips' treatise on the Mammals of Ceylon, which the Court was entitled to do in terms of section 57 of the Evidence Ordinance, it would appear that the buffalo of Ceylon was the animal *bubalus* which was scientifically grouped as a member of the Ox family and was therefore an animal of the ox kind. Its flesh would therefore be 'beef' as defined in the Oxford Dictionary and in the absence of a definition in the Price Order would be beef for the purpose of that order also.

Cases referred to: *Jinadasa v. Edirisuriya*, LXXVI C.L.W. 55
Hamza Naina v. Inspector of Police, Gampaha (1968) LXXV C.L.W. 90.
Annakumaru Pillai v. Muthupayal, (1904) I.L.R. 27 Madras 551 (D.B.)
Menon v. Lentin (1941) XXII C.L.W. 24
S.C. 1250/61 — M.C. Matara 63947 S.C. Minutes of 14th June, 1962)
Mendis v. Jayawardena, S.C. 543/68— M.C. Avissawella 80838 (S.C. Minutes of 23rd October, 1968)

Works of reference cited: *Encyclopaedia Britannica*
Manual on the Mammals of Ceylon — W. W. A. Phillips

Dr. Colvin R. de Silva, with *M. T. M. Sivardeen* and *I. S. de Silva*, for the accused-appellant.

Shibly Aziz, Crown Counsel for the Attorney-General.

Weeramantry, J.

The accused appellant in this case stands charged, under section 4(1) of the Control of Prices Act read with section 3(2) of the Act, with the sale of beef at a rate above the maximum price fixed in terms of the Act and notified in Government Gazette No. 14218 of 7.11.64. The accused is alleged to have sold a pound of beef without bones for Rs. 1/-, whereas the maximum controlled price was 90 cents.

The two principal points taken on behalf of the appellant are firstly that there is no proof that the offence was committed within the administrative district of Kalutara to which the relevant Gazette notification applies, and secondly that the prosecution has failed to prove that the item sold was "beef" within the contemplation of the order in question.

The first contention is based on the fact that the stall at which the sale occurred has been described variously in the proceedings as the Keselwatte-Panadura stall and as the Sarikkamulla beef stall. It is submitted for the defence that there is no proof that Keselwatte-Panadura or alternatively Sarikkamulla are places falling within the administrative district of Kalutara.

In support of this contention the appellant submits certain decisions of this Court where appeals have been allowed against convictions on the basis of the failure of the prosecution to prove by affirmative evidence that the place where the offence was committed fell within the area to which the relevant Order applied. In *Jinadasa v. Edirisuriya*, S.C. 75/1968/ M.C. Matara 36840/S.C. Minutes 13.1.69,* the offence was committed at No. 135 Main Street, Deniyaya while in the area of operation of the price order the only reference to Deniyaya was a reference to the V.C. area of Deniyaya. There was no evidence that No. 133, Main Street, Deniyaya, was within the V.C. area of Deniyaya. It was held in that case that the prosecution had failed to prove that the sale took place in an area covered by the Price Order.

Another decision referred to was that in S.C. 1250/61 M.C. Matara 63947, S.C. Minutes 14/6/62, where Herat, J. upheld the point taken for the appellant that there was no direct evidence tendered by the prosecution that the scene of offence, namely, Kotuwegoda, was within the administrative limits of Matara. The Court disapproved of an observation by the Magistrate that he could take judicial notice of this fact from his knowledge of the area. Again in *Hamza Naina v. Inspector of Police, Gampaha* (1968) 75 C.L.W. 90, the place of offence was "Yakkala, in the Gampaha Kirindiwela road", whereas the Price Order applied to the Colombo District outside the Municipal Limits of Colombo. It was held that the prosecution had failed to prove that the offence was committed within the Colombo District, as the Sub-Inspector of Police had admitted that he could not speak to the limits of the Colombo District. The Court observed that the Magistrate was not justified in presuming that the stall in question was within the Colombo District

* 76 C. L. W. 55

as the judicial districts of Ceylon with which the Magistrate might have been familiar did not correspond to the administrative districts of Ceylon as set out in the Administrative Districts Act No. 4 of 1955 Cap. 392. This case cited with approval another judgment of this Court in *Mendis v. Jayawardena*, S.C. 543/68 M.C. Avissawella 80838/ S.C. Minutes 23.10.68, where de Kretser J. arrived at a similar conclusion.

For reasons which I shall immediately mention it does not appear that any one of these decisions can assist the appellant in this case.

Though the description Sarikkamulla stall as well as the description Keselwatte-Panadura stall are found in the evidence in this case, it would appear that these are not descriptions of different stalls but of one and the same stall. Thus Inspector Rasanayagam speaks of the Sarikkamulla beef stall and says that he saw the decoy Jamis and Police Sergeant Saputantri at the beef stall meaning thereby the Sarikkamulla stall. Jamis speaks of the Sarikkamulla stall to which he proceeded on the instructions of the Inspector. Sergeant Saputantri, on the other hand, speaks of having proceeded to the Keselwatte-Panadura meat stall with Jamis on the instructions of Inspector Rasanayagam. The learned Magistrate as well, who presumably knows the area, has understood the evidence of all these witnesses to relate to the same stall, and has analysed their evidence on this basis. In a careful and comprehensive order he has made no reference to any contention that the descriptions relate to different stalls and it may therefore be safely assumed that no such suggestion was urged by the defence even at the stage of addresses. There can be no doubt then that the stall which Rasanayagam and James were referring to is the identical stall referred to by Saputanthri and I must therefore conclude that this same stall is known by both descriptions. It follows that the evidence of Sergeant Saputantri constituted evidentiary material before the court indicating that the stall is situate in Panadura, and if further proof were wanting that Keselwatte is situate in Panadura this is provided by a compilation of the Department of Census and Statistics known as An Alphabetical and Numerical List of Villages in the Western Province, to which the Crown has referred me. This work shows that the village of Keselwatte falls within Panadura. It is a work published by authority and an appropriate book of reference which in terms of section 57 this court may consult and act upon if indeed that were necessary.

Now Panadura in its turn is within the administrative district of Kalutara, as would appear from the second entry in the first Schedule to the Administrative Districts Act No. 24 of 1955, Cap. 392, and there is thus conclusive proof in this case that the beef stall in question falls within the administrative district of Kalutara.

For all these reasons I consider that there is sufficient material to satisfy the Court that the sale occurred within the area proclaimed.

This suffices to distinguish the present case from the decisions cited in each of which there was no evidence showing the connection between the place of offence and the district proclaimed. A given place in Deniyaya could not be presumed to be within the V.C. area of Deniyaya or a place on the Gampaha-Kirindiwela road to be within the Colombo District in the absence of evidence to such effect or proof by alternative means.

I pass now to the second question urged on behalf of the appellant, namely that there is no proof adduced by the prosecution that the subject matter of the sale was "beef".

It has been strenuously urged at the argument of this appeal that the prosecution has failed to exclude the possibility that the meat sold is buffalo meat, a species of meat which is often sold in butchers' shops as beef, and that so long as such a reasonable possibility exists, there can be no conviction of this offence.

This submission is made in view of the report of the Government Analyst which states that the production was found upon analysis to be beef within the meaning of that term in the Butchers' Ordinance. A perusal of the Butchers' Ordinance

shows however that the word beef as therein used includes the flesh of any of the animals which in the Ordinance are denoted by the term 'cattle' (section 24.) The word 'cattle' is explained in section 2 of that Ordinance as including oxen, bulls, cows, calves and *tame buffaloes*. The only expert evidence before Court thus leaves open the possibility that the flesh in question is that of a buffalo and it is for that reason that the contention is advanced that the prosecution by failing to eliminate that possibility, has failed to prove that what was sold was beef.

It is necessary to note that the Price Order, which appears in Government Gazette No. 14,218 of 7th November 1964, directs among other matters that for the purpose of that order the expression "beef" does not include imported beef whether frozen, salt or chilled or any form of offal. Beyond that explanation the order does not seek to propound a definition of the expression "beef". Indeed on this matter later orders such as the order produced by the defence and marked D4 do attempt a definition of beef and specify that beef shall mean the flesh of neat cattle or buffaloes and shall exclude any form of offal.

We have no such definition to guide us in regard to the present Price Order and we can therefore only proceed on the basis that the expression "beef" must be given the normal meaning which it bears in the English language. It is necessary then to ascertain whether the ordinary meaning of beef would exclude the meat of buffaloes.

The Oxford Dictionary defines beef as the flesh of an ox, bull or cow, used as food. The word also has certain extended meanings and is applied in this extended meaning to the flesh of any animal "of the ox kind". Is then the buffalo an animal of the ox kind?

Turning now to the meaning of the word 'buffalo' one sees from the same Dictionary that the word, though properly denoting a kind of antelope, is the name of several species of *oxen*. According to the Dictionary it is applied to the animal *bos bubalus* originally a native of India, inhabiting most of Europe, Southern Europe and Northern Africa, which, the Dictionary observes, is tamed in India, Italy and elsewhere.

Now, the question before us is whether the Ceylon buffalo falls within the description of buffalo or *bos bubalus* which according to the Oxford Dictionary is a species of oxen, and thus an animal of the ox tribe, whose flesh would be beef.

The expression *bos bubalus* being a scientific term it becomes necessary for the ascertainment of its true meaning to consult appropriate works of reference, which this Court is entitled to do in terms of section 57 of the Evidence Ordinance. (See *Menon v. Lentin*, (1941) 22 C.L.W. 24 at 25.) I am assisted on this matter by the case of *Annakumaru Pillai v. Muthupayal*, 1904 I.L.R. 27 Madras 551 D.B., where to ascertain the meaning of the word 'chanks' the Court referred *inter alia* to the Encyclopaedia Britannica and Emerson Tennent's Ceylon.

I consider therefore that I would be entitled to seek further guidance on these matters from the Encyclopaedia Britannica and also from standard works on the fauna of Ceylon which W. W. A. Phillips' treatise on the Mammals of Ceylon is perhaps the most comprehensive and authoritative.

The Encyclopaedia Britannica while stating that *bubalus* (the buffalo) is a member of the ox family, goes on to describe as a variety of *bubalus* the Indian buffalo which it states is larger than the ox, less docile, and is employed as a draught animal. One learns from the same Encyclopaedia that the animal *bubalus* belongs to the sub-family *bovinae* of the mammal family known as *bovidae*.

W. W. A. Phillips in his treatise on the Mammals of Ceylon, p. 318, states that the family *bovidae* is subdivided into several divisions — *bovinae* (the cattle) *caprinae* (the sheep and goats) and so forth. The sub-family *bovinae* though represented in India by three genera is represented in Ceylon by only one — the *bubalus bubalis*, commonly termed the buffalo.

All this material indicates that the buffalo of Ceylon is the animal *bubalus* which is scientifically grouped as a member of the ox family, and is therefore an animal of the ox kind. Consequently its flesh would be 'beef' as defined in the Oxford Dictionary and, in the absence of a definition in the Price Order, would be 'beef' for the purposes of that Order. It follows that even if the prosecution has failed to eliminate the possibility that the article sold was buffalo meat, it has still proved that it is 'beef' for the purposes of the Order in question.

For these reasons the appeal must fail and it is accordingly dismissed.

Appeal dismissed.

Present: **Alles, J,**

R. A.Y. PERERA *v.* M. H. MAGIE NONA HAMINE*

S.C. No. 67/68 — *C.R. Colombo No.* 95996

Argued on: 2nd July, 1969

Reasons delivered on: 8th October, 1969.

Landlord and Tenant — Tenant in arrears for more than 3 *months — Monthly rental of premises below Rs.* 100/*—Payment of rent and arrears in instalments to authorised officer of Municipality after institution of action — Landlord accepting such rent — Does it amount to a waiver and create a new tenancy*?

Rent Restriction Act, Amendment No. 12 *of* 1966 *— Failure to explain delay in answer filed or to raise issue claiming relief — Explanation given in evidence at the trial— Should court accept it*?

Where the tenant of premises whose monthly rental was below Rs. 100/- was in arrears of rent for more than three months and on receipt of a notice to quit and after the institution of an action for ejectment paid his arrears to the authorised officer of the Municipality in instalments and not only did he fail in the answer filed to explain why he did not pay rent on the due dates, but also failed to raise an issue at the trial claiming relief under Section 12A(1)(a) and 12A(2) of the Rent Restriction Act No. 12 of 1966. (Amendment).

Held: (1) That in the circusmtances, the learned Commissioner was justified in rejecting the explanation given by the tenant in his evidence at the trial for the delay in sending the rent.

(2) That where a tenant enjoys the protection of the Rent Restriction Act (after termination of the contractual tenancy) the mere acceptance of rent by the landlord after the institution of the action did not amount to a waiver and give rise to the creation of a new tenancy.

Followed: *Fernando v. Samaraweera* (1951) 52 N.L.R. 278; XLIV C.L.W. 19

Referred to: *Samaraweera v. Ranasinghe* (1958) 59 N.L.R. 395
Kadibhoy v. Keseyanu, (1952) 53 N.L.R. 420
Chacko v. Mody, (1952) 54 N.L.R. 354

S. S. Basnayake, for the defendant-appellant.

D. R. P. Goonetilleke, for the plaintiff-respondent.

*For Sinhala translation, see Sinhala section, Vol. 19, Part 9 p. 16

Alles, J.

At the hearing of this appeal learned Counsel for the appellant raised the question for the first time whether as a result of the acceptance of rent by the landlord after notice to quit was given and action instituted, a new tenancy between the parties had not commenced and invited me to set the case down for a retrial on a proper issue being framed to determine this question. Even if I were to agree with Counsel's submission, I do not think it is necessary to set the case down for a fresh trial because all the material both on the facts and the law on which this issue can be decided has been placed before this Court. I am however, of the view that on the facts of this case, supported as it is by judicial authority, Counsel's claim is not entitled to succeed.

Briefly the facts are as follows:—

The plaintiff-respondent sued the defendant-appellant for the recovery of damages and for ejectment from premises No. 426, Baseline Road, Dematagoda, the monthly rental of which was Rs 55/75 and subsequently increased to Rs 60/50, the rent being payable at the end of each month. The defendant failed to pay the rent for May, 1966 but the learned Commissioner rightly held that as the rent for this month had been tendered by the defendant and returned by the plaintiff, it could not be said that the defendant was in arrear of rent for the month of May, 1966. The rent for June, 1966 was tendered on 1st September, 1966 (P3) the rent for July on 7th October 1966 (P4) and the rent for August 1966, which was due on 30th November 1966, on 5th December, 1966 (P5). The rents for September, 1966 and thereafter were not paid and the landlord sent the notice to quit on 23rd March, 1967 requesting the defendant to deliver possession on 30th June, 1967. Action was filed on 8th July, 1967. On 1st July, 1967 the defendant sent the rent from September, 1966 to December 1966 to the Authorised Officer of the Municipality who sent the money to the plaintiff on 23rd July. On 19th August, 1967 by P9 the rents from January, to July, 1967 were paid in a similar fashion to the plaintiff. On 8th September, 1967 by P10 the rent for August, 1967 was paid, and on 17th October, 1967 the rent for September, 1967 was paid. The defendant had therefore paid the rent in full till September, 1967. In his answer filed on 20th October, 1967 the defendant did not explain why he was unable to pay the rents from August, 1966 and thereafter on the due dates nor was any issue raised at the trial that he was entitled to seek any relief under Section 12A(1)(a) and 12A(2) of the Rent Restriction Amendment Act as further amended by Act No. 12 of 1966. In the circumstances, the learned Commissioner was justified in rejecting the defendant's explanation for the delay in sending the rent. The defendant's position was, that as a result of several Rent Control inquiries which necessitated the incurring of expenditure and as a result of a fall from his bicycle which incapacitated him for several months, he was unable to fulfil his obligations to his landlord. The defendant states that he has been a tenant of these premises for the last 41 years and would suffer considerable hardship if he is ejected from the premises, but, he has only himself to blame for not taking steps to seek relief to which he would have been entitled, if his story was true, in not promptly bringing these matters to the notice of his lawyers instead of coming out with this explanation for the first time in Court.

The rent being definitely in arrear for more than three months after August, 1966 the only question that remains for determination is whether a new tenancy was created when the landlord accepted the rents for September, 1966 and thereafter, after the institution of the action. In my view, this question has been authoritatively decided by Basnayake, J. in *Fernando v. Samaraweera*, 52 N.L.R. 278 where the learned Judge has fully and exhaustively dealt with the rights and duties of the landlord and tenant under the provisions of the Rent Restriction Act. Learned Counsel for the appellant submitted that the *ratio decidendi* in *Fernando v. Samaraweera* cannot apply to the facts of the present case, because in his submission,

where the tenant has forfeited his protection under the Rent Restriction Act by falling into arrears of three months and the landlord continues to accept rent with that knowledge, a new tenancy was created. He also submitted that on the facts, that case can be distinguished. In *Fernando v. Samaraweera* the cheques sent by the tenant to the landlord were not cashed and were subsequently returned by him to the tenant, whereas in the present case the monies were appropriated by the plaintiff landlord. Although I agree that there is this distinction in regard to the facts, I am unable to agree with Counsel's submission that the principles laid down in *Fernando v. Samaraweera* are not applicable to the present case. Basnayake, J. in that case held that 'even in a contractual tenancy a payment of rent after the termination of the tenancy would only operate in favour of the tenant if it could be shown *that the parties intended and agreed that there should be a tenancy*. That evidence is absent in the present case. As Basnayake, J. states while a tenant enjoys the protection of the Rent Restriction Act (after the termination of the contractual tenancy) he is under a duty to pay the rent and the landlord a duty to accept it. The performance of this duty by the landlord cannot amount to a waiver and give rise to the creation of a new tenancy. In *Samaraweera v. Ranasinghe*, 59 N.L.R. 395 it was held that the Rent Restriction Act imposes on a monthly tenant the *obligation* of paying rent even after the contract of tenancy has been determined by notice to quit. I also agree with respect with the observation of Basnayake, J. as to what amounts to a 'waiver'. Said he at p 2.85:

> 'An intention to waive a right or benefit to which a person is entitled is never presumed. The presumption is against waiver, for though everyone is under our law at liberty to renounce any benefit to which he is entitled the intention to waive a right or benefit to which a person is entitled cannot be lightly inferred, but must clearly appear from his words or conduct. The onus of proof of waiver is on the person who asserts it. Where the tenant alleges that the landlord waived his rights he must prove that the landlord with full knowledge of his rights decided to abandon them either expressly or by unambiguous conduct inconsistent with an intention to enforce them.'

There is a total absence of evidence in this case that the landlord intended to waive his rights and in accepting the rent which was in arrear after the institution of the action the landlord was only performing the duties that were incumbent on him under the provisions of the law.

The case of *Fernando v. Samaraweera* was followed by Nagalingam, A.C.J. in *Kadibhoy v. Keseyanu*, 53 N.L.R. 420 and by Swan, J. in *Chacko v. Mody*, 54 N.L.R. 354 I would, with respect, follow the decision of Basnayake, J. and hold that on the principles laid down in that judgment the defendant-appellant is not entitled to succeed in this appeal. The appeal is therefore dismissed with costs.

Appeal dismissed.

Present: **de Kretser, J.**

A. ABUSALLY *v.* THE PRICE CONTROLLER, KANDY*

S.C. 964/68 — *M.C. Kandy* 53132

Argued on: 16th & 19th March, 1969
Decided on: 26th April, 1969

Price Control Act—Price Order fixing maximum price of mutton with bones and that bone content shall not exceed 25% of the total weight of one pound— Reasonableness of the order—Impossibility of ascertaining precisely the required percentage — Ultra Vires.

* For Sinhala translation, see Sinhala section. Vol. 19, part 9, p. 15

The accused (a butcher) was convicted of selling (*a*) a pound of mutton with bones at Rs. 2/50 when the controlled price was Rs. 2/25 per lb.

(*b*) a pound of mutton with bones, the weight of the bones exceeding 25% of the total weight of one pound in contravention of Price Order No. E.D. 107 published in Government Gazette 13255 of 7.8.1962, paragraph 3 of which provides that when mutton is sold with bones, the weight of bones sold therewith shall not exceed 25% of the total weight sold."

Held: (1) That the said Price Order is *ultra vires* as it is unreasonable to insist that where there is a sale of mutton with bones, the percentage of bone must not exceed 25%, for it is impossible for a butcher to ascertain with precision what percentage of it is bone without scraping the flesh off it.

(2) That the falsity of the evidence given for the defence does not necessarily show that the evidence for the prosecution is true.

N. Satyendra, for the accused-appellant.

Tyrone Fernando, Crown Counsel, for the Attorney-General.

de Kretser, J.

The Magistrate of Kandy (Mr. D. E. Dharmasekera) found the accused — a butcher by name Abusally — guilty of the two charges laid against him:

1. Of selling a pound of mutton with bones at Rs. 2.50 when the Controlled Price was Rs. 2.25.

2. Of selling a pound of mutton with bones — the weight of the bones exceeding 25% of the total weight of one pound.

The Magistrate imposed a sentence of four week's R.I. and a fine of Rs. 250/- in default two week's R.I. on each count. The jail sentences to be concurrent. The accused has appealed.

The relevant Price Order No. KD 107 is found in G.G. 13255 of 7.8.62 and states (Para 2) that mutton for the purpose of the order means the flesh of sheep or goat but shall exclude all forms of offal and controls the price of mutton as follows:

1. Mutton without bones Rs. 2.50 per pound.
2. Mutton with bones Rs 2.25 per pound.

Para 3 of the Order directs that "when mutton is sold with bones the weight of bones sold therewith shall not exceed 25% of the total weight sold."

It is this direction that Counsel for the appellant submits is bad in Law in that it requires a seller of mutton with bone to do what is impossible, for he submits that where mutton is not separated from bone it is impossible for a seller to ascertain the bone content in it with the precision required to say what percentage of the total weight it is, e.g. when a butcher sells a mutton chop it is impossible for him to ascertain with precision what percent of it is bone short of scraping the flesh of it and weighing flesh and bones separately and making it to cease to be what the customer wants to buy, namely a mutton chop.

To sell three-quarter pound mutton and one quarter pound of bone, is to sell a pound of mutton and bone, but that is something quite different to selling a pound of mutton with bone which at the time of sale is an indivisible whole. There are cuts of mutton which are sought to be bought in butcher's stalls in which adherence of mutton to bone is essential for the purpose it is bought for, and the sale separately of mutton and bone cannot be adequately used as a substitute. The Price Order recognises this for while the Price Order controls *The price of mutton* and not the price of bone, it recognises that mutton has to be of two discriptions:

1. Mutton with bones.
2. Mutton without bones.

Were that not so it could content itself with only controlling the price of mutton and stating that as in the case of mutton with offal, vide para 5 of the Price Order, mutton when sold with bone must be weighed separately from the bone.

The Law does not force anyone to do what is impossible, and when a Price Order directs a person to do what is impossible a Court can say with certainty that Parliament never intended to give the Controller of Prices authority to make such an order and that it is unreasonable and *ultra vires*. In the instant case I am satisfied that it is not possible to say of mutton with bone what percentage of it is bone and the proof of that is that even in this case a veterinary surgeon had to be called who says that he separated the flesh from the bone and had it weighed and it is on these weighings that this prosecution was launched. It is so unreasonable to insist that where there is a sale of mutton with bone that the percentage of bone must not exceed 25% that I hold that the Price Order to that effect is *ultra vires*. The conviction of the accused on the charge of selling a pound of mutton with bones the weight of the bones exceeding more than 25% of the total is set aside. There remains the conviction on count 1. It is accused's own evidence that what he was asked for and what he supplied was a pound of mutton with bones. That he supplied a pound of mutton with bones the weight apparently being made up by the addition of bones is also established on complainant's evidence read with the evidence of the veterinary surgeon. The conflict of evidence is in regard to the price charged. For while accused admits he had handed over Rs. 2.50 as change from the Rs. 5/- tended in payment, he says that he intended to hand over 25 cents more but had no change and had sent 50 cents to be changed for that purpose. The decoy admits that he was asked whether he had 25 cents change and he strangely says that he cannot remember whether the accused asked people around whether they had 25 cents with them, and also that he cannot remember whether the accused gave 50 cents to be changed. But he does claim that he asked the accused "whether the amount was correct and when the accused said yes, he lifted the parcel which was the agreed signal for the other Inspectors to come up." He has denied under cross examination that he never asked that question.

The Magistrate bases his conviction on the evidence of the decoy who he says gave his evidence in a truthful manner. But he has apparently not given his mind to the fact that a person speaking to a true incident can give evidence in a truthful manner and yet smuggle in one lie without causing a change of impression. In this instance the one matter is whether it is true that he asked whether the amount was correct. It appears to me to have been an unusual question to ask in the given circumstances for surely what he would have asked is "What about the balance 25 cents" — the accused admittedly having asked him for change. The prosecution could have corroborated his evidence on this vital point by calling the Inspector who was sent for the specific purpose of watching the transaction and was doing so according to the decoy from 4 to 5 feet away. But the prosecution does not call him. While it is possible that the Magistrate is correct when he says that the witness Perera called for the defence was not a witness of truth, the falsity of evidence given for the defence does not necessarily show that the evidence for the prosecution is true.

It appears to me that as the Magistrate has not given his mind to these aspects of the evidence I am entitled to give the accused the benefit of the doubts that assail me that what the accused says is true, namely "Before I could give the 25 cents I was arrested." I set aside the conviction on this count as well. The appeal of the accused is allowed.

Appeal allowed.

Present: **Samerawickrame, J.**

J. A. DON EDWIN KUMARASINGHE JAYAKODY & ANOTHER

v.

THE SUB-INSPECTOR OF POLICE, HETTIPOLA

In the matter of an application for revision

S. C. Applications No. 404-405/1967 — *M. C. Kuliyapitiya Case No.* 31421

Argued on: May 31, 1968
Decided on: September 28, 1969

Evidence Ordinance, section 15—*Admissibility of evidence of similar facts at non-summary inquiry— Magistrate permitting such evidence to be led — Revision, whether it lies — Whether admission involves either an illegality or grave irregularity which would result in a miscarriage of justice — Such evidence admissible to rebut defence — Rule that judge can exclude such evidence if possible prejudice to defence outweighs probative value.*

The accused was charged with abducting one Nandawathie in order that she may be forced or seduced to illicit intercourse. Non-summary proceedings were taken by the Magistrate. At the proceedings the prosecution sought to adduce the evidence of eight other young girls to the effect that they were abducted in order to be forced or seduced to illicit intercourse. The learned Magistrate admitted the evidence, and these proceedings were taken in revision to reverse his order admitting the evidence.

Held: (1) That the question whether a case had been made out to place the accused on trial was one to be decided by the Magistrate at the conclusion of the inquiry, and the Attorney-General could also decide whether proceedings were to be taken in a higher Court. The Supreme Court would not decide these questions in revision at the present stage.

(2) That the only question it could consider at this stage was whether the admissibility of this evidence was an illegality or grave irregularity which would result in a miscarriage of justice.

(3) That under section 15 Evidence Ordinance, such evidence was admissible to rebut a defence of mistake, and that such a defence had been foreshadowed in the cross-examination of Nandawathie by the defence.

(4) That such evidence could be led to rebut a defence which was open to the defence; it was not necessary that such defence should be specifically taken for the evidence to become admissible.

(5) That there was a rule of judicial practice by which a judge could exclude such evidence, even though legally admissible, if the prejudice likely to be caused by the admissibility of the evidence will outweigh its probative value; but that the circumstances in the instant case did not call for the application of this practice.

Cases referred to: *Maxwell v. Director of Public Prosecutions* 1935 A.C. 309; 151 L.T. 477; 50 T.L.R. 499
Makin v. Attorney-Genearl for New South Wales, 1894 A.C. 57; 69 L.T. 778; 10 T.L.R. 155
George Joseph Smith, 11 Criminal Appeal Reports 236
Harris v. Director of Public Prosecutions, 1952 A.C. 694; (1952) 1 A.ER. 1044; 1 (1952) 1 T.L.R. 1075
Reg. v. D. D. W. Waidyasekera, (1955) 57 N.L.R. 202
Noor Mohamed v. The King, 1949 A.C. 695; (1949) 1 A.E.R. 365
Thompson v. The King, 1918 A.C. 221; 118 L.T. 418; 34 T.L.R. 204

A. H. C. de Silva, Q.C., with *Stanley Alles* and *Kumar Amarasekera,* for the accused-petitioners.

Kenneth Seneviratne, Crown Counsel, for the Complainant-respondent.

Samerawickramae, J.

This is an application made by way of revision for the review of an order made by the learned magistrate in respect of the admission of evidence in non-summary proceedings. Learned Crown Counsel, while he did not question the jursidiction of this Court to review such an order, pointed out that it was open to the magistrate at the end of the non-summary inquiry to decide whether a case had been made out to place the accused on trial; that the Attorney-General had to consider whether proceedings should be had in a higher court and that the objection to the admissibility of the evidence which is the subject matter of the order of the learned magistrate could be raised at the trial and, if necessary, canvassed before three judges in the Court of Criminal Appeal. He submitted therefore that this Court should be slow to exercise its jurisdiction in this matter. Learned Queen's Counsel appearing for the petitioner submitted that grave prejudice would be caused to his client if this evidence was admitted and that therefore this Court should exercise its powers of revision to preclude a miscarriage of justice. I am not disposed to come to any decision in respect of matters which have to be determined by the learned magistrate at the end of the non-summary inquiry or by the Attorney-General at the time of considering the question of preferring an indictment against the petitioner. In view however of the submission made by learned Counsel for the petitioner that grave prejudice would be caused to him if this evidence is permitted to be led I have gone into this matter only to decide whether the petitioner can show that this order involves either illegality or some grave irregularity which would result in a miscarriage of justice of such a nature that this Court should at this stage intervene by the exercise of its powers of revision.

The charge against the petitioner is that of abducting one Nandawathie in order that she may be forced or seduced to illicit intercourse. The prosecution sought to lead the evidence of eight other young girls to the effect that they were abducted in order that they may be forced or seduced to illicit intercourse by the petitioner. Learned Queen's Counsel appearing for the petitioner submitted that the evidence sought to be led was, in the circumstances of this case, not admissible and that, even if it was admissible, the prejudice that would be caused to the petitioner was very grave and the probative value of the evidence so slight that the evidence should not be admitted even though it was technically admissible. He further submitted that there was no proof of the ingredients of the offence.

The evidence of the girl Nandawathie is to the effect that on the 19th of March, 1966, she was at a bus halting place at Hettipola along with another girl in order to take bus to Galkande. The accused who came in a car with another offered them a lift saying they were going towards Bowatte. They got into the rear seat of the car and it proceeded towards Galkande. At Galkande junction her companion got down but when she was about to get down the door was shut and the car proceeded. She says, she raised cries and on seeing a car coming in the opposite direction, appealed to the occupant of that car one Chandra Nilame who was known to her. The car driven by the accused reversed into a by-road and the other car blocked it. She says that thereafter there was a fight between Chandra Nilame and the accused.

It appears that sometime after Nandawathie had made her statement to the police she had written a letter to them resiling somewhat from her original position and had made a second statement. Under cross-examination she gave evidence in regard to that matter as follows:—

> "I told the 1st accused that I was going to Galkande. My 2nd statement was recorded by S.I. Silva. If S.I. Silva has recorded that I have told the 1st accused that I was going to Maunawa I accept that as correct. Maunawa is about 6 miles away from the place where my sister got down from the car. I think that the 1st accused had driven off the car after dropping my sister in order to drop me at Maunawa. I say that I shouted when I was taken because I have suspected that I have been taken away and that is why I made my 2nd statement to the police. I can't say that the door of the car was closed in order to take me away. At the time I got tnto the car I told the 1st accused that I was going to Galkande. But on the way the 1st accused asked me from where I was and I told him that I am from Maunawa. I think that 1st accused may have thought that I was going to Maunawa."

Chandra Nilame too gave evidence and stated that when he was going by car he heard cries of distress from the car in which Nandawathie was travelling and that he blocked that car.

The learned magistrate states, in regard to Nandawathie, "Whatever she may have said in cross-examination about being mistaken about the intentions of the accused and having second thoughts about their conduct and writing P1. I do not think I can be influenced by the impression created in the mind of Nandawathie on second thoughts. The letter P1, which is signed by Nanda-

wathie has been clearly written by someone else. There is nothing to indicate that it was anything but an afterthought." The learned magistrate was of course correct in saying that the opinion of Nandawathie is irrelevant. A witness has to depose to the facts to which he can speak but the inference deducible from the facts and the decision in regard to what the facts prove is a matter for the Court. The learned magistrate further states:— "Assuming that the eight girls whom the prosecution proposes to call as witnesses will give the evidence that they were forcibly taken by the accused and subjected to sexual intercourse, I hold that this evidence is admissible under section 15 of the Evidence Ordinance to show the state of mind of the accused when they took away the complainant Nandawathie."

The evidence at a trial should be *prima facie* limited to matters relating to the subject matter of the charge. In *Maxwell v. Director of Public Prosecutions*, 1935 A.C. 309 at 320 Lord Sankey stated,

> "It is of the utmost importance for a fair trial that the evidence should be *prima facie* limited to matters related to the transaction which forms the subject matter of the indictment, and any departure from those matters should be strictly confined."

It is therefore necessary to consider whether the admission of the evidence is warranted by law. Evidence tending to show that the accused had been guilty of criminal offences other than that on which there is a charge against him is inadmissible except in special circumstances where that evidence is relevant to some issue before the Court. The rule relating to admissibility of evidence of similar facts has been laid down by Lord Herschell, L.C. in *Makin v. Attorney-General for New South Wales*, 1894 A.C. 57 as follows:—

> "It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused."

In *George Joseph Smith* (11 Criminal Appeal Reports 236), where the appellant had been charged with the murder of Bessie Munday, it was held that evidence had properly been admitted of the death of Alice Burnham and Margaret Lofty in similar circumstances for the purpose of showing the design of the appellant. In *Harris v. Director of Public Prosecutions*, 1952 A.C. 695, the rule laid down in *Makin's* case was approved though it was held that the evidence which was led in that case was not warranted. In the case of *D. D. W. Waidyasekera*, 57 N.L.R. 202, where the appellant had been charged with causing the death of a woman by an act done with intent to cause miscarriage, the evidence of a nurse employed by him who stated that during the 10 months of her service under the appellant there were 150 to 175 cases in which the accused had caused miscarriage and that in each of those cases the accused used the same instruments and resorted to the same procedure, was held to have been properly admitted. The evidence of other occurrences must negative the inference of accident or establish mens rea by showing system. Evidence of other occurences which merely tend to deepen suspicion does not go to prove guilt — *vide Noor Mohamed v. The King* 1949 A.C. 182 at 192.

Under our law there is statutory provision in section 15 of the Evidence Ordinance which is as follows:—

> "When there is a questions whether an act was accidental or intentional, or done with a particular knowledge or intention, the fact that such act formed part of a series of similar occurences, in each of which the person doing the act was concerned, is relevant."

The evidence of the other girls which the prosecution proposes to lead would not be relevant to show that the accused was a person whose disposition was such that he was likely to have abducted Nandawathie on this day. It would be relevant only in order to rebut the inference of mistake of accident. In cross-examination it has been elicited from Nandawathie that in her view the accused may have taken her in the car onwards from Galkande in the belief that she desired to proceed towards Maunawa. In other words, that the accused took Nandawathie from Galkanda onwards by reason of a mistake. It appears to me that the evidence proposed to be led will be available to rebut the possibility of mistake.

In appears to be the position that a specific line of defence need not be set up before evidence of similar occurrences may be led. It is sufficient if that defence is open on the facts. In *Thompson v. The King*, 1918 A.C. 221 at 232, Lord Sumner stated:—

"No one doubts that it does not tend to prove a man guilty of a particular crime to show that he is the kind of man who would commit a crime or that he is generally disposed to crime and even to a particular crime; but, sometimes for one reason sometimes for another, evidence is admissible, notwithstanding that its general character is to show that the accused had in him the makings of a criminal, for example, in proving guilty knowledge, or intent, or system, or in rebutting an appearance of innocence which, unexplained, the facts might wear. In cases of coining, uttering, procuring abortion, demanding by menaces, false pretences, and sundry species of frauds such evidence is constantly and properly admitted. Before an issue can be said to be raised, which would permit the introduction of such evidence so obviously prejudicial to the accused, it must have been raised in substance if not in so many words, and the issue so raised must be one to which the prejudical evidence is relevant. The mere theory that a plea of not guilty puts everything material in issue is not enough for this purpose. The prosecution cannot credit the accused with fancy defences in order to rebut them at the outset with some damning piece of prejudice."

Commenting on this passage, Lord du Parcq, in *Noor Mohamed v. The King* (supra) at pages 191 and 192 said —

"An accused person need set up no defence other than a general denial of the crime alleged. The plea of not guilty may be equivalent to saying 'let the prosecution prove its case, if it can,' and having said so much the accused may take refuge in silence. In such a case it may appear (for instance) that the facts and circumstances of the particular offence charged are consistent with innocent intention, whereas further evidence, which incidentally shows that the accused has committed one or more other offences, may tend to prove that they are consistent only with a guilty intent. The prosecution could not be said, in their Lordships' opinion, to be 'crediting the accused with a fancy defence' if they sought to adduce such evidence."

In *Waidyasekera* (supra) Basnayake, A.C.J. at page 212 said —

"It is sufficient to say that under our law too the prosecution may adduce all proper evidence tending to prove the charge against the accused, including evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment without waiting for the accused to set up a specific defence calling for rebuttal."

As I have indicated earlier, the position that the petitioner acted on a mistake has been indicated in the cross-examination of Nandawathie, so that the defence of mistake or accident has already been adumbrated.

I should refer to the fact that there is another rule, not of law but of judicial conduct which may be applicable. It is a rule of judicial practice, flowing from the duty of the judge when trying a charge of crime to set the essentials of justice above the technical rule if the strict application of the latter would operate unfairly against the accused, and consider whether the evidence of similar facts which it is proposed to adduce is sufficiently substantial, having regard to the purpose to which it is professedly directed to make it desirable in the interests of justice that it should be admitted. If it can, in the circumstances of the case, have only trifling weight, the judge would be right to exclude it — vide *Harris v. Director of Public Prosecutions* (supra).

I am unable to say, on a consideration of matters as they are before me, that the essentials of justice require the exclusion of the evidence sought to be led by the prosecution. The evidence is relevant and may even be decisive on a matter which the prosecution has to prove. The trial judge will be in a far better position to decide whether this evidence should be excluded by reason of the operation of this rule of practice. He will have before him all the evidence. In fact it has been said that this is a matter which rests entirely within the discretion of the trial judge.

Learned Counsel for the petitioners submitted that there was no evidence to prove the ingredients of the offence. In particular, he submitted, that there was no evidence that any force or deceitful means had been used to induce Nandawathie to get into the car. He further submitted that there was no evidence to show that she was being taken for the purpose of being forced or seduced to illicit intercourse. Although Nandawathie may have got into the car voluntarily without the use of force, it cannot be said that upon the evidence it is not a possible view that the taking of her from Galkande junction onwards was compulsorily and without her volition. According to her, she desired to alight from the car at Galkande but she was prevented from doing so as the door of the car was shut and the car was driven off. Whether a girl who has been abducted was so abducted for the purpose of forcing or seducing her to illicit intercourse is a matter to be inferred from all the evidence in the case. The fact that a young girl is abducted, together with the fact that there was no other ostensible reason for her being taken may be sufficient for the inference to be drawn that she had been abducted for the purpose of being compelled to sexual intercourse. I do not consider it necessary for the purpose of this application that I should decide, at this stage, whether there is *prima facie* evidence in regard to the proof of the ingredients of the offence. It is sufficient for me to state that there is evidence upon which the

learned magistrate has taken that view and that it is not a view taken arbitrarily or without any foundation.

In the result I am of the view that the petitioner has failed to discharge the heavy burden that lay on him to show that, in the circumstance of this case, this Court was called upon to intervene by way of revision at this stage. I wish to stress again that I have considered the matter solely from this point of view and that nothing I have said should be construed as precluding the learned magistrate from coming to a view either way at the end of the non-summary proceedings as to whether a case has been made out warranting the petitioner being put on trial or the Attorney-General in deciding whether an indictment should be preferred and further proceedings taken.

The applications are refused.

Applications refused.

Present: **Wijayatilake, J.**

B. L. JAYASENA *v.* THE CEYLON TRANSPORT BOARD

S.C. 114/'68 — *Labour Tribunal Case No. R.* 956

Argued on: 27th June, 1969
Decided on: 11th July, 1969

Labour Tribunals — Dismissal of Conductor employed by Ceylon Transport Board for failure to issue tickets — Application to Labour Tribunal — President of Labour Tribunal holding misappropriation not proved, but only negligence—Same penalty imposed—Appeal to Supreme Court—Order of dismissal set aside as being too severe in the circumstances — Industrial Disputes Act (*Cap.* 131).

The applicant, a conductor of the Ceylon Transport Board was found guilty at a Departmental Inquiry of having failed to issue tickets to about 7 passengers although he had recovered money from them, and was in consequence dismissed from the service of the Board on the ground of misappropriation.

The matter came up before the Labour Tribunal and the learned President held that the charge of misappropriation contained in the answer filed by the Ceylon Transport Board and in the cross-examination on this basis had not been established but only a degree of negligence not of a criminal nature had been proved, but he imposed the same penalty.

Held: That in view of the trying circumstances under which the applicant was forced to issue tickets as disclosed by the evidence and of the said finding of the learned President, it would be neither just nor equitable to affirm the order. He should be reinstated without back wages, but a deduction of Rs. 100/- should be made out of his salary at Rs. 10/- per month.

Referred to: *The Ceylon University Clerical and Technical Association v. The University of Ceylon* S.C. 43/67, L.T. No. K. 991 (20.12.68).

Asoka de Z. Gunawardene, for the applicant-appellant.

N. Satyendra, for the employer-respondent.

Wijayatilake, J.

The applicant who is a conductor of the C.T.B. had been found guilty at a Departmental Inquiry of having failed to issue tickets to about 7 passengers although he had recovered money from them, after due and proper inquiry. In consequence he was dismissed from the service of the Board.

When this matter came up for inquiry before the Labour Tribunal the learned President held that the dismissal was justified. Learned Counsel for the applicant submits that the charge of misappropriation as alleged by the C.T.B. has not been proved beyond reasonable doubt. He relies on my judgment in the case *The Ceylon University Clerical and Technical Association v. The University of Ceylon*, S.C. 43/67 L/T. No. K. 991 (20.12.68) in which I held that a charge involving moral turpitude such as criminal misappropriation has to be proved beyond reasonable doubt like in a criminal action. Mr. Satyendra, learned Counsel

for the respondent submits that the President has not found the applicant guilty of a charge involving moral turpitude as in the case cited but only of negligence in not issuing the tickets promptly.

According to the evidence led the applicant has been in the service of the C.T.B. and prior to that in the private sector for a period of 21 years as conductor. He had been transferred to the Ratnapura—Bandarawela route only a few days before this incident and he was not at all familiar with the sections on this route. It would appear that he had protested over his transfer but it had been of no avail. He has repeatedly confessed in his evidence that he was so unfamiliar with the route that he had to ask the passengers for particulars of the fare!! He had not been given any training whatever on this route before he assumed duties. On the day in question which was 10th April shortly before the Sinhala-Hindu New Year there had been a rush of passengers and at a place called Ampititenne as many as 25 passengers had got in and thereafter the bus was carrying 56 passengers although its capacity was 37. To add to this it was raining and as the bus had started late it was trying to make up for lost time. The transactions relied on by the C.T.B. had all occurred within one mile. In this context one has to remember the situation of a conductor in a bus on the run. If the bus was travelling at even a speed of 30 M.P.H. which is rather a modest estimate, the transactions referred to would have taken less than a couple of minutes. It is in this light one has to assess the evidence and ascertain the conduct of this conductor. The C.T.B. has not led evidence to controvert the fact that the applicant was unfamiliar with this route. Nor have they attempted to show that conductors new to a route are given a training even for a short period till they familiarise themselves with the different sections on a route new to them. Another factor which has to be taken into consideration is the coincidence of the protest of this conductor when he was transferred to this route and the alleged detection by the Flying Squad soon after.

As the learned President had held a conductor of his experience should have been more expeditious in issuing the tickets but he has not given due consideration to the situation the conductor was placed in. The C.T.B. has not led any evidence to show that the conductor was not authorised to overload the bus. The conditions under which a conductor has to issue tickets and give back the change under such conditions merit careful scrutiny. On a first appraisal of the evidence I was inclined to hold that the dismissal was justified but a careful analysis of the facts has presented a different picture. The applicant has explained that three passengers had given him a rupee for 15 cts. tickets and four passengers had given him a ten rupee note also for 15 cts. tickets and that as he was about to issue the tickets the Flying Squad officers got into the bus. He says that the delay in issuing the tickets was due to the lack of change and his unfamiliarity with the fares on this route. As the learned President has correctly held that the charge of misappropriation contained in the answer filed by the C.T.B. and in the cross-examination on this basis has not been established and only a degree of negligence and that not of a criminal character has been proved I am of the view that considering the long period of service of this conductor the punishment meted out to him is too severe.

It is noteworthy that the C.T.B. had originally thought it fit to dismiss the applicant on the basis of their finding that the charge of misappropriation had been proved against him. The learned President has not gone thus far in his conclusions but he has imposed the same penalty. If the applicant was found guilty of only an act of negligence in these circumstances at the Departmental Inquiry is it likely that they would have imposed the extreme penalty of dismissal particularly where a situation such as this could have been avoided if supervisory staff had given the conductors not familiar with a bus route a training at least on a few trips before entrusting them with the responsibility of operating on such route? It would appear that these conductors are left to themselves to receive such training from the passengers themselves: I think it would be neither just nor equitable to affirm this order. I would accordingly set it aside and order the re-instatement of the applicant without back wages as prayed for by the Applicant in the course of these proceedings and I would also order that a sum of Rs. 100/- be deducted from his salary, at Rs. 10/- per month. I make no order as to costs.

Set aside.

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

U. B. SENANAYAKE

v.

D. G. H. M. L. A. SAIBO'S son M. ABDUL CADER *alias* H. M. A. ABDUL CADER

S.C. No. 22/67F — D.C. Matale No. 842/MS

Argued on: 4th July, 1969
*Decided on:*13th November, 1969

Pleadings — Action on cheque — Need to plead presentment and notice of dishonour or the circumstances dispensing with necessity therefor — Action not properly constituted otherwise.

Bills of Exchange Ordinance (Cap. 82) sections 45, 46, 48, 49, 50, 98(2) — Presentment for payment — Notice of dishonour — Essential ingredients of action on cheque — Law of both Ceylon and England similar — Proof of these ingredients or circumstances dispensing with necessity for them essential for success of action.

Held: (1) That in an action on a cheque it is necessary for the plaintiff to *both plead and prove* the essential statutory requirements of presentment and of notice of dishonour. Where these requirements can be dispensed with or have been waived in terms of the statute, then it is necessary to plead and prove the circumstances which in law have the effect of dispensing with these requirements.

(2) That in the present case, the plaintiff's action must fail *in limine* for non-compliance with these essential and imperative requirements.

Per **Weeramantry, J.** "The law on the necessity for proving presentment or any excuses therefor as well as dishonour or any excuses therefor is clear and well settled. It is somewhat remarkable that although the importance of these matters as pre-requisites to the success of a claim, in such instances as they are required, has been stressed time and again by our Courts for a century and a half, and although the importance of pleading such facts has likewise been stressed, we all too often come upon pleadings ignoring these requisites and trials conducted as though they did not exist. These decisions. as will be observed, reach back to a time prior to the codification in 1882 of the English law relating to Bills of Exchange, for under the English Common law as well this was the accepted position. Indeed they reach back to a time even prior to the Civil Law Ordinance No. 5 of 1852 which by section 2 required our Courts to apply, in questions relating to bills of exchange, promissory notes and cheques, the same law that would be applied in England in the like case at the corresponding period."

Cases referred to: *Boyd v. Benett*, 1820-33 Ram. Reps. 24
D. C. Colombo 56533, 1871 Vand. 165
Weerappah Chetty v. de Silva, (1884) 6 S.C.C. 82
Karuppen Chetty v. Palaniappa Chetty (1907) 10 N.L.R. 278
Murugappa Chetty v. de Silva (1916) 2 C.W.R. 33
Sadeyappa Chetty v. Lawrence, (1892) 2 C.L.Reps. 3
Edridge v. Rustomji 1933 A.I.R. (P.C.) 233
Ceylon Estate Agencies and Warehousing Co. Ltd. v. de Alwis, (1966) 70 N.L.R. 31
De Silva v. Ranasinghe (1966) 69 N.L.R. 278; LXXII C.L.W. 111
Wijewardane v. Kunjimoosa and Co. (1967) 70 N.L.R. 64; LXXII C.L.W. 83
May v. Chiddley (1894) 1 Q.B. 451; 63 L.J.Q.B. 355
Roberts v. Plant (1895) 1 Q.B. 597; 64 L.J.Q.B. 347; 72 L,T. 181
Burgh v. Legge (1839) 5 M. and W. 418.
Fruhauf v. Grosvenor (1892) 61 L.J.Q.B. 717; 67 L.T. 350; 8 T.L.R. 744

Texts cited: Byles on Bills (21st ed.) 344
Halsbury (3rd ed.) Vol. 3, 220
Bullen and Leake — *Precedents and Pleadings* (11th ed.) 123, 132, 135

Vernon Jonklaas, Q.C., with *P. Edussuriya*, for the plaintiff-appellant.

N. R. M. Daluwatte, with *Kosala Wijayatilake*, for the defendant-respondent.

Weeramantry, J.

The plaintiff-appellant sues the defendant-respondent in this case for the recovery of a sum of Rs. 12,000/- and interest thereon on the basis that the sum of Rs. 12,000/- was borrowed and received by the defendant from him upon a cheque for Rs. 12,000/- drawn by the defendant in his favour.

There appeared to me to be some room for argument in this case, having regard to the averments in the plaint, that the action instituted may perhaps be construed as an action for money lent and advanced rather than one upon a bill of exchange. However, both parties seem to have proceeded at all stages on the footing that the action was one upon the cheque and summary procedure was accordingly followed. Further, learned Queen's Counsel appearing for the plaintiff-appellant has also conceded that this action is an action upon the cheque, and it is therefore upon this basis that I proceed to consider the legal questions involved.

The plaint contains no averment of presentment or of notice of dishonour, or of any circumstances showing that these essential requirements had been dispensed with, nor were any issue raised at the trial on any of these matters.

On the question of presentment it would appear however to be the position of the plaintiff that he was in the circumstances of this case excused from this requirement. He has stated in his evidence that he did not present the cheque to the bank for the reason, *inter alia*, that the defendant had asked him not to present it as he was pressed for money. The learned District Judge, though not obliged to do so in view of the absence of an issue on the question, has given his mind to the plaintiff's suggestion that presentment had been waived. Upon an examination of the plaintiff's evidence the learned District Judge has quite rightly concluded that a request by the defendant not to present his cheques for payment as he was short of funds did not justify the non-presentment of the cheque, for such a statement is quite different from a statement that the legal requirement of presentment for payment as a pre-requisite to actionability is being waived.

Again, on the question of notice of dishonour, there is an averment in the plaint that by a notice the plaintiff demanded the sum due from the defendant. This of course, is not a notice of dishonour, and is no substitute for the averment there ought to have been, that the cheque was dishonoured and that notice thereof was duly given to the defendant.

The law on the necessity for proving presentment or any excuses therefor as well as dishonour or any excuses therefor is clear and well settled. It is somewhat remarkable that although the importance of these matters as pre-requisites to the success of a claim, in such instances as they are required, has been stressed time and again by our Courts for a century and a half, and although the importance of pleading such facts has likewise been stressed, we all too often come upon pleadings ignoring these requisites and trials conducted as though they did not exist. These decisions, as will be observed, reach back to a time prior to the codification in 1882 of the English law relating to Bills of Exchange, for under the English Common law as well this was the accepted position. Indeed they reach back to a time even prior to the Civil Law Ordinance No. 5 of 1852 which by section 2 required our Courts to apply, in questions relating to bills of exchange, promissory notes and cheques, the same law that would be applied in England in the like case at the corresponding period.

Thus, as early as 1821, a time long anterior to the Civil Law Ordinance, this Court decided in *Boyd v. Benett* (1820—33) Ram. 24 that a drawer of a bill of exchange payable to a third party is entitled to notice of dishonour. The Court there observed that no proof having been made that the drawer had received notice of dishonour, to which he was entitled, there would be a valid objection to the claim, and had the action been founded on that only, the planitiff's libel would have been dismissed.

Passing next to the period between the enactment of the Civil Law Ordinance and 1882, the year of codification of the English law, we see numerous decisions indicating that the requirements of notice of dishonour and presentment were well recognised by our Courts as pre-requisites to actionability. For example, in 1871 D.C. Colombo 56533 — (1871) Vand. 165 this Court, citing the 5th edition of Byles on Bills, held that where a debtor indorses a note of a third party to his creditor, the latter cannot sue for his debt without proving presentment and notice of dishonour. So also in *Weerappah Chetty v. de Silva*

(1884) 6 S.C.C. 82 Burnside, C.J. held that the pleadings against the last indorser disclosed no cause of action as they failed to aver among other matters presentment for payment and due notice of dishonour. This case is of some special interest in view of certain very caustic observations made by the Chief Justice in regard to the drafting of the pleadings.

Between 1882, the year of enactment of the Bills of Exchange Act in England and 1927, we directly applied the provisions of the English Act. Thus in the year 1907 the Court in *Karuppen Chetty v. Palaniappa Chetty* (1907) 10 N.L.R. 278 applied section 87(1) of the English Act of 1882 and required presentment of a note payable at a particular place, unless there was some excuse for not so doing. Applying this principle, the maker was held not liable when the note was not so presented. Apposite to the present case the Court observed that though it was inclined to think that the case should be sent back for the framing of a new issue on the question whether there was an excuse for non-presentment, on reconsideration it thought that the parties should be held to the issues which they had framed and accepted, and that, in the absence of such an issue, the appeal should be allowed and the action dismissed.

So also in 1917 Wood Renton, C.J. observed that presentment for payment and notice of dishonour were conditions precedent to a right of action against the indorser on a promissory note and that the burden of showing that those conditions had been complied with rested upon the plaintiff (*Murugappa Chetty v. de Silva* (1916) 2 C.W.R. 33).

It is also important to note that when the Civil Procedure Code was enacted in 1889 the English law had been codified by the Act of 1882; and the Civil Procedure Code, through the several specimen plaints contained in its first schedule, makes it quite clear that these principles, which had originated in the English Common law, had been taken over by our legal system. It will be seen that in several of these specimens, where it is necessary in law to plead presentment or an excuse therefor or notice of dishonour, such averments are expressly made. Shortly after its introduction, we find Clarence, J. observing in *Sadeyappa Chetty v. Lawrence* (1892) 2 C.L. Reps. 3 that according to the rules of pleading laid down in the Civil Procedure Code an excuse for non-presentment of a promissory note or a waiver of presentment must be specially pleaded by a statement of the facts relied on. It was further held in that case that evidence would not be admissible on a question of excuse or waiver of presentment in the absence of the necessary averments in the plaint.

No change was brought about in respect of these matters by the enactment in 1927 of the Bills of Exchange Ordinance, in practically the same terms as the English statute, with the provision also, in Section 98(2), that the rules of the Common law of England, including the law merchant, shall apply to bills of exchange, promissory notes and cheques, save in so far as they were inconsistent with the express provisions of the Ordinance or any other enactment for the time being in force.

It would be well at this point to refer briefly to the provisions of this statute in which, along with the Civil Procedure Code, our law relating to the matters under discussion is now contained.

Section 45 of the Bills of Exchange Ordinance requires that a bill be duly presented for payment on default of which the drawer and the indorsers shall be discharged. The same section makes detailed provisions in regard to the manner of due presentment of a bill. Section 46(1) proceeds to enumerate the circumstances in which delay in presentment is excused and section 46(2) the circumstances when it is dispensed with. One of the modes in which presentment is dispensed with is stated in section 46(2)(e) to be wavier of presentment, express or implied. Section 46(3) goes on to state that the fact that the holder has reason to believe that the bill will, on presentment, be dishonoured, does not dispense with the necessity for presentment.

It will be seen from these provisions that it is necessary for a plaintiff suing a drawer upon the cheque to show that there was presentment and since he would ordinarily fail in default of proof of presentment he must in the event of there being no presentment prove the circumstance dispensing with this requirement.

Likewise section 48 sets out the requirement of notice of dishonour which must be given to the drawer and each indorser, in default of which drawers and indorsers are discharged. Here again elaborate rules are laid down as to notice of dishonour (section 49) and section 50 states when delay in such notice is excused or dispensed with.

Section 50(2)(b) shows that in regard to this matter as well, there may be waiver, express or implied.

Inasmuch as an action would fail in the absence of such a notice, it becomes clear that, as in the case of presentment, it is incumbent on the plaintiff to prove such notice, or where it has not been given, circumstances which in law dispense with this requirement.

We see then that the law expressly contemplates waiver of these statutory, requirements; and the necessity for pleading and proving a matter of waiver is relied upon, is self-evident. As Lord Wright observed in *Edridge v. Rustomji*, (1933) A.I.R. Privy Council 233 at 236, waiver is a matter that depends on evidence of fact and where waiver is relied on, it should be pleaded and an issue directed thereon, so as to afford the other party an opportunity to adduce such evidence as he thinks proper.

Passing now to the more recent decisions on the subject, this Court has expressly stated that in an action on a promissory note where presentment for payment is necessary to make the maker and the endorser liable, it is a necessary averment in the plaint that the promissory note was duly presented for payment and was dishonoured (*Ceylon Estate Agencies and Warehousing Co. Ltd. v. de Alwis* (1966) 70 N.L.R. 31 at 39). This Court further observed that if there was any excuse for not presenting the promissory note for payment, such excuse should be pleaded and that if the Court was to take a liberal view of the pleadings the defects should at least be cured by raising the appropriate issues on these matters at the trial, unless these facts were admitted by the defendants. The Court consequently held that as the plaintiff had failed to make this necessary averment in the plaint and had also failed to cure the defect in the plaint by raising the relevant issues at the trial, the plaint failed to disclose a cause of action on the first cause of action in that case, on the promissory note. This first cause of action was therefore held to have been rightly dismissed. So also in *de Alwis v. Ranasinghe* (1966) 69 N.L.R. 278 (see also *Wijewardene v. Kunjimoosa and Company* (1967) 70 N.L.R. 64) notice of dishonour was held to be a condition precedent to a right of action against an indorser where a cheque is dishonoured, the Court observing that the position that notice of dishonour has been dispensed with had not been pleaded in the plaint and that no issue was raised thereon at the trial. In the exceptional circumstances of that case, while observing that it would not be fair on the defendant to hold against him in appeal on a point which he was not called upon to meet at the trial, the Court with some reluctance granted an application for a re-hearing as there appeared to be material from which an inference of dispensing with notice of dishonour could have been drawn.

What our law upon the matter is would thus appear to be beyond doubt, but it would be appropriate to refer finally to the English authorities on this subject.

It has been held in English law that an averment of notice of dishonour is an essential averment in a statement of claim against the drawer (*May v. Chidley* (1894) 1 Q.B. 451; *Roberts v. Plant* (1895) 1 Q.B. 597). So also in all cases where the plaintiff relies upon the fact that notice of dishonour had been dispensed with, the matter of excuse or dispensation is a material fact and must be averred whether in the statement of claim (*Burgh v. Legge*, (1839) 5 M & W. 418) or in a special indorsement (*Fruhauf v. Grosvenor*, (1892) 61 L.J.Q.B. 717; see also Halsbury, 3rd ed. vol. 3, p. 220; Bullen & Leake, Precedents and Pleadings, 11th ed. pp. 123 & 135). Likewise, where the plaintiff relies upon a matter of excuse for non-presentment he must state such matter of excuse in the statement of claim (Bullen & Leake, Precedents & Pleadings, 11th ed. p. 132). With particular reference to the special procedure of proceedings by specially indorsed writ, corresponding broadly with summary procedure upon liquid claims under our law, Byles observes (Byles on Bills, 21st ed. p. 344) that where proceedings in the High Court are instituted by specially indorsed writ under Order 3 Rule 6, the special indorsement must aver performance of the conditions necessary to entitle the plaintiff to payment, such as presentment, protest and notice of dishonour or the excuses for non-performance, in default of which the plaintiff would not be entitled to summary judgment. Reference may also be made to the Appendices to the Rules of the Supreme Court, 1883, Part V Appendix C of which contains specimen statements of claim which may be likened to those

appearing in our Civil Procedure Code, A number of these specimens show that averments of presentment and notice of dishonour, or of excuses therefor, must be made.

It is clear that the plaintiff's action, omitting as it does to comply with these essential and imperative requirements of law, must fail in limine, and the plaintiff's appeal is accordingly dismissed with costs.

Wijayatilake, J.

I agree.

Appeal dismissed.

Present: **Samerawickrame, J.**

M. C. HAMZA LEBBE *v.* FOOD & PRICE CONTROL INSPECTOR, PUTTALAM

S. C. 221/'68 — *M. C. Puttalam* 4069

Argued on: 28th August, 1969
Decided on: 22nd October, 1969

Control of Prices Act — Evidentiary value of the label in regard to weight of tin of condensed milk —Whether hearsay—Has prosecution discharged its burden.

Proof—Burden on prosecution in criminal case—Meaning of phrase "beyond reasonable doubt."

The accused was convicted under the Control of Prices Act for having sold a tin of condensed milk—"Golden Crown" 14 ounces — for 98 cents when the maximum controlled retail price was 90 cents.

In appeal, it was contended that there was no evidence to prove that the tin that was sold was one of 14 ounces in weight and that the statement to that effect on the label which was relied upon by the prosecution was hearsay.

Held: That there was sufficient circumstantial evidence to afford *prima facie* proof that the article that was sold by the appellant was the article referred to in the Food Price Order.

Held further: (1) That the evidence led by the prosecution might not have been sufficient if the offence related to opium, ganja or unlawfully manufactured spirits for the reason that such things are *per se* either injurious or harmful or prohibited by law.

(2) That in the case of offences in respect of opium, ganja or unlawfully manufactured spirits as well as offences in respect of condensed milk, the standard of proof is that of proof beyond reasonable doubt, but in the case of the latter, proof need not be as strict as in the case of the former because of the principle that the more serious the imputation, the stricter is the proof which is required

(3) That the phrase "beyond reasonable doubt" does not mean that the degree of probability must in all cases be as high as 99% or as low as 51%. The degree required must depend on the mind of the reasonable or just man who is considering the particular subject-matter. In some cases 51% would be enough, but not in others.

(4) That in the present case, by an examination of the tin of condensed milk one can be satisfied as to its weight to that degree of probability as is referred to above.

Distinguished: *Patel v. Comptroller of Customs* (1965) 3 A.E.R. 593; (1965) 3 W.L.R. 1221
Comptroller of Customs v. Western Lectric Co. (1965) 3 A.E.R. 599; (1965) 3 W.L.R. 1229

Followed: *Bater v. Bater* (1950) 2 A.E.R. 458

C. Ranganathan, Q.C., with *M. T. M. Sivardeen*, for the accused-appellant.

Kosala Wijayatilake, Crown Counsel, for the Attorney-General.

Samerawickrame, J.

The appellant appeals against his conviction under the Control of Prices Act for having sold a tin of condensed milk "Golden Crown" 14 ounces for 98 cents when the maximum controlled retail price was 90 cents.

Learned counsel for the appellant submitted that there was no evidence to improve that the tin that was sold was one of 14 ounces in weight and that the statement to that effect on the label which was relied upon by the prosecution was hearsay. He relied on decisions of the Privy Council in *Patel v. Comptroller of Customs*, (1965) 3 A.E.R. 593 and *Comptroller of Customs v. Western Lectric Co.*, (1965) 3 A.E.R. 599 which held that legends or marks on bags or goods stating the country of which they were the produce or the country of origin were hearsay and insufficient evidence of such facts on which to found a conviction.

The Food and Price Control Inspector who acted as the decoy and whose evidence has been accepted has stated, "I asked him if he could give me a tin of condensed milk. He said "yes". He told me he had condensed milk of the 'Golden Crown' Brand. I asked him if that was good and he said it was very good and could be given even to children. I asked him if they were 1 lb. tins. The accused said they were 14 ozs. tins. I asked him for the price of a tin of condensed milk of Golden Crown Brand. He quoted 98 cents for a tin of condensed milk, Golden Crown Brand. I asked him to reduce the price. He said he could not do that and that he was getting only 7 to 8 cents profit only. Then I asked him for a tin of Golden Crown Brand Condensed milk. The accused gave me a tin and I gave him Rs. 2/- and the accused gave me Rs 1.02." The tin of condensed milk was a production in the case and it was presumably to all appearances a tin of condensed milk 14 ounces in weight. It was real or material evidence produced in Court and was a matter before it which the Court could consider when deciding whether the case was proved.

In my view there was sufficient circumstantial evidence to afford *prima facie* proof that the article that was sold by the appellant was the article referred to in the Food Price Order P1. In the schedule to P1 there is 'Golden Crown — 14 oz. tin'. The evidence might not have been sufficient if the offence related to opium, ganja or unlawfully manufactured spirits for the reason that such things are *per se* either injurious and harmful or prohibited by law. Condensed milk, on the other hand, is not only not harmful but is useful article of food and its sale is an offence only when it is sold at a price in excess of the controlled price. It is true that in the case of offences in respect of opium, ganja, or unlawfully manufactured spirits as well as offences in respect of condensed milk the standard of proof is that of proof beyond reasonable doubt but in the case of the latter, proof need not be as strict as in the case of the former. This is because of the principle that the more serious the imputation the stricter is the proof which is required.

Denning, L.J. in *Bater v. Bater* (1950) 2 A.E.R. 458, stated:—

> "It is true that by our law there is a higher standard of proof in criminal cases than in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. Many great judges have said that, in proportion as the crime is enormous, so ought the proof to be clear."

Later he stated:—

> "What is a real and substantial doubt? It is only another way of saying a reasonable doubt, and a "reasonable doubt" is simply that degree of doubt which would prevent a reasonable and just man from coming to a conclusion. So the phrase "reasonable doubt" gets one no further. It does not say that the degree of probability must be as high as ninety-nine per cent, or as low as fifty-one per cent. The degree required must depend on the mind of the reasonable and just man who is considering the particular subject-matter. In some cases fifty-one per cent, would be enough, but not in others."

In my view, to require the kind of proof that learned counsel for the appellant submitted should have been led in this case and to reject the circumstantial evidence led in this case would be to require a ninety-nine per cent degree of probability in a

matter in which a lower degree would suffice. This case is to be distinguished from the two Privy Council decisions cited to me by the learned counsel for the appellant. An examination by itself, however close, will not reveal the country of origin of an article. On the other hand by an examination of a tin of condensed milk one can be satisfied as to its weight to that degree of probability referred to by Denning, L.J. in the dictum set out above.

I am accordingly of the view that the finding of guilt is correct and must be upheld. Learned counsel for the appellant pointed out that the prosecution itself conceded that at the time a tin of condensed milk fetched in the market between Rs 1.25 to 1.30 and that the accused-appellant had sold this tin for 98 cents which was only 8 cents in excess of the controlled price. The learned magistrate in considering the matter of sentence stated that he was bound by the amending Act of 1966 to impose a sentence of imprisonment. I find however, that the offence was committed at a time when the Emergency Regulation which made the provisions of section 325 of the Criminal Procedure Code inapplicable had not yet been made. I accordingly set aside the conviction and sentence and acting under section 325 of the Criminal Procedure Code, I direct that the accused-appellant be warned and discharged and that he be ordered to pay a sum of Rupees five-hundred (Rs 500/-) as Crown costs.

Varied.

Present: **Alles ,J.**

D. MARLIN PERERA *v.* K. D. SIMPLINU JAYAWARDENE*

S. C. Case No. 87/67 *(R.N.)* — *C. R. Colombo No.* 93679

Argued on: 16th September, 1968.
Decided on: 23rd October, 1968.

Landlord and Tenant — Tenancy agreement in respect of bare land on payment of ground rent — Tenant agreeing to put up temporary garage at his own expense and to demolish and remove material after ten years — Each party at liberty to terminate tenancy by giving 3 months' notice — Landlord giving notice in tenth year with a request to remove materials used for building — Tenant's failure to reply — Order for ejectment — Do Rent Restriction Acts apply?

By agreement P1 of 1956 the plaintiff allowed defendant to put up a temporary building within an Urban Council area to be used as a garage for 10 years on payment of Rs. 2/50 per month as ground rent. It was also agreed by the parties that the tenancy could be terminated by either party by giving 3 months' notice and on the termination of the contract the defendant would be allowed to demolish the building and remove the materials.

The defendant erected the garage at his own expense with pillars supporting a roof of zinc sheets where he installed machinery and carried out repairs to motor vehicles. Admittedly defendant paid Rs. 5/- as ground rent after the garage was constructed. The plaintiff by P2 gave notice to quit in April 1966 informing him that he was at liberty to remove the materials used for the construction of the garage, but the defendant did not reply thereto. Plaintiff obtained judgment for ejectment.

In appeal it was submitted that the premises in question were governed by the Rent Restriction Acts and therefore the plaintiff's action was not maintainable.

Held: (1) That the documents P1 and P2 and the failure to reply to P2 established that the contract of tenancy was in respect of a bare land.

(2) That the fact that the rental was raised from Rs. 2/50 to Rs. 5/- did not make it a different contract of tenancy.

(3) That for the defendant to succeed it must be established that the premises which formed the subject-matter of the tenancy was a building or a part of a building together with the land appertaining thereto.

*For Sinhala translation, see Sinhala section, Vol. 19, Part 10 p. 19

Distinguished: *Cornelis v. The Urban Council, Dehiwela-Mt. Lavinia*, 59 N.L.R. 115
S.C.M. 15.6.1964 S.C. No. 121/1963. C.R. Colombo 84575

H. V. Perera, Q.C., with *Miss Maureen Seneviratne, and S. Mahadevan*, for the defendant-appellant.

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

Alles, J.

By agreement dated 8th November, 1956 and marked P1, the plaintiff let to the defendant premises No. 367. within the Urban Council limits of Wattala. According to the terms of the agreement, the defendant was allowed to put up temporary building on the said premises at his own expenses, to be used as a garage on payment of Rs 2/50 per month as ground rent. The agreement was to extend for a period of ten years and it was agreed by the parties that three months notice of the termination of the tenancy should be given by either party before the contract is terminated. On the termination of the contract, the defendant was allowed to demolish the buildings and remove the materials. The defendant, in the course of the evidence, denied that he signed the agreement P1, but the learned Commissioner has disbelieved him and accepted the evidence of the plaintiff that the defendant signed the document in his presence.

The defendant erected the garage at his own expense in 1959. It consisted of a cemented floor with twelve pillars supporting a roof of zinc sheets where the defendant installed machinery and carried out repairs to motor vehicles. The plaintiff stated that after the garage was constructed the defendant paid him Rs. 5/- as ground rent. This was admitted by the defendant. By P2 of 27th January 1966, the plaintiff gave notice to the defendant to quit the premises by the end of April 1966 and informed him that he was at liberty to remove the materials used for the construction of the garage. The defendant did not reply to P2 and the plaintiff successfully obtained judgment against the defendant for ejectment and damages.

In appeal, Counsel for the defendant-appellant submitted that the premises in question were goverened by the Rent Restriction Acts and that therefore, the plaintiff's action was not maintainable. I am unable to agree. The documents P1 and P2 and the failure of the defendant to reply to P2 establishes that the contract of tenancy was in respect of a bare land where the defendant was permitted to put up a temporary structure. The fact that the rental was raised from Rs. 2/50 to Rs. 5/- does not make it a different contract of tenancy. For the appellant to succeed, it must be established that the premises which form the subject-matter of the tenancy was "a building or a part of a building together with the land appretaining thereto." Therefore, at the time of the agreement, there should be a building in existence or a permanent building put up by the defendant subsequently with the express consent of the landlord, who contemplated the erection of such a building and the charge of a rental for ta building as distinct from a rental for a bare land. In *Cornelis v. The Urban Council, Dehiwela-Mount Lavinia* 59 N.L.R. 115, the plaintiff Council issued a permit for the occupation of a bare land by the defendant and though there was an express provision in the permit prohibiting buildings from being erected, buildings were erected with the acquiescence of the Council. The Council also accepted a rental for the buildings with each renewal of the permit and the assessment rates levied upon the buildings by the plaintiff Council were paid by the defendant. In the circumstances, the Court held that the defendant was not a mere licensee but became a monthly tenant of the plaintiff Council in respect of the buildings and was therefore entitled to the protection of the Rent Acts.

In the unreported judgment in S.C. Case No. 121/1963;† S.C. Minutes of 15.6.64, the tenant constructed a bakery on the land belonging to the plaintiff with a sum of Rs. 8,000/- advanced to him by the plaintiff. After the bakery was constructed, the defendant became the tenant of the plaintiff, paying Rs. 20/- a month for the bakery and a further sum of Rs. 20/- a month for a structure ture for the storage of fire wood till the advance of Rs. 8,000/- was liquidated. Thereafter, he was required to pay the authorised rent. The character of the plaintiff who let the bare land to the defendant in both these cases altered when the plaintiff in each case by his conduct became landlord of the buildings erected by the defendant for which the defendant agreed to pay a higher rent and in respect of which the Rent Acts applied. The facts of the present case are quite different. It was laways agreed between the parties that what was let was a place of bare land; the garage, by its very nature, was a structure of a temporary kind which could be dismantled quite easily. It was agreed that the defendant was entitled to demolish the structure and remove the materials at the termination of the contract and the rental (whether it be Rs. 2/50 or Rs. 5/- per month) was always fixed as being the rent for the bare land.

In the circumstances, I agree with the findings of the learned Commissioner and the appeal is dismissed with costs in both Courts.

Appeal dismissed.

Present: **G. P. A. Silva, J. and Siva Supramaniam, J.**

THE QUEEN *vs.* A. M. A. HAMEED & ANOTHER*

S.C. No. 3-4/66 — *D. C. Gampaha (Bribery)* 1/*B*

Argued and Decided on: 10*th May*, 1967

Bribery Act— Prosecution under section 19 *— Burden of Proof — Can Court take judicial notice of the fact the Police Officer is not authorised by Law or terms of his employment to accept a gratification?*

Where a Police Sergeant was charged and convicted under section 19 read with Section 89(b) of the Bribery Act with the offence of accepting a gratification in a sum of Rs 25/- which he was not authorised by law or the terms of his employment to receive,

Held: That the Court will not take judicial notice that a police officer was not authorised by law or the terms of his employment to accept a gratification for doing an act which would have the effect of interfering with the course of justice in a proceeding pending before a Court of law.

Per **G. P. A. Silva, J.** "Mr Chitty raised a further argument which appears to have much substance, namely, that even if this Court is prepared to take judicial notice of the afore-mentioned fact, it would not affirm the conviction unless it is clear that the trial Judge was invited to consider this question without evidence and that he decided to take judicial notice of that fact and that the conviction was based on such a decision. Admittedly in this case, the trial Judge was not invited to consider this matter at all nor did he do so *proprio motu*."

Referred to: *Mahamed Auf v. The Queen*, 69 N.L.R. 337.

G. E. Chitty, Q.C. with *E. H. C. Jayatilleke*, for the accused-appellant.

Kenneth Seneviratne, Crown Counsel for the Attorney-General.

† C. R. Colombo 84575.

* For Sinhala translation, see Sinhala section. Vol. 19, part 11, p. 21

G. P. A. Silva, J.

In this case the 1st accused-appellent was charged with the following offence, namely, that while being a Public Servant to wit:-Police Sergeant No. 1775, Meegahawatta Police, did accept from one B. P. Seiman a gratification of a sum of Rs. 25/- which gratification he was not authorised he was not authrised by law or the terms of his employment to receive, and that he thereby committed an offence punishable under section 19 read with section 89 (b) of the Bribery Act. The 2nd accused-appellant was charged with having, as a Publice Servant, to wit, Police Constable No. 26, Meegahawatta Police, abetted the 1st accused in the commission of the said offences, Both the accused were convicted of the said charges.

It was contended by learned Counsel for the appellants, and this is not contradicted by Crown Counsel, that there was no evidence in the case that the 1st accused was not authorised by law or the terms of his employment to receive the said gratification. In the absence of such evidence, he submitted, the conviction cannot be sustained, and for this submission he relied on the recent Divisional Bench decision in *Mohamed Auf* vs. *The Queen* 69 N.L.R. 337 in which it was held that the burden of proving that the acceptance of a gratification was not authorised by the terms of the employment lay on the prosecution and that in the absence of such evidence the prosecution could not maintain this charge. Counsel for the Crown however sought to distinguish the present case from the Divisional Bench case on the footing that the facts of this case were different and that, on the facts that were established, the court can take judicial notice that a police officer was not authorised by law or the terms of his employment to accept a gratification for doing an act which would have the effect of interfering with the course of justice in a proceeding pending before a court of law. He based this argument not on any particular provision of law but on the principle that there are certain notorious facts which are so well known that any court can take judicial notice of them and that one such instance was that a police officer was debarred from accepting a gratification for the purpose for which he accepted it in this case. Acceptance of this submission would be tantamount to a decision that the burden that is cast on the prosecution of proving certain essential ingredients of an offence would depend on the facts of each case. The pronouncement made in the Divisional Bench decision referred to leaves no room for such a conclusion.

Mr. Chitty raised a further argument which appears to have much substance, namely, that even if this Court is prepared to take judicial notice of the afore-mentioned fact, it would not affirm the conviction unless it is clear that the trial Judge was invited to consider this question without evidence and that he decided to take judical notice of that fact and that the conviction was based on such a decision. Admittedly in this case, the trial Judge was not invited to concider this matter at all nor did he do so *proprio motu*. It must, therefore, be assumed that the decision to convict the accused was arrived at without proof of one of the necessary ingredients of the offence, namely, that the acceptance of the gratification was not authorised by law or the terms of employment of the 1st accused. I do not therefore find sufficient reason to distinguish the principle involved in this case from that of the Divisional Bench case referred to in regard to the proof of the essential ingredients of the offence.

Siva Supramaniam, J.

I agree.

Appael dismissed.

Privy Council Appeal No. 27 of 1968

Present: **Lord Hodson, Lord Devlin, Viscount Dilhorne, Lord Donovan and Lord Pearson**

RAJAPAKSE PATHURANGE DON JAYASENA *v.* THE QUEEN

FROM THE SUPREME COURT OF CEYLON

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

Delivered on: 29th July, 1969

Privy Council — Court of Criminal Appeal — Accused convicted of murder—Plea of self-defence — Whether Jury adequately directed on defence.

Evidence Ordinance, sections 3, 105, *and* 106— *Burden of Proof — Interpretation of words, burden of proving in section* 105 *— Position in English Law— Correctness of Rex v. Chandrasekera* (1942) 44 N.L.R. 47.

This appeal was on the question whether at the trial the jury was rightly directed on the burden of proof on the issue of private defence, which is permitted as a defence to a charge of murder not only as a general exception but also as a special exception under sections 93 and 294 respectively of the Penal Code.

Basing his argument on section 105 of the Evidence Ordinance counsel for the appellant submitted. (1) that there are two kinds of burdens (*a*) the legal burden, or the burden of establishing the case (*b*) the evidential burden or the burden of adducing some evidence in support of the case, and that the burden imposed by section 105, is in the second category. If it were in the 1st category the summing up could not be criticised (2) that the words "burden of proving" in section 105 referred to the burden of adducing evidence and they should be interpreted in the light of the decision in *Woolmington v. D.P.P.* (1935) A.C. 462 thus enabling the preservation of the "golden thread" referred to in the famous passage of the Lord Chancellor for the Law of Ceylon. The essence of the appellant's case is that he has not got to provide any sort of proof that he was acting in self-defence.

Their Lordships without scrutinising the summing up proceeded to determine whether the appellant's argument on section 105 is correct.

Held: (1) That in a trial by jury, a party may be required to adduce some evidence in support of his case whether on the general issue or on a particular issue before that issue is left to the jury. Although such a requirement may be described as a burden and it may be convenient to call it an evidential burden, it is confusing and misleading to call it a *burden of proof* whether legal or evidential or by any other adjective, when it can be discharged by the production of evidence that falls short of proof.

(2) That since the mode of proof in Ceylon is spelt out by section 3 of the Evidence Ordinance, it is impossible to suppose that there can be more that one kind of proof or that the burden of proof imposed by section 105 can be anything less than proof in accordance with section 3. The incongruities of any such supposition are fully exposed in the judgments of the majority in *R. v. Chandrasekere* (1942) 44 N.L.R. 47.

(3) That even if there were an ambiguity in the language of sections 3 and 105 of the Evidence Ordinance, the decision in *Woolmington v. D.P.P.* would not aid in resolving it as that decision is an example of a change in the content of the Common Law resulting from a change in the manner of applying it, the common Law being malleable to an extent that a code is not.

(4) That before the decision in the case of *Woolmington v. D.P.P.* in the year 1935 it was widely believed that every killing was presumed to be murder and that if an accused contended that a killing was accidental or provoked or done in self-defence, the burden of proof of any of these issues rested on him. The foundation for this view was the statement of the law in Foster's Crown Law written in 1762 (which view the said decision Woolmington Case declared erroneous) which doubtless was adopted in the codification of the law introduced into Ceylon by the Evidence Ordinance.

On the submission that the effect of section 105 of the Evidence Ordinance upon section 73 of the Penal Code, which includes accident among General exceptions would be to put the burden on the defence of negativing intention,

Held: (5) That as no case under section 73 is before Their Lordships they would not decide where the burden of proof lies when accidental killing is in question. Such a question would raise different considerations. Proof of intentional killing does not negative the answer of private defence. On the contrary, it is only after intentional killing is proved that private defence need be put forward. But proof of intentional killing does negative intention.

(6) That in cases where the accused deny intention (unlike in the present case where the accused admitted the intention to kill, but relied entirely upon private defence) such as in defence of provocation and accident and in cases where the accused says he did not intend to cause bodily injury but in any way he was acting in self-defence, it is not only proper, but may be necessary for the judge to remind the jury that the burden of establishing the intention beyond a reasonable doubt rests always on the prosecution.

(7) That by a direction to the jury that while the burden of proof of a particular defence is on the accused, the general burden of proving guilt beyond a reasonable doubt remains always on the prosecution if the effect produced is that some lighter burden of proof is placed upon the accused, it would be a wrong direction.

(8) That it must be remembered that the evidence of which the accused relies. when an issue of provocation or private defence is raised, may go to challenge the prosecution's case as well as to establishing his own.

(9) That the conclusion arrived at by the Board on section 106 of the Evidence Ordinance in the two cases *Attygalle v. R.* (1936) A.C. 338 2 A.E.R. 116 and *Seneviratne v. R.* (1936) 3 A.E.R. 36 to the effect that the section does not cast upon an accused person the burden of proving that no crime has been committed does not help the aforesaid argument on section 105.

Per **Judicial Committee:** "It may well be that the general principle that the burden of proof is on the prosecution justifies confinning to limited category facts " especially within the knowledge of an accused " but their Lordships do not consider that it can alter the burden of proof in 106, or section 195."

Approved: *R. v. Chandrasekera* (1942) 44 N.L.R. 97

Cases referred to: *Woolmington v. D.P.P.* (1935) A.C. 462 at 473
Emperor v. U. Danapala (1937) 14 A.I.R. 83
Emperor v. Parbhoo (1941) A.I.R. 402
Looi Wooi Saik v. Public Prosecutor (1962) 28 M.L.J. 337.
Dahyabhai v. State of Gujarat (1964) 7 S.C.R. 361
Bhikari v. State of Uttar Pradesh (1965) 3 S.C.R. 194
Attygalle v. R. (1936) A.C. at 338 2 A.E.R. 116
Seneviratne v. R. (1936) 3 A.E.R. 36.

T. O. Kellock Q.C. with *Ian Baillieu* and *M. I. V. Hamavi Hanifa* for the Appellant.

E. F. N. Gratiaen Q.C., with *M. P. Soloman* for the Respondent.

Lord Devlin:

This is an appeal from a judgment given by the Court of Criminal Appeal of Ceylon. The accused, who was the appellant in that Court and is now the appellant before the Board, was on 3rd March, 1966 convicted of murder. At the trial the accused admitted that the deceased died of wounds deliberately inflicted by him, his defence being that he was acting in self-defence. The sole question in the appeal is whether at the trial the jury was rightly directed on the burden of proof on the issue of self-defence, or private defence as it is more precisely called in the Penal Code.

The Penal Code defines murder in sections 293 and 294. Since no question arises in this case about the quality of the intention, it is sufficient to say that it is murder if the act by which the death is caused is done with the intention of causing death or bodily injury of a sort that is likely to cause death. The right of private defence is given in the Code by section 89 and following sections which form part of Chapter IV headed "General Exceptions". Its use as a defence to a charge of murder is permitted not only as a general exception by section 93 but also as a special exception in section 294 itself.

The burden of proof is settled by the Evidence Ordinance section 105, which reads as follows:

> "When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances."

The argument turns upon the construction of section 105 and the meaning to be given to "burden of proving".

Mr Kellock for the appellant submits that there are two kinds of burden. One, which he calls the legal burden, is the burden of establishing the case; the other, called the evidential burden, is the burden of adducing some evidence in support of the case. Mr Kellock submits that the burden imposed by section 105 is in the second category. If it were in the first category, the direction given to the jury by the trial judge in his summing-up cannot be criticised by the appellant, to whom it might be said to be unduly favourable. If it is in the second category, it is at least doubtful whether the direction would be adequate. Rather than scrutinise the summing-up to see whether the direction will pass muster in either category, their Lordships will determine whether the appellant's argument on section 105 is correct.

To understand the argument it is necessary first to understand the position in English law. Before 1935 it was widely believed that in English law killing was presumed to be murder unless the contrary appeared from circumstances of alleviation, excuse or justification; and accordingly that if an accused contended that a killing was accidental or provoked or done in self-defence, the burden of proof on any of these issues rested upon him. There was, as Sankey, L.C. said in *Woolmington v. D.P.P.* (1935) A.C. 462 at 473 "apparent authority" for this view, the foundation for it being the statement of the law in Foster's Crown Law written in 1762. In *Woolmington v. D.P.P.* where the accused was charged with murder and gave evidence that the killing was accidental, the trial judge directed the jury in accordance with this view of the law. The House of Lords declared this view to be erroneous. The House laid it down that, save in the case of insanity or of a statutory defence, there was no burden laid on the prisoner to prove his innocence and that it was sufficient for him to raise a doubt as to his guilt. To prove murder the prosecution must prove that the killing was intentional and unprovoked. This does not mean, as the House made clear in subsequent cases, that a jury must always be told that before it can convict, it must consider and reject provocation and self-defence and all other matters that might be raised as an answer to a charge of murder. Some evidence in support of such an answer must be adduced before the jury is directed to consider it; but the only burden laid upon the accused in this respect is to collect from the evidence enough material to make it possible for a reasonable jury to acquit.

Against this background the appellant's argument can be appreciated and in particular the distinction drawn between what are said to be the two categories of proof, — the establishing of a case, and the adducing of evidence. The argument is not of course that *Woolmington v. D.P.P.* is directly applicable; it is a decision on the common law and the Board is required to interpret and apply the code. The argument is that the code should be interpreted in the light of *Woolmington v. D.P.P.* In his speech Sankey L.C. dealt in two ways with Sir Michael Foster's statement of the law. While at 482 he made it quite clear that he was prepared, if necessary, to reject it, he had earlier at 480 indicated that it could be reconciled with the principle which the House was laying down. If the statement in Foster can be reconciled with the doctrine, then, as Mr Kellock argues, so can section 105. The way of reconciliation is by construing "burden of proving" as referring to the burden of adducing evidence, the so-called evidential burden of proof. In this way the "golden thread", as the Lord Chancellor described it in a famous passage, can be preserved for the law of Ceylon.

This is an argument which has prevailed in several jurisdictions where there is an Evidence Ordinance containing a provision in the same terms as section 105. It was adopted in the High Court of Rangoon in the *Emperor v. U. Damapala* (1937) 14 A.I.R. 83, by a majority in the High Court of Allahabad in *Emperor v. Parbhoo* (1941) A.I.R. 402 and in Malaysia in *Looi Wooi Saik v. Public Prosecutor* (1962) 28 M.L.J. 337. It has however been decisively rejected by the Court of Criminal Appeal of Ceylon sitting as a court of seven with one dissentient, in *R. v. Chandrasekera* (1942) 44 N.L.R. 97. In the present case the Court dismissed the appeal without giving reasons, doubtless following the previous decision. This appeal is therefore in effect an appeal against *R. v. Chandrasekera* which Mr Kellock invites the Board to disapprove.

Their Lordships do not understand what is meant by the phrase "evidential burden of proof". They understand of course that in trial by jury a party may be required to adduce some evidence in support of his case, whether on the general issue or on a particular issue, before that issue is left to the jury. How much evidence has to be adduced depends upon the nature of the requirement. It may be such evidence as, if believed and if left uncontradicted and unexplained, could be accepted by the jury as proof. Or it may be, as in English law when on a charge of murder the issue of provocation arises, enough evidence to suggest a reasonable possibility. It is doubtless permissible to describe the requirement as a burden and it may be convenient to call it an evidential burden. But it is confusing to call it a burden of proof. Further, it is misleading to call it a burden of proof, whether described as legal or evidential or by any other adjective, when it can be discharged by the production of evidence that falls short of proof. The essence of the appellant's case is that he has not got to provide any sort of proof that he was acting in private defence. So it is a misnomer to call whatever it is that he has to provide a burden of proof, — a misnomer which serves to give plausibility but nothing more to Mr Kellock's construction of section 105.

Section 3 of the Evidence Ordinance deals with proof in the following terms:

> "A fact is said to be proved when, after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists."

Their Lordships do not think that proof means anything different in English law. But at any rate in the law of Ceylon, where the mode of proof is clearly spelt out, it is impossible to suppose that there can be more than one kind of burden of proof or that the burden imposed by section 105 can be anything less than proof in accordance with section 3. Their Lordships will not elaborate further since the incongruities of any such supposition are fully exposed in the judgments of the majority in *R. v. Chandrasekera* particularly the judgment of Soertsz, J.

Even if there were any ambiguity in the language of sections 3 and 105 of the Evidence Ordinance, their Lordships would not be aided in resolving it by the decision in *Woolmington v. D.P.P.* In saying this their Lordships are not questioning the place which this authority now holds in the law of England. But it is not necessary to read more than the speech of the Lord Chancellor himself to see that by far the greater strength of previous authority supported the view which the House rejected. Nevertheless, for some considerable time before 1935 many English judges had in practice been applying the law with less strictness towards the defence than its terms warranted. This is illustrated by the judgment of the Court of Criminal Appeal in the very case as it appears from the speech of the Lord Chancellor at 470. The Court said that while there was ample authority for the trial judge's statement of the law," it may be that it would have been better" if he had told the jury that if they entertained any reasonable doubt about the accused's explanation they should acquit; and in fact they dismissed the appeal, not as being unfounded in law, but by resorting to the proviso to section 4(1) Criminal Appeal Act 1907. Thus the decision of the House of Lords is an example of a change in the content of the law resulting from a change in the manner of applying it. The common law is shaped as much by the way in which it is practised as by judicial dicta. The common law is malleable to an extent that a code is not. Foster's statement of the law is not in their Lordships' opinion reconcilable with the law as laid down by the House of Lords. But there can be no doubt that it was adopted in the codification of the law introduced into Ceylon. It was at that time set out in all the English textbooks (from which it has now been dropped), including Stephens' Digest of the Criminal Law; and Sir James Stephens, as is well known, was the begetter of the Evidence Ordinance. The code embodied the old criminal law and cannot be construed in the light of a decision that has changed the law.

In support of his argument Mr Kellock pointed to section 73 of the Penal Code which includes accident among the General Exceptions. He submitted that the effect upon this of section 105 would be, unless it is given the modified reading for which he contends, to put the burden on the defence of negativing intention. Their Lordships consider that the language of sections 3 and 105 in combination is so compelling that they would not be deterred from interpreting it in the way in which they have even if in its application to section 73 it had the consequences which Mr Kellock foresees. Having said this and since no case under section 73 is before them, they do not propose to decide where the burden of proof lies when accidental killing is in question. Such a question would raise different considerations from those material in the present case. Proof of intentional killing does not

negative the answer of private defence; on the contrary, it is only after intentional killing is proved that private defence need be put forward. But proof of intentional killing does negative accident. In *R. v. Chandrasekera*, Soertsz, J. at 125 dealt with the point as follows:

> "The position is however different in cases in which, by involving the fact in issue in sufficient doubt the accused *ipso facto* involves in such doubt an element of the offence that the prosecution had to prove. That, for instance, would have been the position under our law in the *Woolmington* case, if on the charge of murder, on all the matters before them, the Jury were in sufficient doubt as to whether the death of the deceased girl was the result of an accident or not for, in that state of doubt, the Jury are necessarily as much in doubt whether the intention to cause death or to cause an injury sufficient in the ordinary course (sic) of nature to cause death, existed or not. In such a case, the proper view seems to me to be that the accused succeeds in avoiding the charge of murder, not because he has established his defence, but because, by involving the essential element of intention in doubt, he has produced the result that the prosecution has not established a necessary part of its case."

As at present advised, their Lordships agree with this dictum.

The attention of the Board has been drawn to cases in which the direction to the jury has been that, while the burden of proof of a particular defence is upon the accused, the general burden of proving guilt beyond a reasonable doubt remains always on the prosecution. Such a direction might appear at first sight to lend support to Mr. Kellock's contention that some lighter burden than the ordinary burden of proof is in these cases placed upon the accused. If that is the effect of it, it would in their Lordships' opinion be wrong. But it must be remembered that the evidence on which the accused relies, when an issue of provocation or private defence is raised, may go to challenge the prosecution's case as well as to establishing his own. The present case, as Mr. Gratiaen has said, is a clear case of confession and avoidance; the defence admitted the intention to kill and relied entirely upon private defence. It is however much more frequent for an accused to deny the intention. He will say that he did not intend to kill or cause serious bodily injury but that anyway he was acting in self-defence. Likewise provocation and accident often feature together in an accused's story. In such a case it is not only proper, but may be necessary, for the judge to remind the jury that the burden of establishing intention beyond a reasonable doubt rests always on the prosecution. The point has recently been before the Supreme Court of India in relation to the defence of insanity. In *Dahyabhai v. State of Gujarat* (1964) 7 S.C.R. 361 Subba Rao J. at 365 pointed out that evidence that fell short of proof of insanity might yet raise a reasonable doubt about the existence of the requisite intention. In *Bhikari v. State of Uttar Pradesh* (1965) 3 S.C.R. 194 Mudholkar, J. said at 198:

> "If upon the evidence adduced in the case whether by the prosecution or by the accused a reasonable doubt is created in the mind of the court as regards one or more of the ingredients of the offence including mens rea of the accused he would be entitled to be acquitted. This is very different from saying that the prosecution must also establish the sanity of the accused at the time of commission of the offence despite what has been expressly provided for in section 105 of the Evidence Act."

Their Lordships respectfully agree with this observation.

Finally, Mr. Kellock points to section 106 of the Evidence Ordinance which says:

> "When any fact is especially within the knowledge of any person the burden of proving that fact is upon him."

He relies upon two decisions of the Board, *Attygalle v. R.* (1936) A.C. at 338 2 A.E.R. 116 and *Seneviratne v. R.* (1936) 3 A.E.R. 36 in which this section was considered and was not applied so as to shift the burden from the prosecution.

The principle involved in this section derives from the English law of evidence, where it has however been sparingly used. The prosecution is usually able to establish that an accused person has special knowledge of the circumstances of the crime with which he is charged. Under some systems of law this is considered to be sufficient for the accused to be called upon at the outset of a trial to say what he knows. Such a procedure would be quite inconsistent with the accused's right to silence which prevails in the English system as adopted in Ceylon.

Their Lordships are concerned with section 106 only to see whether it gives any support to Mr. Kellock's argument on section 105. He submits that the right solution lies in treating section 106 as imposing only an evidential burden of proof; and that if section 106 has to be treated in that way, why not also section 105? This submission gets no help from the two authorities cited. In these cases the Board said simply and without elaboration that the section does not cast upon an accused the burden of proving that no crime has been committed. Their Lordships in no way dissent from this conclusion. It may well be that

the general principle that the burden of proof is on the prosecution justifies confining to a limited category facts "especially within the knowledge" of an accused; but their Lordships do not consider that it can alter the burden of proof either in section 106 or section 105.

For these reasons, and generally for the reasons given in the majority judgments in *R. v. Chandrasekera*, their Lordships have humbly advised Her Majesty to dismiss this appeal.

Appeal dismissed.

Present: **Sirimane, J. and de Kretser, J.**

V. T. JOSEPH *v.* A. J. THIRUCHELVAM & OTHERS

S.C. 57 (*Inty*) 1967 — *D.C. Jaffna MB* 4885

Argued on: 1.12.68, 22.9.69 and 1.10.69
Decided on: 11.10.1969

Mortgage — Sale under decree entered in mortgage action — Conditions of Sale prescribed by Court—Binding effect thereof on purchaser — Whether Court has power to alter a condition — Consent of all parties affected necessary — Civil Procedure Code, sections 260, 262 — *Mortgage Act* (*Cap.* 89) *sections* 50, 61.

Held: (1) That once a sale under a mortgage decree takes place subject to the conditions of sale prescribed by Court, the purchaser is bound by those conditions. Thereafter the Court can alter a condition only with the consent of all the parties affected by such alteration.

(2) That in the present case the sale had been properly set aside inasmuch as the purchaser had not deposited the balance purchase price within one month as required by the Conditions of Sale. The order obtained by the purchaser extending the time for payment had been obtained without notice to the parties affected and it was therefore of no avail.

Approved: *Subleha Umma v. Nagoor Mohamadu* (1945) 46 N.L.R. 415.

Referred to: *Zahan v. Fernando* (1931) 33 N.L.R. 279

S. Sharvananda, with *M. A. M. Baki* and *M. Waniappa*, for the 7th and the 8th respondents-appellants.

C. Ranganathan, Q.C., with *N. Kanag-Iswaran*, for the 3rd and 4th defendants-respondents.

Sirimane, J.

This is an appeal by the purchaser from an order by the District Judge setting aside a mortgage sale.

According to the Conditions of Sale on which the property was put up for sale by public auction 1/4th of the purchase price had to be deposited immediately after the sale, and the balance paid within one month. If this was not done, the purchaser had to forfeit the deposit, and the property had to be put up for re-sale.

These conditions were made known to the purchaser and all other bidders, and in addition the purchaser had also signed these conditions of sale.

After 30 days had elapsed, the 3rd and 4th defendants (who are the respondents to this appeal) moved that the deposit be forfeited and the property put up for re-sale in accordance with the conditions referred to above. Though the 3rd and the 4th defendants had conveyed their rights in this property to the 6th defendant, and litigation had followed on this sale, yet there was sufficient evidence to show that they (3rd and 4th defendants) were still vitally interested in the property.

Before the lapse of the 30 days, the purchaser had obtained an order enlarging the time for the payment of the balance purchase money, without notice to the 1st, 2nd, 3rd and 4th defendants who were the owners of the property mortgaged.

It was submitted for the purchaser that under section 50(3) of the Mortgage Act, Chapter 89, the Court had power to alter the earlier directions given to the Fiscal.

Conditions of Sale are prescribed by the Court **before** a sale takes place, and there can be no doubt that by subsequent directions the Court may alter those conditions. But once a sale has taken place subject to the conditions so prescribed the purchaser is bound by those conditions.

Section 50(4)(d) enacts that

> "Every person making a bid at the sale shall be bound by the Conditions of Sale prescribed by the Code under the preceding provisions of this section whether or not he signs an agreement to be bound thereby."

After the sale has taken place, a condition can be altered by the Court only with the consent of all the parties affected by such alteration.

At the argument, Counsel for the purchaser conceded that if sections 260 — 262 of the Civil Procedure Code were applicable, the order setting aside the sale was correct. Section 260 provides for the deposit of 1/4th of the purchase money, and section 261 for the payment of the balance within 30 days. Section 262 provides as follows:

> "In default of payment within the period mentioned in the last preceding section, the deposit, after defraying the expenses of the sale, shall be forfeited to and shall go in reduction of the claim of, the judgment-creditor, and the property shall be re-sold, and the defaulting purchaser shall forfeit all claims to the property and to any part of the same for which it may subsequently be sold."

(Condition 5 is in practically the same terms as this section)

It was argued that the trial Judge was in error when he referred to these sections of the Civil Procedure because they are not applicable to mortgage sales, as provided by section 61 of the Mortgage Act, Chapter 89.

But section 50(4)(d) of that Act read with the Conditions of Sale has the same effect as section 262 of the Civil Procedure Code.

The case of *Zahan v. Fernando* (33 N.L.R. 279) was decided under the provisions of the old Mortgage Ordinance 21 of 1927. The purchaser bought the property on the 14th of October, and paid the deposit. He brought in the balance purchase money on the 14th of November. At the highest he was late by a few hours, and the Court held that it would be inequitable to penalise the purchaser for the breach of a Condition of Sale which may be regarded as a mere technicality. Garvin, J. said,

> "I think that this is a case in which the Court is entitled in its discretion to accept the balance purchase money and direct the issue of the conveyance even if in law the purchaser is out of time by a few hours."

Under the Mortgage Ordinance of 1927 there was no section corresponding to section 50(4)(d), and the Court appears to have been influenced by the fact that the objection to the confirmation of sale was very highly technical.

But in the later case of *Suleha Umma v. Nagoor Mohamadu* (46 N.L.R. 415) it was held (in a partition sale) that the Court had no discretion to allow the money to be deposited after the time fixed had elapsed.

I think that this case sets out the better view. Once the purchaser buys, subject to conditions which are binding on him, the Court is left with no discretion "to give vent to its own generous and good natured impulses" as Soertsz, J. put it, and vary the conditions, except with the consent of all the parties who would be affected by such variation.

The appeal is dismissed with costs.

De Kretser, J.

I agree.

Appeal dismissed.

Privy Council Appeal No. 11 *of* 1968

Present: **Lord Hodson, Viscount Dilhorne, Lord Donovan, Lord Pearson and Lord Diplock**

THIRUMAN PALANIMALAY VEERAPPAN *v.* THE ATTORNEY GENERAL*

From
THE SUPREME COURT OF CEYLON

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

Delivered on: 6th October, 1969

Autrefois acquit—Statement by prosecution before accused asked to plead to the charge that no evidence will be adduced against the accused — Accused discharged— Whether plea of autrefois acquit available in subsequent prosecution —Burden of establishing such plea — Procedure where defence calls no evidence on ground "no case to meet" — Verdict of acquittal reversed — Should appeal court give opportunity for pleading in mitigation?

Held: (1) That where the prosecution stated at the commencement of a trial of a person accused of an offence that the prosecution is not adducing evidence against the accused before the accused is required to plead to the charge, and thereupon the accused is discharged, he cannot rely on those proceedings to support a plea of *autrefois acquit* in a subsequent prosecution, as he was never put in peril on the first occasion.

(2) That in such a situation it is unnecessary to consider the question whether the substantial issues raised in the second proceedings are the same as those raised in the first.

(3) That the burden of establishing the plea of *auterfois acquit* lies upon the accused.

(4) That if after the close of the prosecution case, the defence indicates that it does not propose to call any evidence (on the basis that there is "no case to answer") but merely tenders a charge sheet and record of earlier proceedings in support of a plea of *autrefois acquit*, the Court is not obliged to give the accused a second opportunity of leading evidence, if it is of the view that the charge has been established. It can proceed to convict the accused.

(5) That where a verdict of acquittal is reversed in appeal to one of conviction, sentence should not be passed without giving the accused an opportunity of pleading in mitigation.

Per **the Judicial Committee:** "Their Lordships do not regard with satisfaction the practice, if such there be, of dealing with sentences without having a plea in mitigation.

Even though appeals against acquittals may be few in number, they regard it as highly desirable that accused persons in such cases should have the opportunity after conviction by an appellate court of pleading in mitigation."

E. F. N. Gratiaen, Q.C., with *John Baker*, for the appellant.

Montague Solomon, for the respondent.

Lord Hodson:

The appellant was convicted in the Supreme Court of Ceylon on 27th February, 1967 and sentenced to a term of two years rigorous imprisonment on a charge of forgery punishable under section 454 of the Penal Code which provides for a maximum period of five years imprisonment to be imposed.

He was granted special leave to appeal by Order of Her Majesty in Council on 13th November, 1967.

* For Sinhala translation, see Sinhala section. Vol. 19, part 12, p. 23

He had been charged on 10th March, 1966 in the Magistrate's Court of Bandarawela "that on 26th August, 1958 he did sign a document to wit:

> 'Application for a certificate of citizenship by descent, to be issued by the Minister of Defence and External Affairs in terms of Section 6 of the Citizenship Act (Cap 349) with the intention of causing it to be believed that the said document was signed by Veerappen son of Thiruman, (who was born to Thiruman and Lechemey on Sherwood Estate on 1st May, 1958, and in respect of whose birth the Birth Certificate No. 41904 had been issued by the District Registrar of Badulla on 12.6.58) by whom or by whose authority he knew that the said document was not signed, and he has thereby committed an offence punishable under Section 454 of the Penal Code.' "

The offence with which he was charged is not ordinarily triable summarily by a Magistrate's Court but the Magistrate, being also an additional District Judge, assumed jurisdiction on the grounds (1) that the facts were simple (2) expeditious disposal was desirable for the offence was alleged to have been committed in 1958 and (3) no complicated points of law arose. Though entitled to assume jurisdiction under section 152(3) of the Criminal Procedure Code the Magistrate had no power to impose any sentence but one which a District Court might lawfully impose. The punishment which he could have imposed if he had found the appellant guilty was therefore limited to two years imprisonment as opposed to the maximum of five years laid down in section 454 of the Penal Code.

The appellant who pleaded "not guilty", was not called as a witness nor did he offer other evidence save that he put in a document to which reference will be made hereafter. He was acquitted on the ground that, on the facts proved by the prosecution, the charge of forgery had not been established, his offence, if any, being that of cheating.

Upon appeal by the Attorney General to the Supreme Court against the acquittal the Court held that upon the facts found by the Magistrate forgery within the meaning of section 453 of the Penal Code had been made out.

The appellant was an Indian Tamil resident in Ceylon. He had been a watcher on an estate in Haputale. In July 1958 he wrote to the Permanent Secretary, Ministry of Defence and External Affairs, at Colombo asking that his position as a citizen of Ceylon by birth under section 6 of the Citizenship Act, No. 18 of 1948, should be clarified and also asking for an application form. He signed the letter in Tamil.

A form was sent and filled in by him as "THIRUMALAI alias PALANIMALAI VEERAPPEN". No point was made of the difference between Thiruman and Thirumalai. The appellant did however state in answer to the questionnaire, that his father had been born in Ceylon and that he could produce documentary evidence of his own birth in Ceylon, the point being that he would then qualify under section 4 of the Citizenship Act as a citizen of Ceylon by descent. The appellant subsequently signed and sent to the Department a form of application verified by affidavit in which he gave his date and place of birth as 1.5.1918 Sherwood Estate, Haputale and also gave his father's date and place of birth as 1898, Koslande, that is to say, representing that he and his father were born in Ceylon. The application was accompanied by a birth certificate recording the birth of one "Veerapen" the son of "Tiruman" on 1st May, 1918 at the Sherwood Estate. A certificate of Citizenship was accordingly issued to the appellant stating his name and place of birth as set out in his application.

The prosecution proved that the appellant was not the person to whom the birth certificate related. They produced (1) a birth certificate of the appellant's grandson based on information supplied by the appellant which showed that the appellant was not born in Ceylon, (2) a Provident Fund record card filled in on information supplied by the appellant showing that he was born in South India, and (3) a Labour discharge certificate of less significance.

The decision of the Magistrate was that by enclosing the false birth certificate with his appli-

cation form the appellant was seeking to pass himself off as the "Veerappen" son of Tiruman who had the qualification for citizenship of Ceylon by descent.

The Supreme Court, upon these facts, reversing the decision of the Magistrate, held that a verdict convicting the appellant of forgery should be recorded. Forgery is defined by the Penal Code sections 452 and 453 as follows:

"*Section* 452

Whoever makes any false document or part of a document with intent to cause damage or injury to the public or to any person, or to the Government or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud, or that fraud may be committed, commits forgery.

Section 453

A person is said to make a false document:

Firstly who dishonestly or fraudulently makes, signs, seals, or executes a document or part of a document, or makes any mark denoting the execution of a document, with the intention of causing it to be believed that such document or part of a document was made, signed, sealed, or executed, by or by the authority of a person by whom or by whose authority he knows that it was not made, signed, sealed, or executed, or at a time at which he knows that it was not made, signed, sealed, or executed; ...."

The appellant by his counsel did not argue before their Lordships that the conclusion of the Supreme Court as to the forgery was not sustainable but relied upon other matters as substantial grounds for setting aside the judgment of the Supreme Court.

First he relied on the defence of "*autrefois acquit*". This defence was raised before the Magistrate on 7th May, 1968 by counsel who tendered in evidence the Charge Sheet and Record of Discharge in Joint Magistrates' Court Colombo, Case No. 29950, 28th October, 1963 to 24th February, 1965. The Charge Sheet reads as follows:

1. That between the 2nd day of July, 1958 and the 22nd day of September, 1959 at Colombo within the jurisdiction of this Court, you did by submitting Birth Certificate bearing No. 41904 issued by the District Registrar of Births, Badulla with your application for a certificate of Citizenship in terms of Section 6 of the Citizenship Act (Chapter 349 L.E.C.) attempt to deceive the Hon. S. W. R. D. Bandaranaike, Minister of Defence and External Affairs into the belief that the said Birth Certificate which referred to the birth of Veerappen S/O Tiruman born at Sherwood, Haputale on 1st May, 1918, referred to your birth, and thereby fradulently attempted to induce the said Hon. S. W. R. D. Bandaranaike to issue you with a certificate of Citizenship in terms of Section 6 of the Citizenship Act (Chapter 349 L.E.C.) which act he would not have done had he not been so deceived, and which act was likely to cause loss or damage to the Government and you have thereby committed an offence punishable under Section 400 read with Section 490 of the Penal Code.

2. That at the time and place aforesaid and in the course of the same transaction you did for the purpose of procuring a certificate of Citizenship issued in terms of Section 6 of the Citizenship Act (Chapter 349 L.E.C.) make a statement to wit: that you were Veerappen S/O Tiruman born at Sherwood Estate, Haputale Ceylon on 1st May, 1918, knowing such statement to be false in a material particular to wit, that you were Veerappen S/O Tiruman a Citizen of Ceylon by descent and you are thereby guilty of an offence punishable under section 25 of the Citizenship Act."

The Record of Discharge in this case shows that the accused was present. Then follows the word "Evidence" and underneath appears the following:

"Mr. Adv. Sittampalam instructed by Mr. Siva Subramaniam for the accused.

Mr. W. Paul C.C. for the prosecution states that the prosecution is not adducing any evidence against the accused in this case.

I discharge the accused"

There is no indication that the appellant was called upon to plead to the charge. This case can be contrasted with the procedure followed on the trial with which this appeal is concerned; when the appellant on being asked if he had any cause to show why he should not be convicted stated "I am not guilty."

The Magistrate rejected the plea of *autrefois acquit* on the ground that the charge made under

section 454 was not one of the charges in case No. 29950 but in their Lordships' view it is unnecessary to consider the question whether the substantial issues raised in the second proceedings are the same as those raised in the first.

The Record does not show that the appellant was ever put in peril on the first occasion. It shows the reverse namely that counsel for the prosecution stated that the prosecution was not adducing any evidence against the accused in the case whereupon he was discharged.

There is nothing to indicate that the appellant was ever called upon to plead and a search of the Court journal has not shown any indication that he was called upon. The burden being upon appellant to establish the plea of *autrefois acquit* and there being no evidence to support it this ground of appeal is not established.

A second point, taken somewhat tentatively on behalf of the appellant was that when his Counsel stated that he was not calling any evidence but made a submission in law to the effect that the evidence for the prosecution could not support a charge of forgery, he was making a submission of "No case to answer"; and that if the Magistrate had over-ruled that submission justice required that he should then have given the appellant an opportunity of leading evidence. Further it was submitted that the Supreme Court should not have set aside the verdict of acquittal entered by the Magistrate without giving the same opportunity to the appellant since the Supreme Court was in effect doing no more than over-ruling a submission of "No case to answer".

There is no substance in this point. When the case for the prosecution was closed on 8th July, 1966 the Magistrate called on the appellant for his defence. His Counsel then indicated that he was calling no evidence and confined himself to tendering the Charge Sheet and the record of the earlier proceedings. The appellant's counsel in whose hands he was, indicated plainly that he was calling no evidence apart from the document to which reference has been made. In so far as it can be inferred that Counsel submitted there was no case to answer that submission was not over-ruled but was accepted and the Magistrate, upon the facts proved before him, came to the conclusion, afterwards reversed by the Supreme Court, that the offence of forgery was not established.

The Supreme Court, upon those facts, the only facts which the appellant had sought to put forward substituted a verdict convicting the appellant of forgery for the verdict of acquittal which the Court set aside.

No injustice was done to the appellant in that the Supreme Court did not, before giving judgment, give him a further opportunity of calling evidence.

Finally it was submitted that there was a grave irregularity in the Supreme Court in that the Judgment in its final paragraph imposed a sentence of two years rigorous imprisonment without giving an opportunity for the appellant to be heard in mitigation of sentence in the event of a conviction being entered against him.

Their Lordships cannot uphold this objection. They will not as a rule interfere with sentences. Moreover on the face of it the sentence is not in their Lordships' opinion an excessive one.

It is recognised that, since the judgment was handed out by the Court to the parties, there was no separate opportunity given to the appellant by himself or his counsel to plead in mitigation. Nevertheless notice had been given by the Petition of Appeal that the Attorney General was praying not only to have the order of acquittal made by the Magistrate reversed but also that sentence might be passed on the appellant according to law.

It was therefore open to the appellant to deal at the hearing before the Supreme Court with the

question of punishment. It is true that this is a course which an appellant will not readily take when the question of conviction is still in suspense. Their Lordships do not regard with satisfaction the practice, if such there be, of dealing with sentences without hearing a plea in mitigation.

Even though appeals against acquittals may be few in number they regard it as highly desirable that accused persons in such cases should have the opportunity after conviction by an appellate court of pleading in mitigation.

For the reasons given above their Lordships will humbly advise Her Majesty that the appeal should be dismissed.

Appeal dismissed.

IN THE COURT OF CRIMINAL APPEAL

Present: **H. N. G. Fernando, C.J. (President), Sirimane, J. and Weeramantry, J.**

THE QUEEN *v.* ERAMBOO SOTHALINGAM & OTHERS

Appeal Nos. 38-40 *of* 1969 *with Application Nos.* 50-52 *of* 1969
S.C. 16/18 *M.C. Mannar* 4245.

Argued and Decided on: 10th and 11th June, 1969
Reasons Delivered on: 23rd June, 1969

Court of Criminal Appeal — Indictment of three accused for murder — Verdicts of hurt, grievous hurt and murder against different accused — Note of alleged dying deposition — Illegally admitted — Not a case to apply proviso to section 5(1) *of Court of Criminal Appeal Ordinance* (*Cap.* 7) *— Re-trial ordered — Evidence Ordinance* (*Cap.* 14), *sections* 159 *and* 160 *— Court of Criminal Appeal Ordinance* (*Cap.* 7), *section* 5(1).

The 3 accused appellants were indicted on the charge of the murder of S. The jury found the 1st accused guilty of voluntarily causing grievous hurt the 2nd accused of voluntarily causing hurt and the 3rd accused of murder.

The prosecution called two alleged eye witnesses, N and T. The verdict indicated that the jury acted on N's evidence in deciding that the 2nd accused hit S with a club, that the 1st accused cut his finger and that the 3rd accused stabbed him in the abdomen after S had fallen down. At the same time the jury did not appear to have accepted fully the evidence that each of the three men alighted from a bus with a knife in his hand, since, if they had accepted this evidence they might have had no alternative but to hold that the murder was committed in pursuance of a common intention.

An apothecary who had been summoned to the scene stated in evidence that when he came to the scene S was able to speak and made a statement to the apothecary. Sometime later the apothecary made a note of what S told him. The apothecary himself did not give evidence in Court as to what S had told him. But the prosecution produced through him the document P6 as the note which he had made and according to which S has said that the 2nd accused assaulted him with a stick and the 1st and 3rd accused cut him with their knives.

Held: (1) That the document P6 was illegally received in evidence inasmuch as the apothecary had neither given oral evidence regarding the note nor used the note to refresh his memory under section 159 of the Evidence Ordinance nor had he testified to the facts mentioned in the documents in terms of section 160 of the said Ordinance.

(2) That the Court of Criminal Appeal would not apply the proviso to section 5(1) of the Court of Criminal Appeal Ordinance since on the verdicts of the jury, the jury might have entertained a doubt as to the truth of a part of the admissible evidence and the Court should therefore hesitate to hold that a reasonable jury would without doubt convict on the evidence of the two witnesses particularly because the verdict of murder against the third accused was reached by a majority of five to two despite N's evidence that it was the 3rd accused who inflicted the fatal injury. Therefore the test laid down in *Stirland v. D. P. P.* 1944, A.C. 315 could not be applied in this case.

Case referred to: *Stirland v. D.P.P.* (1944) A.C. 315.

G. E. Chitty, .*QC*., with *E. B. Sathirekulasingham*, *M. A. Mansoor* and *G. E. Chitty* (*Jr.*) for the 1st accused-appellant.

E. R. S. R. Coomaraswamy, with *R. Manikkavasagar*, *M. S. Aziz*, *S. C. B. Walgampaya* and *P. H. Kurukulasuriya*, for the 2nd accused-appellant.

Colvin R. de Silva, with *R. Manikkavasagar*, *S. Sinnathamby*, *I. S. de Silva* and *C. Motilal Nehru*, for the 3rd accused-appellant.

V. S. A. Pullenayagam, Senior Crown Counsel, with *Tyrone Fernando*, Crown Counsel, for the Crown.

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

The three accused in this case were indicted on the charge of the murder of one Sivagnanasunderam. By the verdict of the Jury however, the 1st accused was convicted of causing grievous hurt, the 2nd accused of simple hurt, and the 3rd accused of murder. They have all appealed against their convictions.

The incident is alleged to have taken place in the compound of a Sub Post Office. The prosecution called two persons who claimed to have been eye-witnesses: Nadarajah who stated that the deceased man came with him to the Sub Post Office, and Thambipillai the Sub-Post Master. According to these two witnesses the three accused alighted on the road outside the Sub Post Office from a bus which was stopped at a signal given by Nadarajah. Each of the accused alighted with a knife in his hand, and approached the deceased man for the purpose of assaulting him. Nadarajah seized the hand of the 2nd accused disarmed him after a brief struggle, and the 1st accused attacked the deceased with their knives. The verdict indicates that the Jury acted on Nadarajah's evidence in deciding that the 2nd accused hit the deceased with a club, that the 1st accused cut the deceased's finger, and that the 3rd accused stabbed the deceased in the abdomen after the latter had fallen down. At the same time the Jury do not appear to have accepted fully the evidence that each of the three men alighted with a knife in his hand; if they had accepted this evidence they may have had no alternative but to hold that the murder was committed in pursuance of a common intention.

According to the evidence, it would appear that the Sub Post-Master summoned to the scene an Apothecary who was in charge of a dispensary nearby. The Apothecary stated in evidence that when he came to the scene the deceased man was able to speak and made a statement to the Apothecary. Sometime later the Apothecary made a note of what the deceased man told him. The Apothecary himself did not give evidence in Court as to what the deceased had told him. Instead the prosecution produced through the Apothecary as the document P6 the note which he had made. According to the note the deceased had said that the 2nd accused assaulted him with a stick and that the 1st and 3rd accused cut him with their knives.

Learned Senior Crown Counsel has rightly conceded that P6 was improperly received in

evidence. If the prosecution intended that the Apothecary should give evidence of the contents of an oral statement which the deceased made to him, then that evidence should have been adduced directly by an examination of the Apothecary. Again, it may well have been open to the prosecution to suggest that the Apothecary should give oral evidence after refreshing his memory, in which case the Apothecary could have under section 159 of the Evidence Ordinance referred to the document and thereafter testified if his memory was thus refreshed. Alternatively, it may have been open to the prosecution to have the Apothecary testify to the facts mentioned in the document in terms of section 160 of the Ordinance. In fact however the prosecution did not take any one of these three lawful courses. There is thus no doubt that P6 was illegally received in evidence.

We are satisfied however that a conviction could properly have been based on the evidence of the two alleged eye-witnesses, and the contention for the Crown has been that the case is a fit one for the Court to dismiss the appeal under the proviso to section 5(1) of the Court of Criminal Appeal Ordinance. In considering this contention, it suffices for us to refer to the tests laid down in the case of *Stirland v. The Director of Public Prosecutions* (1944 A.C. 315). which has been applied by this Court, namely, that the Court will act under the proviso only if "when the transcript is examined it is evident that no reasonable Jury, after a proper summing up could have failed to convict the appellant on the rest of the evidence to which no objection could be taken."

As we have already stated, the fact that the Jury did not find all the accused guilty of murder reveals the possibility that they were unwilling to accept as true at least one item of the evidence of Nadarajah and the Apothecary, namely the item that the three accused descended from the bus with knives in their hands. If then the Jury may have entertained a doubt as to the truth of a part of the admissible evidence, we should properly hesitate to hold that a reasonable Jury would without doubt convict on the evidence of these two witnesses. The verdict of murder against the 3rd accused was reached by a majority of 5 to 2 despite Nadarajah's evidence that it was the 3rd accused who inflicted the fatal injury. We cannot say, having regard to certain deficiencies in that evidence, that a reasonable Jury must necessarily accept his evidence as being true beyond doubt. Since the disagreement of two jurors can be referable to a conclusion on their part that the offence of the 3rd accused was only that of culpable homicide not amounting to murder, we are unable to say that such a conclusion would be unreasonable. We consider that when all the circumstances which we have just mentioned are taken together they preclude us from deciding that the relevant test is satisfied in this case.

For these reasons we set aside the convictions of each of the accused and the sentences imposed against them, and made order that the case be tried afresh, the 1st accused on a charge of causing grievous hurt, the 2nd accused of causing simple hurt, and the 3rd accused on a charge of murder.

Set aside. Re-trial ordered on charges on which appellants had been found guilty.

Present: **de Kretser, J.**

MRS. S. K. SHAKOOR *v.* S. M. A. ALIM SAIBO & TWO OTHERS*

S.C. 114/66 — *C.R. Matale* 15120

Argued on: 26th January, 1969
Decided on: 11th May, 1969

Landlord and Tenant— Action for ejectment—Tenant denying tenancy — Is it necessary to prove a valid notice to quit?

* For Sinhala translation, see Sinhala section. Vol. 19, part 13, p. 27

Held: That a tenant who disclaims to hold of his landlord and puts him at defiance is not entitled to have the action against him dismissed for want of a valid notice to quit.

Followed: *Muttunachiya v. Pathumanachiya*, (1895) 1 N.L.R. 21.
Sundera Ammal v. Jusey Appu (1934) 36 N.L.R. 400
Pedrick v. Mendis (1967) 62 N.L.R. 471

On the question of the validity of the notice to quit.

Approved: *Haniffa v. Sellamuttu*, 70 N.L.R. 299.

C. Ranganathan, Q.C., with *M. S. M. Nazeem* and *C. Sandrasagara*, for the appellant.

N. R. M. Daluwatte, with *Kosala Wijetilleke*, for the 1st defendant respondent.

de Kretser, J.

The plaintiff's case is that after she had bought the premises in dispute on deed P1 the first defendant who was already a tenant of the premises under her vendor attorned to her in consequence of the letter P2 dated 20th June, 1964. He had get into arrears of rent and she had given him notice on 28.9.65 to quit the premises on or before 1st January, 1966. He ignored that notice and she then filed this action seeking the recovery of Rs. 260/- being arrears of rent due from 1. 12. 64 to 31.12.65, further damages at Rs. 20/- per month until she was restored to possession, the ejectment of the defendants and costs. The second and third defendants were joined on the footing that first defendant had sub-let these premises to them without her permission.

First defendant filed answer denying that he was the tenant of the plaintiff, denying he was in arrears of rent, and denying that he had sub-let the premises to second and third defendants who he averred were persons working under him. Second and third defendants filed answer saying that first defendant was carrying on business in the premises and that they were only there as his employees.

The parties went to trial on the following issues:

1. Is the defendant in arreas of rent?
2. Has the first defendant sub-let the premises without the written consent of the plaintiff?
3. If either issue 1. or 2. is answered in the affirmative is the plaintiff entitled to a writ of ejectment?
4. Is the defendant tenant of the plaintiff?
5. In any event is the notice pleaded in paragraph 5 of the plaint valid in Law?

The learned Commissioner of Requests, Matale, held that the first defendant was tenant of the plaintiff and that he was in arrears of rent for the period December, 1964—November, 1965, but that he had not sub-let to second and third defendants. He held that the notice given was bad in Law and dismissed plaintiff's action with costs. The plaintiff has appealed.

A close perusal of the evidence satisfies me that the learned Commissioner is right in his findings:

1. That the defendant was the tenant of the plaintiff.
2. That he was in arrears of rent for the period December, 1964 — November, 1965.
3. That he had not sub-let to second and third defendants.

It appears to me that the learned Commissioner, when he dismissed plaintiff's action on the grounds that the notice to quit was bad in law, had lost sight of the decision *Muttunatchia v. Pathumanatchiya* reported in 1 N.L.R. (1895) at page 21 that a tenant who disclaims to hold of his Landlord and puts him at defiance is not entitled to have the action against him dismissed for want of a valid notice to quit. This decision has been followed by Dalton J., in *Sundara Anmal v. Jusey Appu*, 1934 36 N.L.R. 400 and more recently by K. D. de Silva, J., in *Pedrick v. Mendis* 62 N.L.R. at page 471. The Order made by the Commissioner must therefore be set aside.

I would point out that were this a case in which it was necessary to prove a valid notice to quit, the Commissioner's finding that the notice dated 28.9.65 to quit on or before the 1st of January, 1966 was bad in Law would have been set aside by me, for in the case of *Haniffa v. Sellamuttu* decided by T. S. Fernando, J., and Sivasupramaniam, J. reported in 70 N.L.R. at page 200 it was held that such a notice is a valid notice. I am in respectful agreement with the reasons given for that decision. The appeal is allowed and the decree appealed against is set aside, and I order that decree be entered giving judgment for plaintiff as prayed for against the first defendant, except that the sum of money due as arrears would be Rs. 240/- and not Rs. 260/-. The first defendant will pay the plaintiff the costs of this appeal.

Appeal allowed.

IN THE COURT OF CRIMINAL APPEAL

Present: **H. N. G. Fernando, C.J. (President,) Sirimane, J. and Samerawickrema, J.**

THE QUEEN *v.* Y. P. SETHUWA *alias* PETER BAAS & FOUR OTHERS

Appeal Nos. 96-100 *of* 1968 *with Application Nos.* 144-148 *of* 1968
S.C. 154/'67 *M.C. Kegalle* 65250

Argued and Decided on: 9th May, 1969
Reasons Delivered on: 8th June, 1969

Court of Criminal Appeal — Unlawful assembly, murder and common intention — Convictions for grievous hurt — Examination-in-chief of witness conducted by trial Judge — Leading questions — Evidence contradictory and unimpressive — Observations by trial Judge re credibility of witness on questions of identity and other questions — Tending to show that Judge considered evidence trustworthy — Misdirection — Functions of trial Judge.

Five accused were indicted on charges of being members of an unlawful assembly, the commonob jectof which was to cause the death of one Siyathuwa, of the murder of Siyathuwa and also of causing grievous hurt to the son of Siyathuwa. On the 4th count the 5 accused were charged with the murder of Siyathuwa on the basis of a common intention and on the 5th count, of causing grievous hurt to the son of Siyathuwa on the same basis.

All 5 accused were convicted on the first three counts but only on the footing of a common object to cause grievous hurt. On the 4th and 5th counts the first four accused were convicted of causing grievous hurt to Siyathuwa and his son.

The trial judge, after one of the alleged principal eye witnesses, K, had been examined by Crown Counsel on some preliminary matters, took on the examination of K with the result that the whole of his evidence incriminating the accused and describing alleged assaults by some of them was presented to the jury in answer to questions by the judge, some of which were of a leading nature.

The evidence of the two principal prosecution witnesses, K and W, fell short of establishing that the seven persons involved came armed to the scene. The trial judge correctly directed the jury on the facts regarding this matter.

The witness W fell into somewhat serious difficulty in the course of cross examination and contradicted himself regarding the acts done by the accused and the identity of the persons responsible for the assaults. The trial judge at more than one stage asked the witness "are you quite sure. Please don't say "yes" to everything" and "I want to remind you that there is really no harm if you say 'you cannot say or you did not see' if you say that all of them came and assaulted you all that is quite sufficient. No one expects you to give such evidence in detail.

Held: (1) That it was most unfortunate that in regard to the witness K the judge performed the functions of the prosecutor for the jury could scarcely have resisted the impression that the trial judge was presenting the evidence of the witness as being evidence in which the judge himself had confidence.

(2) That it followed from the correct direction by the trial judge on the question of the seven persons coming armed to the scene that the prosecution could not establish any of the charges based upon the existence of an unlawful assembly, unless there was some impressive evidence of the actual conduct of the members of the accused party which might have justified an inference of a common object to kill or to injure the deceased.

(3) That the observations made by the trial judge to the witness W were bound to create in the minds of the jury an impression that the trial judge himself fully accepted the evidence of that witness to the effect that the accused did participate in the alleged assaults even though the witness was unable to speak with certainty to any act done by each or any of the accused.

(4) That however much a trial judge may be entitled in his summing up to express an opinion as to the credibility of a witness, there is no sanction in law of the course of intimating to the jury during the examination of a witness that the judge considered his evidence to be trustworthy.

(5) That the remark that the witness need not give details concerning the alleged assaults by various people on the deceased's party was in fact highly prejudicial to the defence, and that the defence was entitled to a consideration by the jury of the entire evidence before it reached a conclusion that any one of the accused had been a member of the alleged assembly and that it was misdirection to leave it open to the jury to reach such a conclusion independently of the evidence which related to the alleged assaults.

(6) That but for the above misdirections the jury could not have reasonably reached the conclusion that there had been an assembly the common object of which was to kill or cause hurt to Siyathuwa.

E. R. S. R. Coomaraswamy, with *C. Chakradaran*, *T. Joganathan*, *Kosala Wijayatilake*, and *S. C. B. Walgampaya* for 1st, 3rd and 5th accused-appellants.

Y. C. David, for 2nd accused-appellant.

Colvin R. de Silva, with *Bala Nadaraja*, *I. S. de Silva* and *C. Sandrasegera*, for 4th accused-appellant.

J. Muthiah (Assigned), for the accused-appellants.

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

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

Five accused were indicted in this case on charges of being members of an unlawful assembly the common object of which was to cause the death of one Siyathuwa, of the murder of Siyathuwa, and also of causing grievous hurt to the son of Siyathuwa. On the 4th and 5th counts the five accused were charged with the murder of Siyathuwa on the basis that the murder was committed by these accused and others in pursuance of a common intention, and the 5th count was of causing grievous hurt to the son of Siyathuwa also on the basis of common intention. All five accused were convicted on the first three counts, but only on the footing of a common object to cause grievous hurt. On the 4th and 5th counts also the first four accused were convicted of causing grievous hurt to Siyathuwa and to his son.

The prosecution called two alleged eye witnesses the first of whom was Karunaratne the son of Siyathuwa. This witness was examined by Crown Counsel on some preliminary matters as to the inmates of Siyathuwa's house and the relationship between Siyathuwa and some of the accused. At this stage the learned trial judge took on the examination of the witness, with the result that the whole of his evidence incriminating the accused and describing alleged assaults by some of them on Siyathuwa, his wife and his son was presented to the Jury in answer to questions by the Judge; some of these questions were of leading nature. In fact, Crown Counsel had nothing further to ask this witness, except a couple of formal questions which elicited the fact that the witness had made a statement to the Police. It was most unfortunate that the Judge thus performed the

functions of the prosecutor, for the Jury could scarcely have resisted the impression that the trial Judge was presenting the evidence of the witness as being evidence in which the Judge himself had confidence.

The evidence both of this witness and the other principal prosecution witness (one Wimalaratne) fell short of establishing that the seven persons came armed to the scene. On the contrary, it was clear from both witnesses that the 1st accused had on previous occasions been in the habit of coming near the house of the deceased and of abusing him, and that on these prior occasions events had not proceeded beyond the stage of abuse. The learned trial Judge himself appears to have appreciated at one stage that the evidence fell short of proving that the persons who came on the night of the commission of these alleged offences had entertained a common object of killing or injuring the deceased man. This point was made in the following passage in the summing-up:—

> "The evidence in this case — I have not dealt in detail with the evidence of Wimalaratne and Karunaratne; I will do so in due course — seems to indicate that these five persons with others came there not with the object of causing the death of Siyathuwa, because if that was the case they could have waylaid him and attacked him without making their presence felt; they had come there abusing, challenging Siyathuwa to come out and, gentlemen, the evidence is that there were some fence sticks close by and some of these assailants may have pulled out the fence sticks; there is no evidence that they came there armed. The only indication that one of them had come armed was that small kitul club P1. We do not know who it was who brought that."

We agree entirely that this was a correct direction on the facts. It follows that unless there was some impressive evidence of the actual conduct of the members of the accused's party which might have justified an inference of a common object to kill or injure the deceased man, the prosecution could not establish any of the charges based upon the existence of an unlawful assembly.

The second prosecution witness Wimalaratne fell into somewhat serious difficulty in the course of cross-examination, when he contradicted himself as to what he claimed to have been the acts done by some or other of the accused in the course of their alleged assaults on the deceased, his wife and his son. At more than one stage, the learned trial judge interposed with remarks such as this:—

> "*Q:* Are you quite sure: Please don't say 'yes' to everything, think and answer — are you quite sure that it was Gunasekera who assaulted you?
> *A:* Yes"
>
> * * *
>
> .....I want to remind you that there is really no harm if you say 'You cannot say or you did not see.' If you say that all of them came and assaulted you all, that is quite sufficient. No one expects you to give evidence in such details."

With great respect it seems to us that observations such as these were bound to create in the minds of the Jury an impression that the trial Judge himself fully accepted the evidence of the witness to the effect that the accused did participate in the alleged assaults, even though the witness was unable to speak with certainty to any act done by each or any of the accused. However much a trial Judge may be entitled in his summing-up to express an opinion as to the credibility of the evidence of a witness, there is no sanction in law for the course of intimating to the Jury, during the examination of a witness, that the Judge considered his evidence to be trustworthy. Moreover, the remark that the witness need not give details concerning alleged assaults by various people on the deceased's party was in fact highly prejudicial to the defence. Wimalaratne gravely contradicted the 1st witness Karunaratne as to the identity of the persons responsible for the assault on the deceased and also on the deceased's wife and Karunaratne. In respect therefore of each one of the accused the defence was quite entitled to ask the Jury to disbelieve the evidence as to these alleged assaults, on the ground that the two principal witnesses contradicted each other on questions of identity; and if evidence as to any one of the accused was disbelieved on this ground, that disbelief would then cast doubt on the truth of the evidence that that accused had even been present at the scene. The defence was entitled to a consideration by the

Jury of the entire evidence before it reached a conclusion that any one of the accused had been a member of the alleged assembly, and it was a misdirection to leave it open to the Jury to reach such a conclusion independently of the evidence which related to the alleged assaults.

On the grounds which have already been stated we are satisfied that, but for these misdirections the Jury could not have reasonably reached the conclusion that there had been an assembly the common object of which was to kill or cause hurt to Siyathuwa, and on this ground we directed a verdict of acquittal of all the accused on the first three counts. We saw no reacon however to interfere with the conviction of the 3rd accused for the offence of causing grievous hurt.

Convictions of all accused on the 1st three counts set aside.

Conviction of 3rd accused for causing grievous hurt affirmed.

Present: **Sirimane, J., Samerawickrame, J. and Wijayatilake, J.**

DINGIRI AMMA *v.* APPUHAMY

S.C. 62 (*Inty.*) /67 — *D.C. Kurunegala* 2176/*P*

Argued on: 4th and 5th October, 1969
Decided on: 13th November, 1969

Partition Action — Dismissal for want of appearance of plaintiff — Does such dismissal bar second action in respect of the same land — Civil Procedure Code sections 84, 85, 207, 403, 496 *— Default of appearance in a partition action — Applicability of the provisions of the Civil Procedure Code in such a case — Provision for casus omissus in section* 79 *of partition Act — Whether case of default in appearance covered by such section — Partition Act* (*Cap.* 69), *sections* 25, 71, 76, 79.

Held: (1) That where a partition action was dismissed after decree *nisi* had been entered and made absolute by reason of the absence of the plaintiff on the trial date, this was no bar to the maintenance of a second action in respect of the same land. This would be so whether the first action had been one that was contested or not so long as there had been no adjudication on the contest.

(2) That in any event, the provisions of Chapter XII of the Civil Procedure Code relating to the consequences and cure of defaults in appearance, have no application at all to a Partition action instituted under the Partition Act. The Act itself provides for the dismissal of an action for many instances of default including the absence of a plaintiff, but in every one of such instances where the action is dismissed without adjudication, section 76 of the Act provides that such a dismissal should not operate as a bar to the institution of another action.

(3) That section 71 of the Partition Act provides for the procedure which is applicable when a plaintiff in a partition action is absent and section 79 of the Act which provides for a casus omissus to be governed by the Civil Procedure Code has no application.

Per **Sirimane, J.** "One consequence of the laws of inheritance obtaining in the Island, is the common ownership of small parcels of land. This in turn leads to many disputes, often resulting in violence. The Partition Act was designed to enable a co-owner to put an end to this evil and obtain a *decree in rem.* At the same time the legislature has paid heed to the fact that a partition action, once instituted, must be prosecuted with reasonable diligence, not only because of the prohibition against alienation pending such actions, but also because the business of a court should not be hindered by a number of semi-animate actions pending on its roll."

Distinguished: *Silva v. Juwa*, 37 N.L.R. 165
Kandavanam v. Kandaswamy, (1955) 57 N.L.R. 241
Referred to: *Abeysundere v. Babuna*, (1925) 26 N.L.R. 459
Herath v. The Attorney-General (1958) 69 N.L.R. 193
Perera v. Punchirala (1920) 2 L.L.R. 58
Wickremasekera v. Fernando and Others (1895-1 Matara Cases 19)
Text cited: Jayewardene — "*Law of Partition in Ceylon*"

E. A. G. de Silva, with *Ben Eliyatamby* and (*Miss*) *S. M. Senaratne*, for the 1st defendant-appellant.

W. D. Gunasekera, with *W. S. Weerasooria*, for the plaintiff-respondent.

Sirimane, J.

The plaintiff had filed an action No. 8067, for the partition of a certain land on the footing that it originally belonged to one Mudiyanse, whose rights devolved on his daughters. He claimed that the rights of two of the daughters passed to him and the 2nd and the 3rd defendants, and those of the third daughter to the 1st defendant.

The 1st defendant filed a statement claiming the entire land on the footing that the two daughers from whom the plaintiff claimed had married in "diga" and inherited no rights to this land.

At the trial in the District Court, the plaintiff succeede d. In appeal, however, the case was sent back for re-trial. The plaintiff was absent on the trial date, and a Decree *Nisi* dismissing his action had been entered. The plaintiff then purged his default to the satisfaction of the trial judge who restored the case to the trial roll. On an appeal by the 1st defendant that order, too, was set aside, and the Decree *Nisi* dismissing the action was made absolute.

The plaintiff thereafter filed this action for partition of the same land.

We cannot now interfere in any way with the order of dismissal in D.C. 8067. But we have to consider what effect that order has on the present case.

A partition action is brought to put an end to the inconvenience of common possession. Apart from the special procedure prescribed for such actions, both in the Ordinance of 1863 and the Partition Act of 1951 (Chapter 69), such an action is very unlike any other action based on a "cause of action" as defined in the Civil Procedure Code. In the present action, like in all other actions for partition, whether filed under the Ordinance or the Act, the plaintiff avers in para 14 of the plaint that common possession of the land is inconvenient and impracticable. That is the basis on which he comes to Court.

It is true that the title of a plaintiff is often challenged in whole or in part by the defendants. But the filing of a statement of claim raising a contest does not transform a partition action into an action for declaration of title. Such a statement does not, in my view, really affect the nature of the proceeding, which has to be ascertained by looking at the plaintiff's case as stated by him. He does not know, or is not expected to know, at the time he files the action, exactly what the defendants may say. Sometimes many contests are raised in the very large number of cases where such contests are given up at the trial. In my view there is no difference between a Partition Action, which is contested (before an adjudication on the contests) and one which is not. As far as the plaintiff is concerned, the basis on which he comes into Court is the inconvenience of common possession. It would be different, of course, if there had been an adjudication on the rights he claimed. I referred to this aspect of the matter because Counsel for the appellant argued at some length that if a partition action is uncontested (a partition action "simpliciter" as he called it), then an order under section 84 of the Civil Procedure Code would not operate as *res judicata*, but, according to his sub-

mission, once a statement of claim is filed raising a contest, such an order would prevent the plaintiff from coming into court again, in view of section 207 of the Code.

I am in respectful agreement with Ennis, A.C.J. when he said in *Abesundere v. Babuna* (26 N.L.R. 459).

> "Now clearly in a partition action the action itself is not founded upon a wrong. It is an action to give relief against the inconveniences of common possession, so that a partition action at its institution is not an action founded upon a cause of action as defined in section 5, but it would be an action under the definition of "action" given in section 6. Section 207, if the limitation contained in the explanation be regarded as a limitation on the main words of the section, would not apply to partition actions, but there is no doubt that in partition actions a contest frequently arises between the parties with regard to the rights of parties and title generally, and with regard to which the parties seek redress, such a contest would be based on a cause of action as defined in section 5, and *the adjudication upon it* might well be res judicata under section 207."

He went on to say,

> "If one regards a partition action as an action founded on some cause, even if it be not such a cause as would fall within the definition in section 5 of the Civil Procedure Code, then the cause of action would seem to be a recurring one, that is, it is due to a continuance of the common ownership which exists from day to day as the inconvenience of common ownership recurs day by day."

The earlier case (D.C. 8067) was dismissed for want of appearance without any adjudication on the plaintiff's rights. That dismissal, in my view, is no bar to the present action, for, the inconvenience of common ownership recurs day by day.

In the case of *Silva v. Juwa* (37 N.L.R. 165) relied on by the appellant, the earlier action brought by the plaintiff was one for declaration of title to a land. Before the defendant intervened in the subsequent partition action, which the plaintiff filed, an order of abatement had been entered in the land case. The Court had to consider the effect of section 403 of the Civil Procedure Code and Garvin, S.P.J., said at page 166,

> "This would, therefore, appear to be a fresh action in the sense that so far as the intervenient and the plaintiff are concerned this action was brought by the plaintiff as against the intervenient subsequent to the date of the order of abatement."

It would appear from the facts of that case, that the second action was a mere subterfuge to circumvent the order of abatement. I think that case is distinguishable from the facts of the present case. In *Kandavanam v. Kandaswamy* (57 N.L.R.241) the Court again had to consider the effect of an *unconditional withdrawal* by the plaintiff of a partition action under section 406 of the Civil Procedure Code, in view of the statutory bar in section 406(2) which precludes the plaintiff from bringing a fresh action in such circumstances. The facts there, too, different from these in the present case, though, with great respect, I venture to think that the Court had gone too far when it held that a defendant who consented to the withdrawal of the action was also prevented from bringing a fresh action.

Jayawardene on *Partition* at page 107 refers to a case decided in 1920 (*Perera v. Punchirala*, 2 L.L.R. 58) where it was doubted whether section 406 of the Code applied to partition actions.

Nor do I think that those cases, where it has been held that a partition action was one "for the recovery of property" for the purposes of administration required by section 547 of the Civil Procedure Code, can be regarded as authority for the proposition advanced for the appellant, that a partition action is no different from an action for declaration of title to land. Though, with great respect, I am unable to share the view expressed in *Herath v. The Attorney-General* (60 N.L.R. 193) that the provisions of section 207 of the Civil Procedure Code apply *only to decrees entered under Chapter* 20 of the Code, yet I think that the learned District Judge was right (this being partition action) when he held that the order in the earlier case was no bar to the present action.

I have examined the question so far on the basis that an order under section 84 of the Civil Pro-

cedure Code is an appropriate order in a partition action.

But I must say, however, that I am very strongly of the view that the provisions of the Civil Procedure Code relating to the consequences and cure of defaults in appearing (Chapter 12) have no application at all to a partition action instituted under the Partition Act.

One consequence of the laws of inheritance obtaining in the Island, is the common ownership of small parcels of land. This in turn leads to many disputes, often resulting in violence. The Partition Act was designed to enable a co-owner to put an end to this evil and obtain a *decree in Rem*. At the same time the legislature has paid heed to the fact that a partition action, once instituted, must be prosecuted with reasonable diligence, not only because of the prohibition against alienation pending such actions, but also because the business of a court should not be hindered by a number of semi-animate actions pending on its roll. The Act, therefore, provides for the dismissal of an action for many defaults, for example, the failure to deposit survey fees (sections 10 and 29), the failure to comply with the requirements relating to declarations, summonses, notices, etc. at the commencement of the action (section 12), the failure to provide security (section 63), default in payment of costs (section 66) or *non-prosecution of the action* (section 71), But in every one of these instances, when the action is dismissed without an adjudication, section 76 provides that such a dismissal should not operate as a bar to the institution of another action.

Absence of a plaintiff without excuse on the trial date surely amounts to a failure to "diligently prosecute the action." One has to bear in mind that the procedure prescribed under the Act before a case is ready for trial is elaborate and expensive, and also that in a partition action every defendant is in the position of a plaintiff.

Section 71, therefore, provides that,

> "No partition action shall abate by reason of the non-prosecution thereof, if a partition action is not prosecuted with reasonable diligence after the Court has endeavoured to compel the parties to bring the action to a termination the Court may dismiss the action:
>
> Provided, however, that in a case where a plaintiff fails or neglects to prosecute a partition action the Court may, by order, permit any defendant to prosecute that action and may substitute him as plaintiff for the purpose and may make such order as to costs as the Court may deem fit."

In my view, the above section provides for the procedure which is applicable when a plaintiff in a partition action is absent, and section 79 of the Partition Act, relied on by the appellant, which provides for a *casus omissus* has no application.

Even a cursory examination of sections 84 and 85 of the Civil Procedure Code would reveal their inapplicability in a partition action, Section 84 for instance, provides for the dismissal of the plaintiff's action if he fails to appear on a day fixed for the appearance and answer of a defendant. It is very common to find a large number of defendants in a partition case. They are never served with summons at one and the same time, and a case has to be called on several dates before this is done. A plaintiff would be in peril on every date that a defendant appears on summons.

Section 85 provides for the *ex parte* hearing of a case and the passing of a *Decree Nisi* if the defendant fails to appear on the day fixed for his appearance and answer. Such a procedure, in addition to being obviously impraticable in a partition case, would also be contrary to the provisions of section 25 of the Partition Act which require the Court to examine the title of each party before entering an Interlocutory Decree. Even as far back as 1895, in *Wickremasekera v. Fernando* (1 Matara cases 19), it was shown that a *Decree Nisi* was altogether irregular in a partition action.

The appeal is dismissed with costs.

Samerawickrame, J.
I agree.

Wijeyatilake, J.
I agree.

Appeal dismissed.

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

LEWIS TISSERA *vs.* COTIN *alias* MOONIS TISSERA & OTHERS

S.C. 654(*F*) 1964 — *D.C. Panadura T.K.* 1274/13886

Argued and decided on: 16th September, 1967

Courts Ordinance, section 61 — *Partition action instituted in District Court K in respect of land situated within its jurisdiction — Interlocutory decree — Subsequent alteration of territorial jurisdiction of such court necessitated by establishment of new District Court P — Whole area where subject matter of partition situated brought under jurisdiction of new Court P—Without transferring case to P, commission issued for scheme of partition — Case transferred to P after scheme prepared — Final decree entered by Court P — Is it valid?*

The interlocutory decree in a partition action instituted in the District Court of Kalutara was entered in 7/6/1937 in respect of a land situated within the Panadura Totamune Division.

The establishment of the District Court of Panadure in October, 1945 necessitated the alteration of the territorial Jurisdiction of the District Court of Kalutara and the entirety of the Panadure Totamune was by a Proclamation brought under the District Court of Panadure where the said partition action should have been transferred thereafter.

The District Court of Kalutara however on 25/3/1962 issued a commission to a Surveyer to prepare a scheme of partition and final decree was entered by the District Court of Panadure (where the case was transferred subsequently) giving effect to the scheme of partition prepared in execution of the said Commission issued on 25/3/1962

Held: (1) That in view of the provisions of Section 61 of the Courts Ordinance the said commission issued by the District Court of Kalutara was contrary to law as the court had then no jurisdiction to issue it.

(2) That, therefore, the final decree which gives effect to the said scheme of partition is bad in Law.

G. P. J. Kurukulasooriya, with *S. Gunasekera*, for the 2nd defendant-appellant.

A. C. Gooneratne, Q.C., with *D. S. Wijewardena*, for the plaintiff-respondent.

Abeyesundere, J.

This partition action was filed in the District Court of Kalutara in 1927 and the interlocutory decree was entered by that Court on 7th June, 1937. By a proclamation which was made under the Courts Ordinance and which came into effect on 1st October, 1945, the territorial jurisdiction of the District Court of Kalutara was altered. That alteration was necessitated by the establishment of the District Court of Panadura within whose limits of jurisdiction the entirety of Panadura Totamune was included. The land in respect of which the aforesaid partition action was instituted is situated within the Panadura Totamune.

Section 61 of the Courts Ordinance provides that, where the jurisdiction of a District Court is altered, an action pending before that Court shall be proceeded upon in the Court in which it ought to have been instituted after the alteration of the Jurisdiction and all proceedings which shall thereafter be had in that action shall be conducted in like manner as if such action had been instituted in the last mentioned Court. In view of the said Section 61, the aforesaid partition action should have been transferred by the District Court of Kalutara to the District Court of Panadura But such a transfer was not done until 24th February, 1964. The District Court of Kalutara had, after

the interlocutory decree, issued a commission to a surveyor to prepare a scheme of partition and that commission had been issued on 25th March, 1962 by that District Court after its jurisdiction had been altered by the aforesaid Proclamation. The final decree was entered by the District Court of Panadura giving effect to the scheme of partition that had been prepared in execution of the commission issued by the District Court of Kalutara on 25th March, 1962.

The second defendant has appealed from the interlocutory decree and final decree entered in this action, but his counsel confined the appeal to one from the final decree only. The ground of appeal from the final decree is that such decree gives effect to a scheme of partition prepared on a commission issued by the District Court of Kalutara which then had no jurisdiction to issue such commission. We are of the view that, in view of the provisions of section 61 of the Courts Ordinance, the commission issued by the District Court of Kalutara on 25th March, 1962 was contrary to law as that Court had then no jurisdiction to issue such commission. The final decree which gives effect to the scheme of partition prepared in execution of the aforesaid commission is therefore tainted by the fact that it gives effect to a scheme of partition prepared contrary to law.

For the aforesaid reasons we set aside the final decree entered in this case and direct the District Court of Panadura to issue a fresh commission for the preparation of a scheme of partition in accordance with the interlocutory decree that has been entered and thereafter enter a final decree according to law. The appellant is entitled to his costs of the appeal.

G. P. A. Silva, J.

I agree.

Appeal allowed.

END OF VOLUME LXXVII

සතිපතා ලංකා නීතිය

ඉංග්‍රීසි භාෂාවෙන් පළවන තෝරාගත් සමහර නඩු තීන්දුවල වාතීා සහ විශේෂ අවස්ථාවල දී
ශ්‍රේෂ්ඨාධිකරණය කැඳවන සභාවල පැවැත්වෙන කථාවන්හි
වාතීා ද අඩංගු වේ.

සංහිතාව

19 වෙනි කාණ්ඩය

රාජනීතිඥ හේම එච්. බස්නායක
(උපදෙශක කතීෘ)

ජී. පී. ජේ. කුරුකුලසූරිය
ශ්‍රේෂ්ඨාධිකරණයේ අධිනීතිඥ
(කතීෘ)

බී. පී. පිරිස් එල්.එල්.බී. (ලන්ඩන්)
වී. රත්නසභාපති බී.ඒ.(ලංකා),එල්.එල්.බී.(ලන්ඩන්)
යූ. ඒ. එස්. පෙරේරා එම්.ඒ.(ලන්ඩන්)
එන්. එම්. එස්. ජයවික්‍රම එල්.එල්.බී.(ලංකා)
එම්. එච්. එම්. නයිනමරික්කාර්
බී.ඒ.,එල්.එල්.බී,(කැන්ටැබ්)
එස්. එස්. බස්නායක බී.ඒ., බී.සී.එල්. (ඔක්ස්ෆර්ඩ්)
එන්. එස්. ඒ. ගුණතිලක එල්.එල්.බී.(ලංකා)
වරුන බස්නායක

ශ්‍රේෂ්ඨාධිකරණයේ අධිනීතිඥවරු
සහකාර කතීෘවරු

1970

දායකමීල මුලදීම ගෙවීවොත් – කාණ්ඩයකට (ඉංග්‍රීසි වාතීාත් සමග) රු. 17/50 පසුගිය කාණ්ඩයක මිල රු. 20/00.
පිටපත් ලබාගත හැක්කේ නොා: 50/3, සිරිපා පාර, හැවිලොක් ටවුම්—කොළඹ 5.

පාශ්‍රීය කාරයන්ගේ නාම

අපරාධ නඩු විධාන

ඇපැලේ දී වරදකරු වීම — දඬුවම් නියම කිරීමට පෙර සහනය ඉල්ලීමට අවස්ථාවක් දිය යුතු බව ... 23

අපරාධ නඩු සංවිධාන සංග්‍රහය

''ඕත්තුපුවා අකි'' යන ප්‍රඥප්තිය — චිත්තිකරු චෝදනාවට උත්තර දීමට පෙර ඔහුට විරුද්ධව නඟා ඇති චෝදනාව ඔප්පු කිරීමට සාක්ෂි ඉදිරිපත් නොකරන බව පැමිණිල්ල ප්‍රකාශ කිරීම — චිත්තිකරු නිදහස් කිරීම — දෙවනුව එම චෝදනාවම පිට පවරන ලද නඩුවක් සම්බන්ධයෙන් ඕත්තුපුවා අකි'' හෙවත් 'කලින් නිදහස් කරන ලදැයි' යන ප්‍රඥප්තියේ වාසිය නිදහසට ප්‍රමාණවත් හේතුවක්ද ? — උත්තර දීමට තරම් දෙයක් නැතැයි යන පදනම උඩ චිත්තිය සාක්ෂි නොකැඳවන විට අනුගමනය කළ යුතු ක්‍රියාපටිපාටිය — නිදහස් කිරීමේ නියෝගය ඇපැලේ දී වෙනස්කර වැරදිකරු කිරීම — දඬුවම් ගැන සහනය පතා අයැදීම.

තීන්දුව: (1) වරදක් සම්බන්ධයෙන් චෝදනා කරනු ලැබ සිටියකුගේ නඩු විභාගය ආරම්භයේ දී පැමිණිල්ල චෙනුවෙන් සාක්ෂි කැඳවීමට අදහස් නොකරන බව පැමිණිල්ලේ නීතිඥවරයා කියා සිටියෙන් චිත්තිකරු චෝදනාවට උත්තර දීමට පෙර ඔහු නිදහස් කරනු ලැබීමෙන් පසු දෙවනුව ඔහුට විරුද්ධව ගෙනෙන ලද පැමිණිල්ලක් ද පළමු වතාවේ දී ඔහු වරදකරු වීමේ අන්තරායකට කිසිසේත් ම පාත්‍ර නො වූ නිසා කලින් නිදහස් කරන ලද්දේය හෙවත් ''ඕත්තුපුවා අකි'' යන ප්‍රඥප්තිය නිදහසට කාරණයක් ලෙස ගත නොහැකිය.

(2) එවැනි අවස්ථාවක දී දෙවැනි පැමිණිල්ලෙන් හා පළමුවැනි පැමිණිල්ලෙන් මතුවන ප්‍රධාන හඹ ප්‍රශ්නවල සමානත්වය විසඳීම උචිතතා නැත.

(3) ''ඕත්තුපුවා අකි'' යන්න නිදහසට කාරණයක් ලෙස දක්වන කල එය ඔප්පු කිරීමේ භාරය චිත්තිකරු වෙත පැවරේ.

(4) පැමිණිල්ලේ සාක්ෂි අවසන් වීමෙන් පසුව උත්තර දීමට තරම් දෙයක් නැතැයි යන පදනම උඩ චිත්තිය සාක්ෂි කැඳවීමට අදහස් නොකරන බව උසාවියට දන්වා ''ඕත්තුපුවා අකි'' හෙවත් කලින් නිදහස් කරන ලදී යන කාරණය මත පිහිටා කලින් නඩුවක චෝදනා පත්‍රයක් සහ වාර්තාවක් ඉදිරිපත් කළ පමණින් චිත්තිකරුට දෙවැනි වරට සාක්ෂි කැඳවීමේ අවස්ථාවක් දීමට උසාවිය බැඳී නැති අතර චෝදනාව තහවුරු වී ඇතැයි හැඟී ගියහොත් චිත්තිකරු වරදකරු කිරීමට උසාවියට හැකිය.

(5) නිදහස් කිරීමේ තීන්දුවක් ඇපැලේ දී වෙනස් කොට චිත්තිකරු වරදකරු කරන තීන්දුවක් බවට හැරී වූ විට, චිත්තිකරුට දඬුවම් දීම පිළිබඳ සහනය පතා අයැදීමේ අවස්ථාවක් නො දී දඬුවම් නො කළ යුතුය.

රාජාධිකරණ මණ්ඩලයේ ප්‍රකාශය: ''සහනය පතා අයැදීමක් නොමැතිව දඬුවම් සම්බන්ධයෙන් ක්‍රියාකිරීමේ පිළිවෙතක් ඇත්නම් එය සතුටුදායක එකක් ලෙස ගරු විනිශ්චය කාරතුමන්ලාට නොපෙනේ.

නිදහස් කිරීමේ තීන්දුවලින් කෙරෙන අහියාචන සංඛ්‍යාව ඉතා සුළු වීමට ඉඩ ඇතත් එවැනි අවස්ථාවල දී වරදකරු කිරීමෙන් පසු චිත්තිකරුවන්ට දඬුවම් ලිහිල් කරවා ගැනීම සඳහා සහනයක් පතා අයැදීමේ අවස්ථාවක් ඇපැල් උසාවිය විසින් දීම ඉතාමත් වැඩදායකය යන්න ගරු විනිශ්චයකාර සාමිවරුන්ගේ අදහසයි.''

තිරුමන් පලනිමලෙයි වීරප්පන් එ. නීතිපතිතුමා ... 23

අලාභ හානි

අලාභහානි ඉල්ලා සිටීම — අසල්වැසි චිත්තිකරුගේ ඉඩමෙහි පිහිටා තිබුනු පූවක් ගසක් පැමිණිලිකරුගේ ගෙට නෙරා තිබුණත් එම ගස ගෙය පැත්තට ඇලවී තිබීම — එම ගස පැමිණිලිකරුගේ ගෙය මත වැටීම — ගසේ අනතුරුදායක තත්ත්වය දැනගෙනත් එමගින් අසල්වැසි ඉඩම් හිමියාට විය හැකි අලාභ හානි මග හැරීමට චිත්තිකරු නිසි ලෙස ක්‍රියා නොකිරීම — චිත්තිකරුගේ නොසැලකිල්ල — අලාභ හානි ඔහුගෙන් අයවිය යුතු ද යන්න.

පැමිණිලිකරුගේ ගෙට අඩි 14 ක දුර ප්‍රමාණයෙන් පූවක් ගසක් විය. එම ගස පැමිණිලිකරුගේ ගෙට නෙරා නොතිබුණු නමුත් එය ගෙය පැත්තට ඇල වී පිහිටියේය. චිත්තිකරු එම ගස පැමිණිලිකරුගේ ගෙය මත වැටෙන්ට අවුරුදු තුනක පමණ කාලයක සිට ගසේ අනතුරුදායක තත්ත්වය ගැන දැන ගෙන සිටිය බව සාක්ෂිවලින් ඔප්පුවිය.

තීන්දුව: පූවක් ගස පැමිණිලිකරුගේ ගෙට නෙරා නොතිබුණත්, ගස අයිතිකරු එහි අන්තරාදායක තත්ත්වය දැන ගෙනත් එයින් ඇතිවිය හැකි අලාභහානි මග හැරීමට කාලෝචිත ලෙස ක්‍රියා නොකිරීමෙන් පැහැදිලිවන නොසැලකිලිමත්කම නිසාත්, චිත්තිකරු අලාභහානිවලට වගකිව යුත්තකු වී ඇත. මෙය ජිනසේන එ. එංගල්හිනා (1919) 21 වැනි නව නීති වාර්තා කාණ්ඩයේ 445 වැනි පිටුවේ සඳහන් නඩුවේ ප්‍රඥප්තිය අනුවයි.

ජේ. ඒ. විමලාවති එ. ඒ. ඩී. ජේ. ගුණරත්න ... 1

අල්ලස් පනත

අල්ලස් පනත — 19 වැනි ඡේදය යටතේ චෝදනා කිරීම — එය ඔප්පු කිරීමේ කාර්යභාරය පැමිණිලි පක්ෂය මත පැවරෙන බව — පොලිස් නිලධාරියකුට අල්ලසක් ගැනීම නීතිය අනුව හෝ ඔහුගේ පත්කිරීමේ කොන්දේසි අනුව හෝ නොහැකියයි ඊට සාක්ෂි නොමැති විටෙක විනිශ්චයාත්මකව සලකා ගැනීම උසාවියට හැකි ද?

තීන්දුව: පොලිස් සේවයේ නිලධාරියකු වශයෙන් සේවය කරන අතර නීතියෙන් හෝ තමන්ගේ රැකියාවට අදල කොන්දේසි අනුව හෝ ලබා ගැනීමට අවසර නොමැති අල්ලසක් ලබා ගැනීමේ වරදට අල්ලස් පනතේ 19 වැනි ඡේදය යටතේ ඉදිරිපත්වුනු චෝදනාවක දී පොලිස් නිලධාරියකුට නීතිය මගින් හෝ රැකියාවේ කොන්දේසි අනුව හෝ එලෙස අල්ලසක් ගැනීමට නොහැකි බව අධිකරණයකට හෝ විනිශ්චය සභාවකට හෝ ඊට සාක්ෂි නොමැති විටෙක දී විනිශ්චයාත්මක ලෙස සලකා ගත හැකි කරුණක් නොවේ. මෙම තර්කය පිළිගතහොත් විනිශ්චය සභාවක් ඉදිරියේ චෝදනාවක් ඔප්පු කිරීමේ කාර්යභාරය පිළිබඳ පිළිගත් මූලික ධර්මවලට පරස්පර මතයක් ගැනීම සිදු වේ. එය යුක්තිය ඉටු කළ යුතු මාර්ගයට බාධාවක් දැමීමක් වැන්නකි.

ජී. පී. ඒ. සිල්වා විනිශ්චයකාරතුමා: ''විටිටි මහතා විසින් ඉදිරිපත් කරන ලද තවත් තර්කයක ද සැහෙන පමණ සාරාංශයක් ඇති බව කිව යුතුය. මෙම උසාවිය ඉහත සඳහන් කරුණු විනිශ්චයාත්මක ලෙස ගැනීමට සූදානම් වුවත්, නඩුව විනිශ්චය කළ විනිශ්චයකාරවරයාගේ අවධානය එබඳු දෙයක් සාක්ෂි නැතිව විනිශ්චයාත්මක ලෙස සලකා ගැනීමට යයි යොමු කරන ලද බවක් ඒත්තු නොගියහොත් මෙම අධිකරණයෙන් එබඳු වරදට පත් කිරීමක් තහවුරු නොකළ යුතු බව විටිටි මහතාගේ තර්කයයි. මෙම කරුණ දිස්නික් විනිශ්චයකාරවරයා තමාගේ අවධානයට යොමු නොකළ බව ද පැහැදිලිව පෙනේ.''

රජින එ. ඒ. ඒ. ඇම්. හමීඩ සහ තවත් අය ... 21

ඉඩම් හිමියා සහ බදුකරු

ඉඩම් හිමියා සහ බදුකරු — වැවිලි රහිත හිස් ඉඩමක් සඳහා බිම් බද්දක් ගෙවීමේ බදුකරයක් — තමාගේ වියදමින් ගරාජයක් ඉදිකොට දස අවුරුද්දකට පසු එය කඩා දමා සුන්බුන් ඉවත්කර ගැනීමට බදුකරු එකඟවීම — තුන් මසක දැනුම් දීමකින් පසු එම ගිවිසුම් සමාප්ත කිරීමට දෙපක්ෂයටම අවකාශ තිබීම — ඉඩම් හිමියා දස වැනි අවුරුද්දේ ගරාජය බිඳ දමා එම ගොඩනැගිල්ල තැනීමට ඇති ද්‍රව්‍ය ඉවත්කර ගැනීමට දැනුම් දීම — බදුකරු එයට පිළිතුරක් යැවීමට අසමත් වීම — ඉඩමෙන් ඉවත් කිරීමේ නියෝගය — ගෙවල් කුලී ආඥා පනත මෙයට අදාළ වන්නේ ද?

සුළු නගර සභා සීමාවක් ඇතුළත මසකට රු: 2.50 ක බිම් කුලියක් ගෙවමින් දහ අවුරුදු කාලයක්ම ගරාජයක් ලෙස පාවිච්චි කිරීම සඳහා තාවකාලික ගොඩනැගිල්ලක් ඉදිකිරීමට 1956 වර්ෂයේ 31 දරණ ගිවිසුමෙන් පැමිණිලිකරු වගඋත්තරකරුට අවසර දුන්නේය. දෙපක්ෂයෙන් එක් පක්ෂයක් තුන් මසක දැනුම් දීමක් කිරීමෙන් මෙම ගිවිසුම අවසාන කළ හැකි බවට එසේ ගිවිසුමක් අවසාන කිරීමෙන් පසු ගොඩනැගිල්ල බිඳ දමා එය තනා ඇති ද්‍රව්‍ය ගෙන යාමට ද වගඋත්තරකරුට අවසර ලැබිය යුතු යැයි ද ගිවිස ගන්නා ලදී.

තමාගේ වියදමින් බිත්ති කනු මත සවිකරන ලද සින්ක් තහඩුවලින් කැනු වහලක් සහිත ගරාජයක් ඉදිකළ වගඋත්තරකරු යන්ත්‍රෝපකරණ වලින් එය සමන්විත කොට මෝටර් රථ අළුත්වැඩියා කිරීම ඇරැඹීය. ගරාජය තැනීමෙන් පසු වගඋත්තරකරු රු: 5/- ගණනේ මසකට බිම් බදු ගෙවිය. 1966 දී පැමිණිලිකරු 32 දරණ ලියැවිල්ලෙන් ඉඩමෙන් ඉවත් වන ලෙස වගඋත්තරකරුට දැනුම්දෙමින් එසේ කිරීමේ දී ගරාජය තැනීමට යොදා ඇති ද්‍රව්‍ය ඉවත්කර ගැනීමට වගඋත්තරකරුට අවකාශ ඇති බව ද දන්වීය. වගඋත්තරකරු මෙයට පිළිතුරක් නොයැවීය. පැමිණිලිකරු වගඋත්තරකරු ඉඩමෙන් ඉවත් කරවන නඩු තීන්දුවක් ලබා ගත්තේය.

නඩුවට අදාළ භූමි භාගය ගෙවල් කුලී ආඥා පනත්වලට යටත් වන හෙයින් පැමිණිලිකරුට මෙම නඩුව පවත්වාගෙන යා නොහැකි යැයි ඇපැලේ දී තර්ක කරන ලදී.

තීන්දුව: (1) 31 සහ 32 යන ලියැවිලිත්, 32 දරණ ලියැවිල්ලට පිළිතුරක් යැවීමට අසමත්වීමත් මෙම ගිවිසුම හිස් භූමිභාගයක් සඳහා බව ඔප්පු කරයි.

(2) රු: 2/50 සිට රු: 5/- දක්වා බිම් කුලිය වැඩි කිරීමෙන් මෙය වෙනත් අන්දමක ගිවිසුමක් බවට පත් වී නැත.

(3) වගඋත්තරකරුට ජය ගැනීමට නම් බදු ගිවිසුමට අදාළ භූමි භාගය ගොඩනැගිල්ලක් හෝ ගොඩනැගිල්ලක කොටසක් ද, ඊට අයත් භූමිය ද සහිත වූවක් බව ඔප්පු කළ යුතුය.

ඩී. මෙරිලින් පෙරේරා එ. කේ. බී. සිමිජ්ලිනු ජයවර්ධන ... 19

උසාවි ආඥා බලය

මහේස්ත්‍රාත් උසාවියේ ආඥා බලය — දිස්ත්‍රික් උසාවියෙන් පමණක් විසඳිය හැකි චෝදනාවක් — අපරාධ නඩු විධාන සංග්‍රහයේ 152(3) වැනි ඡේදය යටතේ තමාට ආඥා බලය පවරා නොගෙන මහේස්ත්‍රාත්වරයා නඩුව විසඳීමට ඇරැඹීම — චෝදනයා වරදකරු බවට පත්කිරීම — ඊට හේතු යුක්ති පසු දවසක දක්වීම —ආඥා බලය පිළිබඳ ප්‍රශ්නය ගැන කල්පනා කිරීම — එහෙත් නඩුව සුදුසු අන්දමින් විසඳුනු බව නිගමනය කිරීම — සම්පූර්ණ නඩු විභාගයේ ඇති නීතිමය බලය.

තුවක්කුවකින් වෙඩි තබා පැමිණිලිකරුට ශාරීරික හිංසාවක් කරන බවට තර්ජනයක් එල්ල කිරීම පිළිබඳව චෝදිතයකුට විරුද්ධව චෝදනා ඉදිරිපත් විය. (මෙය දණ්ඩ නීති සංග්‍රහයේ 486 වැනි ඡේදය යටතේ දිස්ත්‍රික් උසාවියකින් පමණක් විසඳිය හැකි චෝදනාවකි.) අපරාධ නඩු විධාන සංග්‍රහයේ 152(3) දරණ ඡේදය යටතේ ආඥා බලය තමා වෙත පවරා නොගෙන මෙම විසඳීම ඇරැඹූ මහේස්ත්‍රාත්තුමා චෝදිතයා එයට වරදකරු කොට ඊට දෙසතියකට පසු හේතු යුක්ති දක්වීමේදී එම නඩුව විසඳීමේ ආඥා බලය පිළිබඳ ප්‍රශ්නය තමාගේ කල්පනාවට භාජන වූ බව කියා තමාගේ මතය අනුව මහේස්ත්‍රාත්වරයා ලෙස එය තමා නිසි පරිදි විසඳා ඇති බව ද කීයේය.

තීන්දුව: ආරම්භයේදීම අපරාධ නඩු සංවිධාන සංග්‍රහයේ 152(3) වැනි ඡේදය අනුව තමා වෙත ආඥා බලය පවරා නොගෙන කරන ලද නඩු විභාගය මූලුමනින්ම අකුමික විභාගයක් පමණක් නොව එය නීති විරෝධී නඩු විභාගයකි.

හේරත් රාලලාගේ රම්බණ්ඩා එ. පොලිස් පරීක්ෂක, පාදුක්ක 8

ගෙයකින් බැහැර කිරීම

ගෙයකින් බැහැර කිරීමට දමූ නඩුවක් — විත්තිකාරිය එම ගෙය තමාට බදු දුන් අයගේ ගෙයි කුලියට සිටින බව කී පැමිණිලිකරු එම බද්ද තමාට දී ඇති බව විත්තිකාරියට ලියමනකින් දන්වා එම නිසා තමාට එම ගෙවල් කුලිය ගෙවිය යුතු බවද ඇයට දන් වූ බව කියා පැමිණිලියම ලද විත්තිකාරිය නිශ්ශබ්දව සිටීම හා ගෙවල් කුලිය ද නොගෙවා පැහැර හැරීම — ගෙයින් බැහැර කිරීමට නඩු දමීම — ගෙවල් කුලියට ගැනීමක් සිදු නොවූ බැව් කී විත්තිකාරිය එම ඉඩම පැමිණිලිකරුට බදු දුන් තැනැත්තා ඇයට ඉඩම ඔප්පුවකින් ලියා දෙන බවට ප්‍රතිඥා දී ඇය අනියම් බිරිය ලෙස තබා ගත් පුවත ගෙන හැර දක්වීම — සාක්ෂි දීමට බදු දුන් අය නොකැඳවීම.

"ඩී" නමැත්තකුගෙන් වර්ෂ 1963 බදුකරයක් (31) ගත් පැමිණිලිකරු පහත සඳහන් කරුණු ගෙනහැර පාමින් විත්තිකාරියට නඩු පවරා තිබේ.

(ඒ) විත්තිකාරිය තමාට බදු දුන් තැනැත්තාගෙන් ගෙයක් කුලියට ගත් කෙනකු බව.

(බී) තමාගේ නීතීඥ මහතාගේ 4.3.63 දරන ලිපියෙහි (32) පැමිණිලිකරු මෙම බද්ද ගැන දැනුම් දී 1963 පෙබරවාරි මාසයේ සිට ගෙවල් කුලිය තමාට ගෙවන ලෙස විත්තිකාරියගෙන් ඉල්ලීමක් කළ බව

(සී) අවුරුද්දක පමණ ගෙවල් කුලි ඇ නොගෙවා සිටි බව සහ

(ඩී) පැමිණිලිකරු 64.5.3 වැනි දින විත්තිකාරියට ගෙය අත්හැර යන සේ නිවේදනයක් යැවූ බව

තමාගේ උත්තරයෙහි ගෙවල් කුලියට ගැනීමක් කිසි ලෙසකින් සිදු නොවූ බව කියා පෑ විත්තිකාරිය 'ඩී' නමැත්තා විසින් තමා ඔහුගේ අනියම් බිරිය හැටියට තබා ගන්නා ලද බවත්, එම භූමි භාගය ඔප්පුවකින් තමාට පවරා දීමේ පොරොන්දුව පිට තමා එහි භුක්තිලාභී පදිංචිකාරිය කළ බවත් කියා සිටියාය.

ගෙයින් පිටමං කිරීමේ තීන්දු ප්‍රකාශයක් ලැබීමට පැමිණිලිකරුට සුදුසු තත්වයක් නැති බවත්, එහෙත් වර්ෂ 1963 සිට ගෙවල් කුලිය ඔහුට ලැබිය යුතු බවත් උගත් කොමසාරිස්වරයා තීන්දු කළේය.

ඉහත සඳහන් (32 දරණ) ලියමනට විත්තිකාරියගෙන් පිළිතුරක් නොලැබුනු බව සාක්ෂිවලින් අනාවරණය විය.

තීන්දුව: ගෙවල් කුලි ගෙවීම විත්තිකාරිය විසින් පැහැර හරිනු ලැබුවත් 32 දරණ ලියමන ලද ඇයගේ එම නිශ්ශබ්දතාවයෙන් ඇ පැමිණිලිකරුට ගෙවල් කුලි ගෙවිය යුතු බව පිළිගෙන තිබීම සැබෑ වූව ද මෙම විත්තිකාරිය එම භූමි භාගය තමාට බදු දුන් පුද්ගලයාගේ ගෙය කුලියට ගත් අයකු බව පැමිණිලිකරුට ඔප්පු කිරීමට නොහැකි වී තිබීම නිසා ඇ පැමිණිලිකරුට ගෙහිමියා හැටියට කුලි ගෙවිය යුතුයයි පිළිගෙන තිබීම ප්‍රතිඝ්‍යාව සේ සලකමින්, ඒ අයුරින් මාසික කුලි ගෙවීමක් ඇති බව සලකා දමා ඇති මෙම නඩුව කරුණු වරදවා වටහා ගෙන පවරා ඇති නඩුවකි.

විජයතිලක විනිශ්චයකාරතුමා: ''මේ නඩුවේ බලන කල මිල දී ගත් තැනැත්තකු විසින් කුලියට පදිංචිව සිටින කෙනකු තමාගේ ගෙවල් කුලිකරුයැයි දන්වන ලද කලෙක ඉන් පසු එම ගෙයි පදිංචිව සිටින කුලී ගෙවන්නකු විසින් ඔවුනොවුන් අතර ඇති කොන්ත්‍රාත්තුවක සහයෝගතාවයක් ඇති බව තහවුරු කිරීමට සැහෙන තරමින් එම ගෙය මිල දී ගත් තැනැත්තාට එම ගෙයි හිමිකම ඇති බව පිළිගෙන තිබෙය යන්න දන්වා ස්ථාපිත වූ නීති ප්‍රඥප්තියක් සේ පෙනී යයි.''

ක්. පී. ප්‍රංචිනෝනා එ. ටී. ගෙන්ට්ක් පෙරේරා ... 5

ගෙවල් කුලි පාලන පනත

ගෙවල් කුලි පාලන පණත — ගෙගිම්යාට යුක්ති යුක්ත අන්දමින් යලකා බලන විට ගෙය උවමනා යයි ද, කුලියට ගත් අය විසින් තව කෙනකුට එය කුලියට දෙන ලදයි ද යන කරුණු උඩ කුලියට ගත් අය පිටමං කිරීමට පවරන ලද නඩුවක් —මාසික කුලිය රුපියල් 100 ට අඩු ගෙයක් — වර්ෂ 1966 අංක 12 හේ සංශෝධන පණතේ 4(1)ඒ දරණ ඡේදය — මෙම ඡේදය නිසා මෙම නඩුව දුබල බල ශූන්‍ය තත්වයකට පත්වේ ද යන්න.

ගෙවල් කුලි පාලන ආඥා පණත බල පවත්වන එසේම මාසික කුලිය රුපියල් සියයට අඩු ගෙයකින් පැමිණිලිකරු විසින් තමාගෙන් එය කුලියට ගත් දය බැහැර කිරීමට පහත සඳහන් කරුණු මත නඩු පවරා තිබේ.

(ඒ) කරුණු යුක්ති යුක්ත ලෙස සලකා බලන විට තමාගේ පදිංචියට ගෙය උවමනා වී ඇති බව සහ

(බී) විත්තිකරු විසින් එය තව අයෙකුට කුලියට දී තිබෙන බව

තීන්දුව: වර්ෂ 1966 අංක 12 දරණ සංශෝධිත ආඥා පණතේ 4(1)(ඒ) ඡේදයේ හේතුවෙන් මෙම නඩුව අබල දුබල බලශූන්‍ය තත්වයකට නොවැටේ. 12(ඒ)(1) දරණ ඡේදයේ අඩංගු නොවන කරුණු මත ගෙයකින් බැහැර කිරීම පිණිස පවරනු ලැබ නිමාවට නොගිය නඩුවලට එය බලපවත්වනු ලැබේ.

එස්. ඒ. ජමල්දීන් එ. ඒ. මනාප් සහ තව කෙනෙක් ... 3

නිවාස සහ නගර සංවර්ධන ආඥා පනත

15, 88, 95 වෙනි ඡේද 9

නොසැලකිල්ල

අලාභ හානි යටතේ බලනු 9

ප්‍රඥප්ති සහ පදවි

''ඕත්‍ර ප්‍රව්ටා අකි''

අපරාධ නඩු සංවිධාන යටතේ බලනු 23

මැන්ඩාමුස් ආඥාව

මැන්ඩාමුස් ආඥාවක් — පෙත්සම්කරු, පළාත් ආණ්ඩු සභාපතිගෙන් තමන් විසින් සාදවන ලද ගොඩනැගිල්ලක් වෙනුවෙන් අනුකූලතා සහතිකයක් ඉල්ලීම — එය පැහැර හැරීම — නිවාස හා නගර සංවර්ධන ආඥා පනතේ 15 වැනි ඡේදය යටතේ දිස්ත්‍රික් උසාවියට අභියාචනා කිරීම — දිස්ත්‍රික් උසාවිය එම අනුකූලතා සහතිකය නිකුත් කරන ලෙස නියෝග කිරීම — නිකුත් කරන ලද සහතිකය නිවාස හා නගර සංවර්ධන ආඥා පනතේ 15 වැනි ඡේදයට අනුකූල නොවීම — මැන්ඩාමුස් ආඥාවක් ශ්‍රේෂ්ඨාධිකරණයෙන් ඉල්ලා සිටීම — දිස්ත්‍රික් උසාවිය මගින් දෙන ලද නියෝගය ක්‍රියාත්මක කිරීමේ පිළිවෙල ඉහත කී ආඥා පණතේ 95 වැනි වගන්තියේ යදහන් කර ඇති හෙයින්, එය පැහැර හැර මැන්ඩාමුස් ආඥාවකට ඉඩ දිය හැකි ද?

නිවාස හා නගර සංවර්ධන ආඥා පනත (268 වැනි පරිච්ඡේදය) ඡේද 10ඒ, 15(1), (2), 16, 88 හා 95.

වත්තේගම පදිංචි පෙත්සම්කරු අභිනව නිවාසයක් තැනීම සඳහා සැලැස්මක් ඉහත කී ආඥා පනත යටතේ බලයලත් නිලධාරියා වන වගඋත්තරකරුගේ අනුමැතිය සඳහා ඉදිරිපත් කරන ලදී. එකී පනතේ 10(ඒ) ඡේදයට අනුව නිසි පරිදි දන්වා එම ගොඩනැගිල්ල 1963 ජූනි මස පටන් ගෙන 1964 පෙබරවාරි මස අවසන් කරන ලදින් එම ආඥා පනතේ 15(2) ඡේදය යටතේ අනුකූලතා සහතිකයක් 1964.2.24 වැනි දින ඉල්ලා සිටි නමුත් ඔහුට ඒ සම්බන්ධයෙන් කිසිදු පිළිතුරක් නොලැබුණු හෙයින් එම ආඥා පනතේ 16 වැනි ඡේදය අනුව දිස්ත්‍රික් උසාවියට අභියාචනා කර සිටියේය. එම අභියාචනයට ඉඩ දුන් දිස්ත්‍රික් විනිශ්චයකාරතුමා අනුකූලතා සහතිකයක් නිකුත් කරන ලෙස වගඋත්තරකරුට නියෝග කළේ වී නමුදු වගඋත්තරකරු විසින් නිකුත් කරන ලද සහතිකය නිවාස හා නගර සංවර්ධන ආඥා පනත යටතේ 15 වැනි ඡේදයට අනුකූල නොවිය. එහෙයින් පැමිණිලිකරු එම ඡේදයට අනුකූලව සහතිකයක් නිකුත් කරන මෙන් කරන ලද ඉල්ලීම වගඋත්තරකරු විසින් පැහැර හැරිය හෙයින් එවැනි සහතිකයක් නිකුත් කරන ලෙස මැන්ඩාමුස් ආඥාවක් මගින් ශ්‍රේෂ්ඨාධිකරණයෙන් ඉල්ලා සිටියේය.

තීන්දුව: (1) පෙත්සම්කරු විසින් (තමා පිළිගත් පරිදි) නිවාස හා නගර සංවර්ධන ආඥා පනතේ 95 වැනි ඡේදයේ නියමකර ඇති පිළිවෙල අනුව අභියාචනා මණ්ඩලයේ තීන්දුව ක්‍රියාත්මක කිරීමට පියවර නොගත් හෙයින් මැන්ඩාමුස් ආඥාවක් නිකුත් කිරීමට නීතියෙන් අවසර නොමැත.

(2) නිවාස හා නගර සංවර්ධන ආඥා පනතේ සඳහන් පරිදි දිස්ත්‍රික් උසාවිය මගින් සිවිල් නඩු සංවිධාන සංග්‍රහයේ නියම කර ඇති අයුරු දිස්ත්‍රික් උසාවියක නඩු තීන්දුවක් මෙන් ක්‍රියාත්මක කිරීම අනිවාර්යය වේ.

(3) ශ්‍රේෂ්ඨාධිකරණය සතු විශේෂ බලතල අනුව මෙම ඉල්ලීමට අවසර දිය හැකිය යන මතය සළකා බැලීමට සුදුසු අවස්ථාව පැමිණ නැති බවත් එසේ කිරීම අයෝග්‍ය වගක් පෙනේ. එම අදහස සළකා බැලිය යුත්තේ පැමිණිලිකරුට නීතියෙන් නියමකර ඇති මාර්ගය අනුව යහනයක් සොයා නොලැබුණහොත් පමණයි.

ආඩිගේ ජිනදස ප්‍රනාන්දු එ. වක්කටු චිත්‍රමසිංහලාගේ දෙන් ධර්මසිරි, සභාපති, නගර සභාව, වත්තේගම ... 9

මිල පාලන පනත

මිල පාලන පනත — කටු සහිත මස් විකිණීමේ දී කටුවල බර ප්‍රමාණය විකුණන මුළු බර වූ රාත්තලට සියයට 25 නොඉක්මවිය යුතු යයි කරන නියෝගය — නියම සියයට ප්‍රමාණය දැන ගැනීමට නොහැකි නිසා නියෝගයෙහි ඇති සුක්තිසහගත බව. — නීතිමය බලයෙන් පිට බව. (Ultra Vires).

(අ) කටු සහිත මස්වල පාලන මිල රා: 2.25 ක්ව නිබිය දී, රු: 2.50 ක වැඩි මිලකට විකුණු වේ යයි ද,

(ආ) කටු සහිත මස් රාත්තලක කටුවල බර ප්‍රමාණය මුළු බර වූ රාත්තලකින් සියයට විසිපහ නොඉක්මවිය යුතුය යන්න, 7.8.62 දින දරණ අංක 13255 රජයේ ගැසට් පත්‍රයෙහි 3 වැනි ඡේදයෙහි පළ කරන ලද අංක කේ.ඩී. 107 මිල නියෝගයට විරුද්ධව කටු සහිත එළු මස් රාත්තලක් කටුවල බර ප්‍රමාණය මුළු බරින් සියයට විසිපහ ඉක්මවා විකුණුවේ යයි ද වෝදනාවලට මස් වෙළෙන්දකු වූ විත්තිකරු වරදකරු විය.

තීන්දුව: (1) එම මිල නියෝගය නීතිමය බලයෙන් පිට ය. එසේ වන්නේ කටු සහිත මස් විකුණන විට, කටු ප්‍රමාණය සියයට 25 ට වැඩි නොවිය යුතුය යනු දන ගැනීමට මස් වෙළෙන්දකුට කටුවලින් මස් ඉවත් නොකොට එය දන ගැනීමට බැරි බැවිනි.

(2) චිත්තියේ සාක්ෂිය බොරු වූ පමණින් පැමිණිල්ලේ සාක්ෂි සත්‍ය බව කිව නොහැක.

ඒ. අබුසාලි එ. මහතුවර මිල පාලක 15

ගෙවල් හිමියා සහ බදුකරු — බදුකරු මාස තුනකට වැඩි කාලයක්ම ගෙවල් කුලී නොගෙවා ඇත — මාසික කුලිය රු: 100 ට අඩුය — නවූ පැවරීමට පසු කුලියත්, හිහ මුදලත් නගර සභාවේ බලය ලත් නිලධාරියාට කොටස් වශයෙන් ගෙවා ඇත. — ගෙවල් හිමියා එම මුදල් හාර ගෙන ඇත — එයින් ගෙවල් හිමියා සිය අයිතිවාසිකම් අත්හැර බදුකරුට නැවත ගෙය බදු දීමක් සිදු කළා ද? — ගෙවල් කුලී සීමා කිරීමේ පනත — 1966 දෙළොස්වන සංශෝධනය — බදුකරු තමාගේ උත්තරයේ ප්‍රමාදයට කරුණු ඉදිරිපත් නොකර මේ අනුව උසාවියේ විසඳීමට කරුණක් ද නොනැඟූ නමුත් නවූවේ සාක්ෂි වශයෙන් කරුණු ඉදිරිපත් කොට ඇත — එම සාක්ෂි උසාවිය විසින් හාරගත යුතු ද?

මාසික ගෙවල් කුලිය රු: 100 ට අඩු වූ ගෙයක වෙසෙන බදුකාරයෙක් මාස තුනකට ගෙවල් කුලි ගෙවීමේ නැත. එවිට ගෙවල් හිමියා ඔහුව ගෙයින් පිට කිරීම පිණිස පිටවීමේ දන්වීමක් යවා නවූ පැවරිය. මේ සියල්ලට පසු, බදුකරු හිහ කුලි සියල්ල කොටස් වශයෙන් නගර සභාවේ බලය ලත් නිලධාරින්ට ගෙවූ නමුත් උසාවියේ බැඳී උත්තරයේ ගෙවල් කුලි ගෙවීමට ප්‍රමාද වූ කාරණය සඳහන් නොකොට මේ කරුණු අනුව උසාවිය මගින් විසඳීමට කරුණක් ගෙවල් කුලි සීමා කිරීමේ පනත 1966 12 වැනි සංශෝධනයේ 12ඒ(1) (ඒ) සහ 12ඒ(2) ඡේද යටතේ නොහැකිය.

තීන්දුව: (1) මේ නවූවේ කරුණු අනුව බදුකරු ඔහුගේ ප්‍රමාදයට සාක්ෂි මගින් පමණක් ඉදිරිපත් කළ කරුණු ප්‍රතික්ෂේප කිරීමෙන් උගත් කොමසාරිස්තුමා හරියාකාර අන්දමට ක්‍රියා කළේය.

(2) ගෙවල් කුලී සීමාකිරීමේ පනතේ ඇරක්ෂාව ලබන බදුකරුට (ගිවිසුම් බද්ද නිමවූවාට පසු) ගෙවල් හිමියා නවූ පැවරූ පසු මාසික කුලිය හාරගන් හේතුවෙන්ම නැවත ගෙයි විසීමට අයිතිවාසිකමක් අත් වෙන්නේ නැත.

ආර්. ඒ. ඩබ්. පෙරේරා එ. ඇම්. එච්. මැගිනෝනා හාමිනේ ... 16

ගෙවල් හිමියා සහ බදුකාරයා — ගෙයින් පිටමං කිරීමට නඩුවක් — එවිට ගෙවල් හිමියාගෙන් බදු ගැනීමක ගිවිසුමක් නැති බව කියා සිටීම — ගෙයින් අස්වීමට නීත්‍යානුකූල නිවේදනයක් අවශ්‍ය ද?

තීන්දුව: ගෙවල් හිමියා ගෙන් බදුගත්තේ නැතැයි කියා ඔහුගේ අයිතිවාසිකමට අභියෝග කරන බදුකරුවකු ඉඩමකින් අස්කිරීමට නීත්‍යානුකූල නිවේදනයක් කලින් ඔහුට දීම අවශ්‍ය නැත. එය තුදුන් නිසා නඩුව අහක දැමීමට නොහැක.

ඇස්. කේ. ෂකූර් මහත්මිය එ. ඇස්. ඇම්. ඒ. අලිම් සයිබෝ සහ තවත් අය 27

රාජාධිකරණ තීන්දු

සිවිල් නඩු විධාන සංග්‍රහය

සිවිල් නඩු විධාන සංග්‍රහය,84 වැනි ඡේදය — පැමිණිලිකරු නඩුව විභාග වන දිනයෙහි උසාවියට නොපැමිණීම — ඔහුගේ නීතිඥවරයා කල් ඉල්ලීම — එය ප්‍රතික්ෂේප කිරීම — නඩුව ඉවත දමමින් 'නයිසයි' ආඥාවක් දීම — එය නීත්‍යානුකූල ද?

පැමිණිලිකරුගේ නීතිඥ මහතා නඩු විභාගයට නියමව තිබූ දිනයේ වෛද්‍ය සහතිකයක් ඉදිරිපත් කොට නඩුව කල් දමන ලෙස ඉල්ලන ලදී. එම සහතිකය පිළිනොගෙන නඩුව ඉවත දමමින් විනිශ්චයකාරතුමා 'නයිසයි' ආඥාවක් දෙන ලදී. එම ආඥාව ඉවත දැමීමට දින 14 ක් තුළ දී පැමිණිලිකරු ඉල්ලා සිටිය නමුත් එය විභාග වන විට දින 14 ක් ඉක්ම ගොස් බැවින් නඩුකාරතුමා නයිසයි ආඥාව ස්ථිර බවට පත් වී තිබෙන නිසා එම ඉල්ලීම ප්‍රතික්ෂේප කරන ලදී. මෙම තීන්දුවෙන් ඇපැල් ගත්තා ලදී.

තීන්දුව: පැමිණිලිකරුගේ නීතිඥවරයා උසාවියේ ඔහු වෙනුවෙන් පෙනී සිටි බැවින් 'නයිසයි' ආඥාවක් නිකුත් කිරීම නීති විරෝධිය. ඔහුගේ පෙනී සිටීම නිසා දෙපාර්ශ්වයම උසාවිය ඉදිරිපිටට පැමිණි නඩුවක් ලෙස සැලකිය යුතු බැවින්ය.

ඇල්. ඒ. මැන්ඩිස් සිල්වා එ. එච්. ඩෙවිඩ් සිල්වා ... 2

ගරු අලස් සහ පණ්ඩිත ගුණවර්ධන විනිශ්චයකාරතුමන් ඉදිරිපිටදී

ජේ. ඒ. විමලාවති එ. ඒ. ඩී. ජේ. ගුණරත්න*

ශ්‍රේෂ්ඨාධිකරණ අංකය 494/65—දී. උ. පානදුර අංකය 8409

විවාද කළේ: 1969 මැයි 10 සහ 14
තීන්දුව දුන්නේ: 1969 ජූනි 1

අලාභහානි ඉල්ලා සිටීම — අසල්වැසි චිත්තිකරුගේ ඉඩමෙහි පිහිටා තිබුනු පුවක් ගසක් පැමිණිලිකරුගේ ගෙට නෙරා නොතිබුණත් එම ගස ගෙය පැත්තට ඇලවී තිබීම — එම ගස පැමිණිලිකරුගේ ගෙය මත වැටීම — ගසේ අනතුරුදායක තත්ත්වය දැනගෙනත් එමගින් අසල්වැසි ඉඩම හිමියාට විය හැකි අලාභ හානි මග හැරීමට චිත්තිකරු නිසි ලෙස ක්‍රියා නොකිරීම—චිත්තිකරුගේ නොසැලකිල්ල—අලාභහානි ඔහුගෙන් අයවියයුතුද යන්න.

පැමිණිලිකරුගේ ගෙට අඩි 14 ක දුර ප්‍රමාණයෙන් පුවක් ගසක් විය. එම ගස පැමිණිලිකරුගේ ගෙට නෙරා නොතිබුණු නමුත් එය ගෙය පැත්තට ඇලවී පිහිටියේය. චිත්තිකරු එම ගස පැමිණිලිකරුගේ ගෙය මත වැටෙන්ට අවුරුදු තුනක පමණ කාලයක සිට ගසේ අනතුරුදායක තත්ත්වය ගැන දැනගෙන සිටිය බව සාක්ෂිවලින් ඔප්පුවිය.

තීන්දුව: පුවක් ගස පැමිණිලිකරුගේ ගෙට නෙරා නොතිබුනත්, ගස අයිතිකරු එහි අන්තරාදායක තත්ත්වය දැන ගෙනත් එයින් ඇතිවිය හැකි අලාභහානි මග හැරීමට කාලෝචිත ලෙස ක්‍රියා නොකිරීමෙන් පැහැදිලිවන නොසැලකිලිමත්කම නිසාත්, චිත්තිකරු අලාභහානිවලට වගකිව යුත්තකු වී ඇත. මෙය ජිනසේන එ. එංගල්හිනා (1919) 21 වෙනි නව නීති වාර්තා කාණ්ඩයේ 445 වෙති පිටේ සඳහන් නඩුවේ ප්‍රඥප්තිය අනුවයි.

සලකා බැලූ නඩු: ජිනසේන එ. එංගල්හිනා (1919) 21 නව නීති වාර්තා 445 පිටුව.
ඩාර්ලිස් අප්පු එ. ඩෙවිඩ් සිංඤෝ (1948) 50 නව නීති වාර්තා 241 පිටුව.

රාජනීතිඥ එච්. ඩබ්ලිව්. ජයවර්ධන, ඇල්. ඩබ්ලිව්. ඇතුලත්මුදලි සහ ජී. ඇස්. සමරවීර සමඟ, චිත්තිකාර-ඇපැල්කරු වෙනුවෙන්.

ජී. පී. ජේ. කුරුකුලසූරිය, පැමිණිලිකාර-වගඋත්තරකරු වෙනුවෙන්.

අලස් විනිශ්චයකාරතුමා:

මෙම නඩුවෙහි පැමිණිලිකරු නීතියේ පිහිට ලබා ගැනීමට ඉදිරිපත් වූයේ, ඔහුට අයත් නිවසෙහි කොන්ක්‍රීට් වහලට චිත්තිකරුට හිමි ඉඩමක පිහිටා තිබුණු ගසක් වැටීමෙ කරුණ උඩය. පැමිණිලිකරු තම අසල්වැසි ඉඩම්හිමියාගෙන් මෙම කරුණ උඩ අලාභය ඉල්ලා සිටියි.

මෙම නිවස වර්ෂ 1957 ගොඩනංවා තිබුණද 1962 අගෝස්තු මස 6 වැනි දින එම පුවක් ගස වහලට වැටෙන අවස්ථාවේදීද එහි පදිංචියට ගොස් නොතිබිණ. තවද එම දිනයේදී එහි බිත්ති කපරාරු කිරීම හා හුණු ගෑම අවසාන කොට නොතිබිණ. 1959 නොවැම්බර් 26 වැනි දින පැමිණිලිකරු පී2 දරන ලිපියෙන් ඉහා අනතුරුදායකව තිබෙන පුවක් ගස් 3 ක් සහ පොල් ගස් 3 ක් පිළිබඳව දියාපතිතුමාට දන්වන ලදී. මෙම ලිපියෙන් ඈ බලාපොරොත්තු වූයේ මෙම කරුණ ගැන යොයා බලා ගස් කපා දැමීම පිණිස කටයුතු යෙදීමය. ගස් කැපීම සම්බන්ධයෙන් දෙපක්ෂයටම සාධාරණ පිළිවෙලක් යොදා ගැනීමට අපහසු විය. ගෙය මත වැටුණු ගස හඳුනා ගැනීමේ ප්‍රයත්නය ආකුල බවට පත්වී ඇතක් දිස්ත්‍රික් නඩුකාරතුමා එය පැමිණිලිකරුගේ සාක්කිය අනුව පී2 දරන ලිපියේ සඳහන් ගසක් බව පිළිගත්තේය. පැමිණිලිකරුගේ සාක්කිය අනුව මෙම ගස, ගෙය මත වැටීමට ප්‍රථම පිහිටා තිබුණේ ගෙට අඩි 14 ක් නුදුරින්ය. එසේ නමුදු එය පැමිණිලිකරුගේ ඉඩමට හෝ ගෙට හෝ නැමී නොතිබිණ. කෙසේ වුව ද චිත්තිකරු එම ගස අනතුරුදායක තත්වයක තිබුනු බව 1959 සිට දැනගෙන සිටින ලද බව ඔප්පුවී ඇත.

කරුණු එසේ වුවද ජිනසේන එ. එංගල්හිනා (1919 නව නීති වාර්තා 21/445 පිටුව) තීන්දුව අසල්වැසි ඉඩමකට අලාභහානි වන පරිදි ගසක් වැටීමේදී එම ගස අයිතිකරු එහි අන්තරාදායක තත්ත්වය දැන සිටින ලද්දේ නම් බලපානු ඇත කියා මම සිතමි.

*ඉංග්‍රීසි පිටපත ඉංග්‍රීසි ආංශයෙහි 77 වෙනි කාණ්ඩයෙහි 11 වෙනි පිට බලනු.

මේ හැරත් ඩාර්ලිස් අප්පු එ. ඩෙවිඩ් සිංහෝ (1948 නව නීති වාර්තා 50/241 පිටුව) නීන්දුවෙහිදී තම ඉඩමෙහි අන්ත්‍රාදායකව පිහිටා තිබුනු ගස ගැන දැන සිටියද ඊට පිළියම් නොයෙදූ විත්තිකරු වරදකරු බවට පත්විය.

එවැනිම කරුණක් උඩ තීන්දුවක් දීමට සිදුවූ අවස්ථාවක වැඩ බලන අග්‍ර විනිශ්චයකාර සුට්ස් මහතා, පොඩිහාමි එ. ජයරත්න (1946 නව නීති වාර්තා 47 පේ 484 වැනි පිටුව) නඩුවෙහි තීන්දුව දෙමින් මෙයේ කියා ඇත: ''ගසේ අන්ත්‍රාදායක තත්වය දුටු විගසම විත්තිකරු එය සැලකිල්ලට ගෙන කටයුතු කළ යුතුය. එය ඔහුගෙන් ඉටුවිය යුතු යුතුකමකි.''

මෙම තීන්දු අනුව බලන විටත් මෙම නඩුවේදී ඉදිරිපත් කරන ලද කරුණු බලන විටත් අපට පෙනී යන්නේ විත්තිකරු පැමිණිලිකරුගේ නිවසේ වහලට කරන ලද අලාභහානියට වගකිව යුතු බවය. සැළකිල්ලට භාජනය කළ යුතු අනෙක් වැදගත් කරුණ නම්, විත්තිකරු විසින් පැමිණිලිකරුට ගෙවිය යුතු අලාභහානි ප්‍රමාණය තීරණය කිරීමය.

ප්‍රථමයෙන් පැමිණිලිකරු රු: 3,000 ක් අලාභ වශයෙන් ඉල්ලා ඇත. පසුව රුපියල් 1,577/77 ක් ඉල්ලන ලදී. අවසාන වශයෙන් රු. 1,000/- ක් අලාභය වශයෙන් ඇයට හිමිවිය. සිවිල් ඉංජිනේරුවකු වන පිලිප්අයියාගේ විශේෂඥයෙක් වශයෙන් දුන් සාක්කිය අනුව ගස වැටීමේ හේතුවෙන් වූ දෙදරීම් තුනෙන් එකක් මුළු වහලේ පළල හා සමානය. දිස්ත්‍රික් නඩුකාර තුමාගේ සොයා බැලීම් අනුව පිලිප්අයියාගේ විශේෂඥ සාක්කිය සතුටුදායක එකක් නොවූවත් එය සත්‍ය සාක්කියක් වශයෙන් සැළකිය හැකිය. විත්තිකරුගේ එක් සාක්කිකරුවකු වූයේ අහංගම නමැති රජයේ බලයලත් මිනින්දෝරුවෙකි. ඔහුගේ ඇස්තමේන්තුව අනුව අලාභය රුපියල් 50/-කට සීමාවී ඇත. ඊට හේතුව නම් ඔහුගේ මතය අනුව මුලු වහලම වෙනස් කිරීමට අවශ්‍ය නොවීමය. දිස්ත්‍රික් නඩුකාරතුමා මෙම ඇස්තමේන්තුව පිළිනොගත් එකම කාරණය අහංගම ගොඩනැගිලි සම්බන්ධයෙන් විශාරදයෙක් නොවීමය. අපේ තීරණය අනුව අය විය යුතු අලාභය රු: 250/- කට සීමා කළ හැකිය. එම නිසා එම මුදල විත්තිකරුගෙන් පැමිණිලිකරුට අයවෙන පරිදි තීන්දුව දෙමු. එක් එක් පක්ෂය තම තමන්ගේ නඩු ගාස්තු තම තමන් විසින්ම දැරිය යුතුය. තවද විත්තිකරුගේ ඉඩමෙහි එල්බව පිහිටා ඇති පුවක් ගස සහ පොල් ගස් දෙක කැපිය යුතු බවට දිස්ත්‍රික් නඩුකාරතුමන් විසින් කරන ලද අණ කිරීම සම්බන්ධයෙන් අප කිසි ප්‍රකාශයක් නොකරනවා ඇත.

පණ්ඩිත-ගුණවර්ධන විනිශ්චයකාරතුමා:
මම එකඟවෙමි.

අලාභය අඩු කරන ලදී.

ගරු සිරිමාන සහ සිවසුප්‍රමනියම් විනිශ්චයකාරතුමන් ඉදිරිපිටදී

ඇල්. ඒ. මැන්ඩිස් සිල්වා එ. එච්. ඩේවිඩ් සිල්වා*

ශ්‍රේ.අ. අංක 245/66 (ඵජ්ප) — බළපිටිය දී. උ. එල්/478

විවාදකොට තීන්දු කළේ: 1967 ජූනි 25 වැනිදා

සිවිල් නඩු විධාන සංග්‍රහය, 84 වැනි ඡේදය — පැමිණිලිකරු නඩුව විභාග වන දිනයෙහි උසාවියට නොපැමිණීම — ඔහුගේ නීතිඥවරයා කල් ඉල්ලීම — එය ප්‍රතික්ෂේප කිරීම — නඩුව ඉවත දමමින් 'නයිසයි' ආඥාවක් දීම — එය නීත්‍යානුකූලද?

පැමිණිලිකරුගේ නීතිඥ මහතා නඩු විභාගයට නියමව තිබූ දිනයේ වෛද්‍ය සහතිකයක් ඉදිරිපත්නොට නඩුව කල්දමන ලෙස ඉල්ලන ලදී. එම ඝ්හතිකය පිළිනොගෙන නඩුව ඉවත දමමින් විනිශ්චයකාරතුමා 'නයිසයි' ආඥාවක් දෙන ලදී. එම ආඥාව ඉවත දැමීමට දින 14ක් තුලදී පැමිණිලිකරු ඉල්ලා සිටිය නමුත් එය විභාග වන විට දින 14 ක් ඉක්ම ගොස් බැවින් නඩුකාරතුමා නයිසයි ආඥාව ස්ථිර බවට පත්වී නිබෙන නිසා එම ඉල්ලීම ප්‍රතික්ෂේප කරන ලදී. මෙම තීන්දුවෙන් ඇපැල් ගත්නා ලදී.

තීන්දුව: (1) *පැමිණිලිකරුගේ නීතිඥවරයා උසාවියේ ඔහු වෙනුවෙන් පෙනී සිටි බැවින් 'නයිසයි' ආඥාවක් නිකුත් කිරීම නිසි විරෝධිය. ඔහුගේ පෙනී සිටීම නිසා දෙපාර්ශ්වයම උසාවිය ඉදිරිපිටට පැමිණි නඩුවක් ලෙස සැලකිය යුතු බැවින්ය.*

කේ. ෂින්යා මහතා, පැමිණිලිකාර-ඇපැල්කරු වෙනුවෙන්.

විත්තිකාර වගඋත්තරකරු වෙනුවෙන් නිතිඥයකු පෙනී සිටියේ නැත.

ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 77 වෙනි කාණ්ඩයෙහි 10 වෙනි පිට බලනු.

සිරිමාන විනිශ්චයකාරතුමා:

මේ නඩුව විභාගයට ගත් අවස්ථාවේ පැමිණිලිකරු උසාවියේ පෙනී සිටියේ නැත. එවෙලේ උසාවියේදී ඔහුගේ නීතිඥයා උසාවියට වෛද්‍ය සහතිකයක් ඉදිරිපත් කරමින් දිනයක් අයැද සිටියේය. යම්කිසි නඩුවක පාර්ශ්වකරුවන්ට අඩගැසූ විටෙක නීතිඥයකු පෙනී සිටියහොත් එය ඔහු පෙනී සිටින තැනැත්තා වෙනුවෙන් කෙරෙන පෙනී සිටීම හැටියට ගිනිය හැකිය යන්න දැන් මනා සේ ස්ථාපිත වූ නීති සම්ප්‍රදායය යන්න මගේ අදහසයි. (*ආඩිඅප්පා චෙට්ටියාර් එ. ඡන්මුගම් චෙට්ටියාර්* 33 න.නී.වා. 217 වන පිටුව බලන්න.) මෙම වෛද්‍ය සහතිකය අභියෝගයකට භාජන වූ පසු අල්ප වශයෙන් සාක්කිද ඉදිරිපත්කොට තිබේ. මෙම විභාගයේදී නීතිඥයා ද පෙනී සිටිය බව විශ්වාස කළ හැක්කේ සාක්කිකරුගෙන් හරස් ප්‍රශ්න ඇසීමට ඔහුට ඉඩ දුන් නමුදු ඔහු සිය කැමැත්තෙන් එසේ නොකර තිබීමෙනි. ඔහුගේ සේවා ලාභියා (Client) වෙනුවෙන් පෙනී සිට ඒ අවස්ථාවේ නඩුවෙන් ඉවත් වීමට නීතිඥයාට අවකාශ නැත. මේ නිසා මෙය දෙපාර්ශ්වයෙන්ම නියෝජනය ලැබුනු නඩුවක් ලෙස සැලකේ.

කෙසේ හෝ වේවා උගත් විනිශ්චයකාරවරයා 'නයිසයි' නියෝගයක් නිකුත් කොට තිබේ. එයට විරුද්ධව දින 14 ක් ඇතුලත පැමිණිලිකරු කරුණු දැක්වීමට පරිශ්‍රමයක් දරා ඇත. නමුත් පරීක්ෂණය පැවැත්වීමට ඇත්තේ දින 14 ක් ගතවූ පසුවය. උගත් විනිශ්චයකාරවරයා පැමිණිලිකරුගේ ඉල්ලීම ප්‍රතික්ෂේපකර තිබෙන්නේ එහි ඇති සරු නිසරු බව සලකා නොවේ. නයිසයි නියෝගය ස්ථාවර වී ඇති බව ප්‍රකාශ කරමිනි.

උගත් විනිශ්චයකාරවරයා නයිසයි නියෝගයක් නිකුත් කරමින් 66.2.6 වැනි දින දෙන ලද තීරණය සහ එහි ප්‍රතිඵලය වශයෙන් ඉක්බිතිව දෙන ලද සියලු නියෝග ඉවත දමා නැවත විභාග කිරීම සඳහා නඩුව ආපසු යැවීම යෝග්‍ය යයි අපට සිතේ. ඒ කෙසේ වුවද නඩුව නිෂ්ඵල වූ 66.2.6 වැනි දින නඩු ගාස්තු පැමිණිලිකරු විසින් විත්තිකරුට ගෙවිය යුතුය. අනිත් සියලුම ගාස්තු නඩුවේ ප්‍රතිඵලය මත පවතිනු ඇත.

සිවසුබ්‍රමනියම් විනිශ්චයකාරතුමා
මම එකඟ වෙමි.

නියෝග ඉවත් කර ආපසු විභාගයට යවන ලදී.

සිරිමාන විනිශ්චයකාරතුමා ඉදිරිපිටදී

එස්. ඒ. ජමල්දීන් එ. ඒ. මනාෆ් සහ තව කෙනෙක්*

ශ්‍රේෂ්ඨාධිකරණ අංකය 77/67 — මහනුවර රික්වැස්ට් උසාවිය අංක 190

විවාදකොට නිම්වූ කළ දිනය: 1967 ඔක්තෝබර්, 28 වැනි දා

ගෙවල් කුලි පාලන පණත — ගෙහිමියාට යුක්ති යුක්ත අන්දමින් සලකා බලන විට ගෙය උවමනා යයිද, කුලියට ගත් අය විසින් තව කෙනකුට එය කුලියට දෙන ලදැයිද යන කරුණු උඩ කුලියට ගත් අය පිටමං කිරීමට පවරනා ලද නඩුවක් — මාසික කුලිය රුපියල් 100 ට අඩු ගෙයක් —වර්ෂ 1966 අංක 12හේ සංශෝධන පණතේ 4(1)ඒ දරණ ඡේදය — මෙම ඡේදය නිසා මෙම නඩුව දුබල බල ශූන්‍ය තත්වයකට පත්වේද යන්න.

ගෙවල් කුලි පාලන ආඥා පණත බල පවත්වන එසේම මාසික කුලිය රුපියල් සියයට අඩු ගෙයකින් **පැමිණිලිකරු** විසින් තමාගෙන් එය කුලියට ගත් අය බැහැර කිරීමට පහත සඳහන් කරුණු මත නඩු පවරා තිබේ.

(ඒ) කරුණු යුක්ති යුක්ත ලෙස සලකා බලන විට තමාගේ පදිංචියට ගෙය උවමනාවී ඇති බව සහ

(බී) විත්තිකරු විසින් එය තව අයෙකුට කුලියට දී තිබෙන බව

නීත්‍යුව: වර්ෂ 1966 අංක 12 දරණ සංශෝධිත ආඥා පණතේ 4(1) (ඒ) ඡේදයේ හේතුවෙන් මෙම නඩුව අබල දුබල බලශූන්‍ය තත්වයකට නොවැටේ. 12(ඒ) (1) දරණ ඡේදයේ අඩංගු නොවන කරුණු මත ගෙයකින් බැහැර කිරීම පිණිස පවරනු ලැබ නිමාවට නොගිය නඩුවලට එය බලපවත්වනු ලැබේ.

පී. සෝමතිලක මහතා, පී. එදුසූරිය මහතා සමඟ, පැමිණිලිකාර-ඇපැල්කරු වෙනුවෙන්.

බී. ජේ. ප්‍රනාන්දු මහතා, විත්තිකාර-වගඋත්තරකරු වෙනුවෙන්.

*ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 77 වෙනි කාණ්ඩයෙහි 8 වෙනි පිට බලනු.

සිරිමාන විනිශ්චයකාරතුමා:

මෙම නඩුව 65.7.27 වැනි දින පැමිණිලිකරු විසින් පහත සඳහන් කරුණු උඩ විත්තිකරු පදිංචි තැනින් පිටමං කිරීමට පවරන ලදී.

(ඒ) පැමිණිලිකරුට පදිංචිය සඳහා මෙම නිවාසය සහිත භූමිය යුක්ති-යුක්ත ලෙස වුවමනා වී තිබීම සහ

(බී) විත්තිකරු මෙම ගෙය ඔහු කුලියට සිටියදී තවත් කෙනකුට කුලියට දීම

මෙම භූමිස්ථානයට සහ ගෙයට ගෙවල් කුලි පාලක පණත බලපවත්වන බවත් එහි මාසික කුලිය රු. 100/- ට අඩු බවත් පිළිගෙන තිබේ. මෙම නඩුවට උත්තර විත්තිකරු විසින් බැඳ තිබෙන්නේ 66.9.3 වැනි දිනදීය. මෙම දින දෙක අතර තුර (එනම් 66.5.10 වැනි දින) වර්ෂ 1966 අංක 12 දරණ සංශෝධන පණත සම්මත විය. එම සංශෝධන පණතේ ප්‍රතිඵලය වන්නේ මයකට රු. 100/- ට අඩු ගෙවල්වලින් එහි පදිංචි තැනැත්තන් බැහැර කිරීමට ගෙවල් හිමියාට ඇති අයිතිවාසිකම් තව දුරටත් සීමාකිරීම ය. නමුත් එම පණතේ 12ඒ(1) ඡේදයෙන් මසකට කුලිය රු: 100/- ට අඩු ගෙවල් වලින් කුලියට පදිංචිකරුවන් පිටමං කිරීමට ගෙවල් හිමියාට හැකිවන්නේ කුමන අවස්ථාවන්හිදී ද යන්න සඳහන්ව තිබේ. (මෙය පණතට ඇතුලත් වී ඇත්තේ සංශෝධන පණතේ 2 වැනි ඡේදයෙනි) එමෙන් ම කුලියට පදිංචිකරුවකු විසින් තව කෙනකුට මෙබඳු ගෙයක් කුලියට දුන් විටෙක පිටමං කිරීමේ නඩුවක් දැමීමට එම පණතේ 12ඒ(1)(බී) ඡේදයෙන් බලය ලැබේ.

මෙම පණතේ 4 වැනි ඡේදයෙන් එහි පැණවීම් වර්ෂ 1962 ජූලි මස 20 වැනි දා සිට බලපවත්වන අයුරින් සඳහන් වී තිබේ.

සංශෝධන පණත සම්මත වූ දිනයේ 62.7.20 දිනට පසු එහි 12(ඒ)(1) ඡේදයෙන් අදාළ නොලැබුණ අයුරින් පිටමං කිරීමට යාඳූ කොට පැවරූ නඩු බොහෝ ගණනක් විභාගවීමේ අපේක්ෂාවෙන් අධිකරණයේ තිබුනා යැයි සිතිය හැක. මේ නිසා ඒ නඩුවලටත් බලපවත්වන ලෙස එසේ විභාගවීමේ අපේක්ෂාවෙන් තිබුන නඩු බල ශූන්‍ය අවලංගු නඩු බව ප්‍රකාශ කිරීම අවශ්‍ය විය. මේ නයින් 4(1) ඡේදයෙන් 62.7.20 දරණ දිනට පසු උසාවියට ඉදිරිපත් කොට නඩු විභාගයේ අපේක්ෂාවෙන් සංශෝධන පණත ක්‍රියාත්මක වන අවස්ථාවේ තිබුණු නඩු බල ශූන්‍ය අවලංගු නඩුසේ ගිනිය යුතුවේ.

මාගේ මතයේ හැටියට මෙම ඡේදයේ පැණවීම් බලපවත්වන්නේ 12ඒ(1) ඡේදයෙන් කියැවෙන හේතූන්ට අදාල නොවන කරුණු උඩ පිටමං කිරීමේ නඩු පැවැරූ කලෙක පමණකි. (එයද කෙරෙන්නේ ගෙයි කුලිය මසකට රුපියල් සියයකට අඩුවූ විට පමණකි).

උගත් කොමසාරිස්වරයා පැමිණිලිකරුගේ නඩුව නිශ්ප්‍රභා කරමින් සඳහන් කර ඇත්තේ සංශෝධන පණතේ කරුණු සලකා බලන විට ඔහු ඉදිරියේ වූ එම නඩුව බල ශූන්‍ය අවලංගු නඩුවක් බව පමණකි. නමුත් ඔහු මේ තීරණයට බැස ගත්තේ කුමන හේතුවක් මතදැයි එහි සඳහන් නොවේ. නමුත් මගේ මතය පැමිණිලිකරුට මෙම නඩුව කලින් පවරන ලදුව නඩු විභාගයේ අපේක්ෂාවෙන් තිබූ නඩු අහෝසි කරමින් සංශෝධන පණත පැණවූ පසුව වුවද දැමිය හැකි නඩුවක් යන්නයි.

මේ නිසා පැමිණිලිකරුගේ නඩුව නිශ්ප්‍රභා කරමින් දෙන ලද නියෝගය ඉවත් ලන මම නැවතත් නඩුව විභාග කිරීම සඳහා උගත් කොමසාරිස්වරයා වෙත යවන්නෙමි.

විත්තිකරු වෙනුවෙන් පෙනී සිටි නීතිවේදියා කරුණු සැලකරමින් මෙම නඩුවේ පැමිණිල්ලේ විත්තිකරුට ගෙයින් ඉවත යාමට යවන ලද නිවේදනයේ එම ගෙය පැමිණිලිකරුට යුක්ති යුක්ත ලෙස අවශ්‍යවී තිබෙන බවත්, විත්තිකරු විසින් එය තවකෙනෙකුට කුලියට දී ඇතිය යන හේතුව උඩ ඔහු පිටමං විය යුතුයැයි කියා ඇති නිසා එම පැමිණිල්ල පැහැදිලි නැතැයි කියා සිටියේය. පැමිණිලිකරුට රිසි නම් පැමිණිල්ල සංශෝධනය කිරීමට අවසර දිය යුතුය. මෙම අභියාචනයේ ගාස්තුව ලැබීමට විත්තිකරු සුදුස්සෙකි.

නියෝගය නිෂ්ප්‍රභා කර ආපසු යවන ලදී.

විජයතිලක විනිශ්චයකාරතුමා ඉදිරිපිටදී

කේ. පී. පුංචිනෝනා එ. ටී. හෙන්ද්‍රික් පෙරේරා*

ශ්‍රේෂ්ඨාධිකරණයේ අංක 119/67 (ආර්.ඊ.) — කොළඹ රික්වැස්ට උසාවියේ අංක 88705

විවාද කළ දිනය: 1968 සැප්තැම්බර්, 15 ද
තීන්දු කළ දිනය: 1968 ඔක්තෝබර්, 10 ද

ගෙයකින් බැහැර කිරීමට දැමූ නඩුවක් — විත්තිකාරිය එම ගෙය තමාට බදු දුන් අයගේ ගෙයි කුලියට සිටින බව කී පැමිණිලිකරු එම බද්ද තමාට දී ඇති බව විත්තිකාරියට ලියමනකින් දන්වා එම නිසා තමාට එම ගෙවල් කුලිය ගෙවිය යුතු බවද ඇයට දැන්වූ බව කියා පෑම — ලියමන ලද විත්තිකාරිය නිශ්ශබ්දව සිටීම හා ගෙවල් කුලියද නොගෙවා පැහැර හැරීම — ගෙයින් බැහැර කිරීමට නඩු දැමීම — ගෙවල් කුලියට ගැනීමක් සිදු නොවූ බැව් කී විත්තිකාරිය එම ඉඩම පැමිණිලිකරුට බදු දුන් තැනැත්තා ඇයට ඉඩම ඔප්පුවකින් ලියා දෙන බවට ප්‍රතිඥා දී ඇය අනියම් බිරිය ලෙස තබා ගත් පුවත ගෙනහැර දැක්වීම — සාක්ෂි දීමට බදු දුන් අය නොකැඳවීම.

''ඩී'' නමැත්තකුගෙන් වර්ෂ 1963 බදුකරයක් (පී1) ගත් පැමිණිලිකරු පහත සඳහන් කරුණු ගෙනහැර පාමින් විත්තිකාරියට නඩු පවරා තිබේ.

(ඒ) විත්තිකාරිය තමාට බදු දුන් තැනැත්තාගෙන් ගෙයක් කුලියට ගත් කෙනකු බව.

(බී) තමාගේ නීතීඥ මහතාගේ 4.3.63 දරන ලිපියෙහි (පී2) පැමිණිලිකරු මෙම බද්ද ගැන දැනුම් දී 1963 පෙබරවාරි මාසයේ සිට ගෙවල් කුලිය තමාට ගෙවන ලෙස විත්තිකාරියගෙන් ඉල්ලීමක් කළ බව

(සී) අවුරුද්දක පමණ ගෙවල් කුලී ඇ නොගෙවා සිටි බව සහ

(ඩී) පැමිණිලිකරු 64.5.3 වැනි දින විත්තිකාරියට ගෙය අත් හැර යන සේ නිවේදනයක් යැවූ බව

තමාගේ උත්තරයෙහි ගෙවල් කුලියට ගැනීමක් කිසි ලෙසකින් සිදු නොවූ බව කියා පෑ විත්තිකාරිය 'ඩී' නමැත්තා විසින් තමා ඔහුගේ අනියම් බිරිය හැටියට තබා ගත්තා ලද බවත්, එම භූමි භාගය ඔප්පුවකින් තමාට පවරා දීමේ පොරොන්දුව පිට තමා එහි භුක්තිලාභී පදිංචිකාරිය කළ බවක් කියා සිටියාය.

ගෙයින් පිටමං කිරීමේ තීන්දු ප්‍රකාශයක් ලැබීමට පැමිණිලිකරුට සුදුසු තත්වයක් නැති බවත්, එහෙත් වර්ෂ 1963 සිට ගෙවල් කුලිය ඔහුට ලැබිය යුතු බවත් උගත් කොමසාරිස්වරයා තීන්දු කළේය.

ඉහත සඳහන් (පී2 දරණ) ලියමනට විත්තිකාරියගෙන් පිළිතුරක් නොලැබුනු බව සාක්ෂිවලින් අනාවරණය විය.

තීන්දුව: ගෙවල් කුලි ගෙවීම විත්තිකාරිය විසින් පැහැර හරිනු ලැබුවත් පී2 දරණ ලියමන ලද ඇයගේ එම නිශ්ශබ්දතාවයෙන් ඇ පැමිණිලිකරුට ගෙවල් කුලී ගෙවිය යුතු බව පිළිගෙන තිබීම සැබෑ වුවද මෙම විත්තිකාරිය එම භූමි භාගය තමාට බදු දුන් පුද්ගලයාගේ ගෙය කුලියට ගත් අයකු බව පැමිණිලිකරුට ඔප්පු කිරීමට නොහැකි වී තිබීම නිසා ඇ පැමිණිලිකරුට ගෙහිමියා හැටියට කුලී ගෙවිය යුතුයයි පිළිගෙන තිබීම ප්‍රතික්ෂේප කළ නොහැකි බවත්, ඒ අයුරින් මාසික කුලී ගෙවීමක් ඇති බව සලකා දමා ඇති මෙම නඩුව කරුණු වරදවා වටහා ගෙන පවරා ඇති නඩුවකි.

විශේෂිලක විනිශ්චයකාරතුමා: ''මේ නයින් බලන කල මිලදී ගත් තැනැත්තකු විසින් කුලියට පදිංචිව සිටින කෙනකු තමාගේ ගෙවල් කුලිකරු යැයි දන්වන ලද කලෙක ඉන් පසු එම ගෙයි පදිංචිව සිටින කුලී ගෙවන්නකු විසින් ඔවුනොවුන් අතර කොන්ත්‍රාත්තුවක සහයෝගතාවයක් ඇති බව තහවුරු කිරීමට සෑහෙන තරමින් එම ගෙය මිලදී ගත් තැනැත්තාට එම ගෙයි හිමිකම ඇති බව පිළිගෙන තිබෙය යන්න දැන් ඉතාම ස්ථාපිතවූ නීති ප්‍රඥප්තියක් සේ පෙනී යයි.''

සලකා බැලූ නඩු: විජය රත්න එ. හෙන්ද්‍රික්, 3 න.නී.වා. 158
අරනෝලිස් එ. මොහිදීන් පිවවෙ, 3 බාලසිංහම න. සටහන් 159
උක්කුවා එ. ප්‍රනාන්දු, 38 න.නී.වා. 125
රාජපක්ෂ එ. කුරේ, 2 ලංකා ටයිම්ස් වාර්තා 209
සභාපති පිල්ලේ එ. රාමු පිල්ලේ, 58 න.නී.වා. 367
චාර්ල්ස් පෙරේරා එ. ද කෝස්තා, 57 න.නී.වා. 283
ද අල්විස් එ. පෙරේරා, 52 න.නී.වා. 443 සහ 445 පිටු
සිල්වා එ. සිල්වා, 16 න.නී.වා. 315
සකාරියා එ. බෙනඩික්, 53 න.නී.වා. 311

ජේ. ඩබ්ලිව්. සුබසිංහ මහතා, ටී. එච්. ඇන්. රිචර්ඩස් මහතා සමග, විත්තිකාර ඇපැල්කාරිය වෙනුවෙන්.

ඇස්. සී. ඊ. රුද්‍රිගු මහතා, පැමිණිලිකාර-වගඋත්තරකරු වෙනුවෙන්.

*ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 77 වෙනි කාණ්ඩයෙහි 24 වෙනි පිට බලනු.

විජයතිලක විනිශ්චයකාරතුමා:

මාදිවල පාරේ නොා. 567 දරණ ගෙයින් චිත්තිකාරිය බැහැර කිරීමට සහ එහි හිඟ හිටි කුලිය ලබා ගැනීමට පැමිණිලිකරු විසින් චිත්තිකාරියට විරුද්ධව මෙම නඩුව පවරන ලදී. නඩුව විභාග කළ පසු උගත් කොමසාරිස්වරයා පැමිණිලිකරුට චිත්තිකාරිය පිටමං කිරීමට තීන්දු ප්‍රකාශයක් ලබාගැනීමට අයිතියක් නැතැයි නිගමනය කළේ ය. කෙසේ වෙතත් වර්ෂ 1963 පෙබරවාරි මාසයේ සිට 1965 ජනවාරි මස අග දක්වා පැමිණිලිකරුට මසකට රු: 15.00 බැගින් කුලිය ලබා ගැනීමට හැකි බවද ඔහුගේ නිගමනය විය.

මෙම නඩුවේ උද්ගතව ඇති ප්‍රධාන ප්‍රශ්නය නම් චිත්තිකාරිය සහ පැමිණිලිකරුගේ බදු කරු අතර ගෙයක් කුලියට ගැනීමේ කොන්ත්‍රාත්තුවක් තිබුණාද යන්න සහ එසේ තිබුණා නම් චිත්තිකාරිය පැමිණිලිකරුට එම ගෙයි හිමිකම ඇති බැව් පිළිගෙන නිබේද යන්නය. ප්‍රශ්නයට භාජනව ඇති මෙම ගෙයි හිමිකරු කේ. ධර්මදාස ප්‍රනාන්දු නමැත්තෙක් යැයි පිළිගෙන නිබේ. පැමිණිලිකරු කියන හැටියට චිත්තිකාරිය එකී ප්‍රනාන්දු නමැත්තාගෙන් මාස්පතා කුලී ගෙවීමේ ක්‍රමයට ගෙයක් කුලියට ගෙන, ගෙවල් කුලීකාරියක මෙන් පදිංචිවූවකු වන අතර පැමිණිලිකරු මෙම නඩුවේ (පී1) දමා සළකුණු කරන ලද අංක 306 සහ 8.2.63 දිනම දරණ ඔප්පුවට අනුව, ඉහත කී ප්‍රනාන්දු නමැත්තාගෙන් අවුරුදු දෙකක කාල සීමාවකට එම ගෙය බද්දට ගෙන නිබේ. ඉන්පසු ඔහුගේ නීතිඥ මහතා චිත්තිකාරියට ලියන ලද (පී2) දමා සළකුණු කර ඇති 4.3.63 දරණ ලිපියෙන් මෙම බද්ද ගැන ඇයට දන්වා, මසකට රුපියල් 15.00 බැගින් වර්ෂ 1963 පෙබරවාරි මස සිට ගෙවිය යුතු ගෙවල් කුලිය පැමිණිලිකරුට යවන ලෙස ඉල්ලීමක් කොට නිබේ. මෙම ලිපිය ලැබුණු නමුත් චිත්තිකාරිය විසින් කිසිම ගෙවල් කුලියක් නොගෙවන ලද නිසා අවුරුද්දකට ආසන්න කාලයකට පසු 8.2.64 දරණ දින පැමිණිලිකරුගේ නීතිඥයා මෙම නඩුවේ (පී3 දමා සළකුණු කරන ලද) නිවේදනය ඇයට යවා ගෙයින් ඉවත් වීමට නිවේදනය කොට 31.5.64 දරණ දින එම ගෙයි බුක්තිය භාර දීමට යැයි දන්වා ඇත. චිත්තිකාරිය තමාගේ උත්තරයේ පී3 දරණ නිවේදනය ලද බව පිළිගෙන ඇති අතර මෙම නඩුව ආරම්භයේදී ඇයගේ නීතිඥයා පී2 දරණ ලිපිය ගැන සඳහන් කළ නිසා පැමිණිලිකරුට තමාගේ පැමිණිල්ල සංශෝධනය කිරීමට ඉඩ ලැබිණ. මෙම ලිපි දෙක ලියන ලද නීතිඥයාද නඩුවෙහිදී සාක්ෂි කියා නිබේ.

චිත්තිකාරියගේ කරුණු අනුව මෙම නඩුවෙහි ඇයගේ තත්වය වූයේ තමා ඉහත සඳහන් ප්‍රනාන්දු නමැත්තාගේ අනියම් භාර්යාව බවත් මෙම ගෙයි හිමිකරුවූ ඔහු තමාට මෙම ඉඩම ඔප්පුවකින් ලියා දීමේ පොරොන්දුව පිට වර්ෂ 1960 ඔක්තෝබර් මාසයේ යම්කිසි අවස්ථාවක තමා එම ගෙයි පදිංචි කළ බවත් ඉන්පසු මෙම ගෙයි හිමිකාරයෙකුගේ අයුරින් (Ut Dominus) ඈ පදිංචිව සිටි බවත්ය. එකී ප්‍රනාන්දු සමග ගෙවල් කුලී කොන්ත්‍රාත්තුවක් කිසි ලෙසකින් තමා ඇති නොකර ගත් බව ඈ ප්‍රකාශ කරයි.

තම සාක්ෂියේදී පැමිණිලිකරු කියා ඇත්තේ මෙම බදුකරය ලිවීමෙන් පසු ඔහු බදුකරුන් සමග ගොස් චිත්තිකාරියට ගෙවල් කුලී ඉන්පසු තමාට ගෙවිය යුතු යැයි කීවිට ඇය ඊට එකඟවූ බවය. මෙය කෙසේ වෙතත් තමාට ආධාර පිණිස එම බදුකරු පැමිණිලිකරු විසින් මෙහි නොකැඳවා තිබීම මෙහිලා සැලකිය යුත්තකි. පැමිණිලිකරුගේ නීතිඥයා හැරුණු විට ඔහු විසින් කැඳවන ලද එකම සාක්ෂිකරු වූයේ එම ඉඩමෙහි ම පිහිටි තවත් ගෙයකට ගෙවල් කුලී තමා විසින් ගෙවන ලදැයි කී දයානන්ද නමැත්තකු පමණි. එහෙත් මෙය තහවුරු කිරීමට කිසිම කුවිතාන්සියක් ඉදිරිපත් කිරීමට ඔහු අපොහොසත් විය. තවදුරටත් සළකා බලන කල, ඔහුගේ සාක්ෂියෙන් කියැවෙන්නේ පී1 දමා සළකුණු කරන ලද බදුකරයේ කාල පරිච්ඡේදය අවසන්වූ පසුව ඇති කාල සීමාව පිළිබඳවය.

චිත්තිකාරිය විසින් විරෝධය දක්වා පිළිතුරක් නොා එවන ලද නිසා පැමිණිලිකරුගේ නීතිවේදියා පී2 දමා සළකුණු කරන ලද ලියමන විශේෂයෙන් මෙහිදී ප්‍රතිඥා කොට ගත්තේය. චිත්තිකාරිය පී2 දරණ 4.3.63 දාතමින් යුතු ලිපිය ගැන නොසළකා තිබෙන බව පැහැදිළිය. එසේම 8.2.64 දින දරණ ගෙයින් පිටව යාමේ නියෝගය යවන තුරු අවුරුද්දක් පමණ කාලය තුළ පැමිණිලිකරුද තමාගේ අයිතිවාසිකම් ගැන නොසළකා ඇස පියාගෙන සිටියේ පෙනේ. මේ අවස්ථාවේ ඔහු අනුගමනය කළ ක්‍රියා පිළිවෙල සම්බන්ධයෙන් සලකන කල එය චිත්තිකාරියගේ ප්‍රකාශයෙහි සත්‍යයට තුඩුදෙන කරුණක් යැයි මා විසින් සිතාගත යුතුය. මෙම නඩුවෙහි ඉදිරිපත් වූ පැමිණිල්ලේ සඳහන් වී ඇත්තේ පැමිණිලිකරු විසින් ප්‍රශ්නයට භාජනව ඇති ගෙය කෙලින්ම චිත්තිකාරියට කුලියට දී ඇති බව වන අතර බද්දක් පිළිබඳව එහි සඳහනක් නොමැත. මෙයද මෙම නඩුවේ ඉතාම ප්‍රකට කරුණකි. ඇපැල්කාරියගේ නීතිවේදියා වන සුබසිංහ මහතා කරුණු පැහැදිලි කරමින් කියා සිටියේ චිත්තිකාරිය පැමිණිලිකරුගේ බදුකරු යටතේ ගෙවල් කුලියට ගත්තෙක් යැයි මෙහිදී සළකා ගත්තත් පැමිණිලිකරුට තමා ගෙයි හිමිකමක් ඇති නැනැත්තෙක් බව චිත්තිකාරිය විසින් පිළිගත් පුවත ඔප්පු කිරීමට නොහැකිවූ බවය, තමාගේ පිළිසරණ පිණිස සුබසිංහ මහතා පහත සඳහන් නඩු උපයෝගි කොට ගනී.

විජයරත්න එ. හෙන්ද්‍රික්, 3 න.නී.වා. 158
අරනෝලිස් එ. මොහිදීන් පිච්චෙ, 3 බාලසිංහම් න. සටහන්159
උක්කුවා එ. ප්‍රනාන්දු, 38 න.නී.වා. 125
රාජපක්ෂ එ. කුරේ, 2 ලංකා ටයිම්ස් වාර්තා 209

අනිත් අතට පැමිණිලිකාර වගඋත්තරකරු වෙනුවෙන් පෙනී සිටි නීතිවේදියා වන රුදිගු මහතා, කරුණු දක්වමින් බද්දට දෙන ලද භූමි භාගයක් ඉඩම් හිමියා විසින් විකුණන ලද කලෙක එහි ගෙයක කුලියට සිටින්නකුට එම ඉඩම මිළදී ගත් තැනැත්තා ඔහුගේ ගෙයක් කුලියට ගත් තැනැත්තකු ලෙස තමා සැලකීමට සතුටු බව දැන්වූ අවස්ථාවෙක එම ගෙයි තවදුරටත් පදිංචිව සිටින්නේ නම් එකී මිලදී ගත් තැනැත්තාට ඇති අයිතිය තමා පිළිනොගන්නා බව නොදන්වා ඔහුට ගෙයි ඇති හිමිකම ප්‍රතික්ෂේප කිරීමට අයිතියක් නැතැයි යන

ප්‍රඥප්තිය කෙරෙහි විශ්වාසය තැබිය. ඔහු විසින් උපයෝගි කොට ගන්නා ලද්දේ පහත සඳහන් නඩුය.

සබාපති පිල්ලේ එ. රාමු පිල්ලේ, 58 න.නී.වා. 367
වාර්ල්ස් පෙරේරා එ. ද කෝස්තා, 57 න.නී.වා. 283
ද අල්විස්, එ. පෙරේරා, 52 න.නී.වා. 343 සහ 445 පිටු
සිල්වා එ. සිල්වා, 16 න.නී.වා. 315
ෂකාරයා එ. බෙනඩික්, 53 න.නී.වා. 31

මේ නයින් බලන කල මිලදී ගත් තැනැත්තකු විසින් කුලියට පදිංචිව සිටින කෙනකු තමාගේ ගෙවල් කුලිකරු යැයි දන්වන ලද කලෙක ඉන්පසු එම ගෙයි සිටින කුලී ගෙවන්නකු විසින් ඔවුනොවුන් අතර කොන්ත්‍රාත්තුවක සහයෝගතාවයක් ඇති බව නුහවුරු කිරීමට සැහෙන තරමින් එම ගෙය මිලදී ගත් තැනැත්තාට එම ගෙයි හිමිකම ඇති බව පිළිගෙන තිබෙය යන්න දැන් ඉතාම ස්ථාපිත වූ නීති ප්‍රඥප්තියක් සේ පෙනී යයි.

දැනට අප ඉදිරියෙහි ඇති නඩුවේ විත්තිකාරිය විසින් පී2 දරණ ලියමන ලැබීමෙන් පසු පෙන්වන ලද නිශ්ශබ්ද තාවය ඇ විසින් කිසිම ගෙවල් කුලියක් නොගෙවන ලද නමුත් එය ඇ පදිංචි ගෙයි හිමිකම බදුකරුට ඇති බව භාර ගැනීමක් ලෙස පිළිගනු ලැබිය හැක. එය කෙසේ හෝ වේවා මගේ මතයේ හැටියට මෙම නඩුවෙහි දී විත්තිකාරිය පැමිණිලිකරුගේ බදුකරු යටතේ කිනම් අවස්ථාවක හෝ ගෙවල් කුලිකාරියක වශයෙන් සිටිය බව පැමිණිලිකරුට ඔප්පු කළ නොහැකි විය. මේ සඳහා ඉතාම වටිනා සාක්ෂිය විය හැකිව තිබුනේ බදුකරුගේ සාක්ෂිය. සිතාසියකින් බදුකරු කැඳවන ලද නමුත් පැමිණිලිකරු ඔහුට සාක්ෂි දීමට අමතා නැත. විත්තිකාරිය මත මෙම කරුණු ඔප්පු කිරීමේ කාර්ය භාරයක් තිබුනේ යැයි මම නොසිතමි.

මෙම නඩුවේ සියලුම කරුණු පරීක්ෂණයට භාජන කළ විට පෙනී යන්නේ පී2 දරණ ලියමන ලැබුණාද යන්න ගැන ප්‍රශ්න කළ විට ඇ සත්‍යවාදී නොවූවත් විත්තිකාරිය විසින් ගෙන හැර දැක්වූ කතාව වඩා පිළිගත හැකි තත්වයක තිබීමයි. ඉඩම අයිති තැනැත්තා තමා ඔහුගේ අනියම් භාර්යාව ලෙස තබාගෙන සිටි බව විත්තිකාරිය විසින් තම උත්තරයෙහි එඩිතරව සඳහන් කරන ලද්දේය. මෙබඳු කියා සිටීමක් කර තිබියදීත් ඉඩම හිමියා පැමිණිලිකරු අනුගමනය කළ තත්වයට සහයෝගය දී එම කියා සිටීම අසත්‍ය කිරීමට අපොහොසත් වී තිබේ. තමා විසින්ම මවා ගන්නා ලද ප්‍රේමබද්ධ ප්‍රශ්නයකින් මග හැරීමට මෙම නඩුවේ පැමිණිලිකරුගේ වාසියට මෙහි පී2 දමා සළකුණු කරන ලද බදුකරය ලියා ඒ අනුසාරයෙන් මෙම කාන්තාව පිටමං කිරීමට වක්‍ර ප්‍රතිපත්තියක් ගෙහිමියා විසින් අනුගමනය කරන ලදැයි යන අවසාන නිගමනයට මෙහිදී නොබැස නොසිටිය හැකි තත්වයක් මතුවෙයි.

මෙම නඩුවෙහි මාසික ගෙවල් කුලී කොන්ත්‍රාත්තුවක් පිළිබඳව බදුකරුට ගෙයි ඇති හිමිකම විත්තිකාරිය විසින් පිළිගන්නා ලද්දේය යන මතය මත මෙම නඩුව ස්ථාපිත කිරීම වරදවා කරුණු තේරුම් ගැනීමක් ලෙස පෙනේ. ඒ අනුව මෙම අභියාචනයට ඉඩදෙන මම උගත් කොමසාරිස්වරයාගේ තීන්දුව නිෂ්ප්‍රභා කොට ගාස්තුවටත් යටත් කොට පැමිණිලිකරුගේ නඩුව ඉවත් කරමි. මෙම අභියාචනයට වියදම්වූ ගාස්තුව විත්තිකාරියට ලැබිය යුතුය.

ඇපෑලට ඉඩ දෙන ලදී.

විජයතිලක විනිශ්චයකාරතුමා ඉදිරිපිටදී

හේරත් රාලලාගේ රංබණ්ඩා එ. පොලිස් පරීක්ෂක, පාදුක්ක

ශ්‍රේෂ්ඨාධිකරණ අංකය 544/68 — අවිස්සාවේල්ල මහේස්ත්‍රාත් උසාවිය අංක 84429

විවාද කර තීන්දුව දුන් දිනය: 1968 සැප්තැම්බර් 2 වැනිදා

මහේස්ත්‍රාත් උසාවියේ ආඥා බලය — දිස්ත්‍රික් උසාවියෙන් පමණක් විසඳිය හැකි චෝදනාවක් — අපරාධ නඩු විධාන සංග්‍රහයේ 152(3) වැනි ඡේදය යටතේ තමාට ආඥා බලය පවරා නොගෙන මහේස්ත්‍රාත්වරයා නඩුව විසඳීමට ඇරඹීම — චෝදිතයා වරදකරු බවට පත්කිරීම — ඊට හේතු යුක්ති පසු දවසක දැක්වීම — ආඥා බලය පිළිබඳ ප්‍රශ්නය ගැන කල්පනා කිරීම — එහෙත් නඩුව සුදුසු අන්දමින් විසඳුනු බව නිගමනය කිරීම — සම්පූර්ණ නඩු විභාගයේ ඇති නීතිමය බලය (Ultra vires).

*ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 77 වෙනි කාණ්ඩයෙහි 32 වෙනි පිට බලනු.

තුවක්කුවකින් වෙඩි තබා පැමිණිලිකරුට ශාරීරික හිංසාවක් කරන බවට තර්ජනයක් එල්ල කිරීම පිළිබඳව චෝදිකයකුට විරුද්ධව චෝදනා ඉදිරිපත් විය. (මෙය දණ්ඩ නීති සංග්‍රහයේ 486වැනි ඡේදය යටතේ දිස්ත්‍රික් උසාවියකින් පමණක් විසඳිය හැකි චෝදනාවකි.) අපරාධ නඩු විධාන සංග්‍රහයේ 152(3) දරණ ඡේදය යටතේ ආඥා බලය තමා වෙත පවරා නොගෙන මෙම විසඳීම ඇරඹූ මහේස්ත්‍රාත්තුමා චෝදිතයා එයට වරදකරු කොට ඊට දෙසතියකට පසු හේතු යුක්ති දැක්වීමේදී එම නඩුව විසඳීමේ ආඥා බලය පිළිබඳ ප්‍රශ්නය තමාගේ කල්පනාවට භාජන වූ බව කියා තමාගේ මතය අනුව මහේස්ත්‍රාත්වරයා ලෙස එය තමා නිසි පරිදි විසඳා ඇති බවද කියේය.

නීත්‍යර්ථය: ආරම්භයේදීම අපරාධ නඩු සංවිධාන සංග්‍රහයේ 152(3) වැනි ඡේදය අනුව තමා වෙත ආඥා බලය පවරා නොගෙන කරන ලද නඩු විභාගය මුලුමනින්ම අක්‍රමික විභාගයක් පමණක් නොව එය නීති විරෝධී නඩු විභාගයකි.

සෑම් පී. සී. ප්‍රනාන්දු මහතා, චෝදිත ඇපැල්කරු වෙනුවෙන්.

රජයේ අධිනීතිඥ ප්‍රියන්ත පෙරේරා මහතා, නීතිපතිවරයා වෙනුවෙන්.

විජයතිලක විනිශ්චයකාරතුමා:

චෝදිත ඇපැල්කරු වෙනුවෙන් මෙම නඩුවේ පෙනී සිටින සෑම් පී. සී. ප්‍රනාන්දු මහතා චෝදිතයාට විරුද්ධව සකස් කොට තිබෙන චෝදනාවට මගේ අවධානය යොමු කරයි. චෝදිතයා විසින් පාදුක්කේ අයර් වත්තේ ආර්. ඇම්. ඇන්. බී. චිත්‍රමනායක නමැත්තාට තුවක්කුවකින් වෙඩි තබා හිංසාවක් කිරීමට තර්ජනය කරමින් ඒ නයින් එකී චිත්‍රමනායක නමැත්තාට බලවත් චිත්ත සංතාපයක් ඇති කිරීමේ හේතුවෙන් දණ්ඩ නීති සංග්‍රහයේ 486 වැනි ඡේදය යටතේ දඬුවම් දිය හැකි වරදක් කරන ලදැයි චෝදනා ඉදිරිපත් කොට තිබේ. චෝදනාව සකස් කොට ඇති ආකාරයෙන්ම මහේස්ත්‍රාත් උසාවියට, මහේස්ත්‍රාත්වරයා විසින් අපරාධ නඩු විධාන සංග්‍රහයේ 153(3) දරණ ඡේදය යටතේ තමා පිටට ආඥා බලය පවරා ගත්තොත් මිස එම නඩුව ඇසීමට ආඥා බලයක් නැතැයි කියමින් නීතිවේදියා කරුණු සැළකරයි. උගත් මහේස්ත්‍රාත්වරයා එබඳු අයුරින් ආඥා බලයක් තමා පිට පවරාගෙන නැත. කෙසේ වෙතත් නඩු විභාගය අවසානයේදී වර්ෂ 1968 පෙබරවාරි මස 14 වැනි දින චිත්තිකරු වරදකරු යැයි තීරණය කරනු ලැබූ පසු මහේස්ත්‍රාත් වරයා වර්ෂ 1968 පෙබරවාරි මස 28 වැනි දින නිගමනයට බැසීමේ හේතු කියා පාන විට එම උසාවියේ ආඥා බලය පිළිබඳ ප්‍රශ්නයට තමාගේ අවධානය යොමු වී ගිය බවත්, යම්කිසි තර්ජනයකින් බරපතල තුවාල කිරීමට හෝ මරණය සිදු කිරීමට හෝ තර්ජනය එල්ල වී ඇති විටෙක 486 වැනි ඡේදය යටතේ දඬුවම් ලැබිය යුතු වරදක් සිදුවූ කල එය දිස්ත්‍රික් උසාවිය විසින් පමණක් විනිශ්චය කළ යුතු නඩුවක් බව කියා තිබේ. එය එසේ වුවද තමාගේ මතය අනුව යථා පරිදි මෙම නඩුව මහේස්ත්‍රාත්වරයා හැටියට තර්ජනය මැරීමට වුවද ඒ පිළිබඳව ආඥා බලය තමා පිටට නොපවරා ගෙන විනිශ්චය කළ බව කීමට මහේස්ත්‍රාත්වරයා සැරැසෙයි. මෙම නිගමනයට ඔහු බැස තිබෙන්නේ සාක්ෂිවලට අනුව බව පෙනී යන සේය. සාක්ෂිවලට අනුව චිත්තිකරු කර තිබෙන්නේ තුවක්කුව කඩා පැමිණිලිකරු මරණ බවත්, ඔහුගේ පියා සහ මහ එකා මරණ බවත් යැයි ඔහු කියයි. එවෙලේ පැමිණිලිකරුගේ පියා හෝ මහ එකා හෝ එතැන නොසිටි බවත් කියන මහේස්ත්‍රාත්වරයා චිත්තිකරු අතේ පතරොම් තිබුණු නමුදු ඔහු ඒවා තුවක්කුවට අඩංගු නොකළ බවද කියයි. මගේ මතයේ හැටියට නීතිවේදියාගේ කරුණු සැළ කිරීම ජයගත හැකි විදියට පෙනේ. ඒ මන්ද උගත් මහේස්ත්‍රාත්වරයා නඩු විභාගය ආරම්භයේදීම අපරාධ නඩු විධාන සංග්‍රහයේ 152(3) දරණ ඡේදය යටතේ ක්‍රියා කිරීමට උත්සාහයක් දැරුවේ නම් නඩු විභාගය ආරම්භයේදීම ආඥා බලය තමා පිටට පවරාගත යුතුව තිබුණි. දැන් පෙනී යන පරිදි මහේස්ත්‍රාත්වරයා ආඥා බලයක් නැතිව සාක්ෂි සටහන් කොට තිබේ. එසේ කොට චෝදිතයා වරද කරු කොට සති දෙකකට පසුව මහේස්ත්‍රාත්වරයා තමා අනුගමනය කළ ක්‍රියා කලාපය නිදෙස් බව පෙන්වීමට පරිශ්‍රමයක් දරා තිබේ. මෙය ක්‍රම විරෝධී දෙයක් පමණක් නොව නීති විරෝධී දෙයක්ද බව පැහැදිලිව පෙනී යයි.

උගත් රජයේ අධිනීතිඥවරයාද ඇපැල්කරුගේ නීතිවේදියා කරන ලද සැළකිරීම්වලට එකඟ වේ. ඒ අනුව මෙම විභාගයේ කරුණු නිෂ්ප්‍රභා කරන මම මෙම නඩුව වෙන මහේස්ත්‍රාත්වරයකු ඉදිරියේ නැවතත් විභාග කිරීමට යවන්නෙමි.

කරුණු නිෂ්ප්‍රභා කර යළි විභාගයට යවන ලදී.

ජී. ජී. ඒ. සිල්වා, වැඩබලන අග්‍රවිනිශ්චයකාරතුමා සහ සිව සුප්‍රමනියම් විනිශ්චයකාරතුමා ඉදිරිපිටදී

ආඩිගේ ජිනදාස ප්‍රනාන්දු එ. වක්කටු වික්‍රමසිංහලාගේ දෙන් ධම්සිරි, සභාපති, නගර සභාව, වත්තේගම

ශ්‍රේෂ්ඨාධිකරණයේ අංක 116/69 — දිස්ත්‍රික් උසාවිය මහනුවර නඩු අංක ඇල්/7547

තර්ක කළේ: 1969 ජූනි 11 හා 12 වැනි දිනවල
තීන්දුව ප්‍රකාශයට පත් කළේ: 1969 ජූලි 26 වැනි දින

මැන්ඩාමුස් ආඥාවක් — පෙත්සම්කරු, පළාත් ආණ්ඩු සභාපතිගෙන් තමන් විසින් සාදවන ලද ගොඩනැගිල්ලක් වෙනුවෙන් අනුකූලතා සහතිකයක් ඉල්ලීම — එය පැහැර හැරීම — නිවාස හා නගර සංවර්ධන ආඥා පනතේ 15 වැනි ඡේදය යටතේ දිස්ත්‍රික් උසාවියට අභියාචනා කිරීම — දිස්ත්‍රික් උසාවිය එම අනුකූලතා සහතිකය නිකුත් කරන ලෙස නියෝග කිරීම — නිකුත් කරන ලද සහතිකය නිවාස හා නගර සංවර්ධන ආඥා පනතේ 15 වැනි ඡේදයට අනුකූල නොවීම — මැන්ඩාමුස් ආඥාවක් ශ්‍රේෂ්ඨාධිකරණයෙන් ඉල්ලා සිටීම — දිස්ත්‍රික් උසාවිය මගින් දෙන ලද නියෝගය ක්‍රියාත්මක කිරීමේ පිළිවෙල ඉහත කී ආඥා පණතේ 95 වැනි වගන්තියේ සඳහන් කර ඇති හෙයින්, එය පැහැර හැර මැන්ඩාමුස් ආඥාවකට ඉඩ දිය හැකිද ?

නිවාස හා නගර සංවර්ධන ආඥා පනත (268 වැනි පරිච්ඡේදය) ඡේද 10ඒ, 15(1)(2), 16, 88 හා 95.

වත්තේගම පදිංචි පෙත්සම්කරු අගිනව නිවාසයක් තැනීම සඳහා සැලැස්මක් ඉහත කී ආඥා පනත යටතේ බලයලත් නිලධාරියා වන වගඋත්තරකරුගේ අනුමැතිය සඳහා ඉදිරිපත් කරන ලදී. එකී පනතේ 10(ඒ) ඡේදයට අනුව නිසි පරිදි දන්වා එම ගොඩනැගිල්ල 1963 ජූනි මස පටන් ගෙන 1964 පෙබරවාරි මස අවසන් කරන ලදින් එම ආඥා පනතේ 15(2) ඡේදය යටතේ අනුකූලතා සහතිකයක් 1964.2.24 වැනි දින ඉල්ලා සිටී නමුත් ඔහුට ඒ සම්බන්ධයෙන් කිසිදු පිළිතුරක් නොලැබුණු හෙයින් එම ආඥා පනතේ 16 වැනි ඡේදය අනුව දිස්ත්‍රික් උසාවියට අභියාචනා කර සිටියේය. එම අභියාචනයට ඉඩ දුන් දිස්ත්‍රික් විනිශ්චයකාරතුමා අනුකූලතා සහතිකයක් නිකුත් කරන ලෙස වගඋත්තරකරුට නියෝග කළේ වී නමුදු වගඋත්තරකරු විසින් නිකුත් කරනලද සහතිකය නිවාස හා නගර සංවර්ධන ආඥා පනත යටතේ 15 වැනි ඡේදයට අනුකූල නොවිය. එහෙයින් පැමිණිලිකරු එම ඡේදයට අනුකූලව සහතිකයක් නිකුත් කරන මෙන් කරන ලද ඉල්ලීම වගඋත්තරකරු විසින් පැහැර හැරිය හෙයින් එවැනි සහතිකයක් නිකුත් කරන ලෙස මැන්ඩාමුස් ආඥාවක් මගින් ශ්‍රේෂ්ඨාධිකරණයෙන් ඉල්ලා සිටියේය.

තීන්දුව: (1) පෙත්සම්කරු විසින් (තමා පිළිගත් පරිදි) නිවාස හා නගර සංවර්ධන ආඥා පනතේ 95 වැනි ඡේදයේ නියමකර ඇති පිළිවෙල අනුව අභියාචනා මණ්ඩලයේ තීන්දුව ක්‍රියාත්මක කිරීමට පියවර නොගත් හෙයින් මැන්ඩාමුස් ආඥාවක් නිකුත් කිරීමට නීතියෙන් අවසර නොමැත.

(2) නිවාස හා නගර සංවර්ධන ආඥා පනතේ සඳහන් පරිදි දිස්ත්‍රික් උසාවිය මගින් සිවිල් නඩු සංවිධාන සංග්‍රහයේ නියම කර ඇති අයුරු දිස්ත්‍රික් උසාවියක නඩු තීන්දුවක් මෙන් ක්‍රියාත්මක කිරීම අනිවාර්යයවේ.

(3) ශ්‍රේෂ්ඨාධිකරණය සතු විශේෂ බලතල අනුව මෙම ඉල්ලීමට අවසර දිය හැකිය යන මතය සළකා බැලීමට සුදුසු අවස්ථාව පැමිණි නැති බවත් එසේ කිරීම අයෝග්‍ය වගක් පෙනේ. එම අදහස සළකා බැලිය යුත්තේ පැමිණිලි කරුට නීතියෙන් නියමකර ඇති මාර්ගය අනුව සහනයක් සොයා නොලැබුණහොත් පමණයි.

සළකා බැලූ නඩු: සිරිසේන එ. සීමාසහිත කොටවෙර–උඩගම සමූපකාර සමිතිය, 51 න.නී.වා 262
රසු එ. වොන්ඩස්වර්ත් විනිශ්චයකාරවරු, ඒකපාක්ෂිකව රිඩ (1942) 1 ඒ.ඊ.ආර්. 56
රාජින එ. සීමාසහිත ව්ක්ටෝරියා උද්‍යාන සමාගම (1841) 1 කිව්.බී. 288
වුල්වර්හැම්ප්ටන් නව ජලකර්මාන්ත සමාගම එ. හෝක්ස්ලේපෝර්ඩ, කොමන් බෙන්ච් වාර්තා (ඇන්.ඇස්.) 336 පිටු 356
පාස්මෝර් සහ තවත් අය එ. ඔස්වල්ඩ්-ටුවිස්ල් නගර සභාව (1898) ඒ.සී.වාර්තා 387.
ඩෝ එ. බ්‍රජස් (1831) 1 බී. සහ ඇඩ්. 847 859
විල්කින්සන් එ. බැංකු සංස්ථාව (1948) 1 කේ.බී. 721
හෙන්ඩ්‍රික් අප්පුහාමි එ. ජෝන් අප්පුහාමි, 69 න.නී.වා. 29

අධිනීතිඥ නිමල් සේනානායක, අධිනීතිඥ සෑම් සිල්වා සමග, පෙත්සම්කරු වෙනුවෙන්.

අධිනීතිඥ එච්. වනිගතුංග, අධිනීතිඥ ජේ. වීරසේකර හා අධිනීතිඥ ඇන්. තිරුවෙල්වම් මහතා සමග වගඋත්තරකරු වෙනුවෙන්.

*ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 77 වෙනි කාණ්ඩයෙහි 41 වෙනි පිට බලනු.

ජී. පී. ඒ. සිල්වා, වැඩ බලන අග්‍ර විනිශ්චයකාරතුමා

මේ නඩුවේ පෙත්සම්කරු වත්තේගම නගර සභාවේ බල සීමාව ඇතුළත පිහිටි ඉඩමක අයිතිකරු වන අතර වගඋත්තරකරු එකී නගර සභාවේ සභාපතිවරයා වෙයි. 1962 දෙසැම්බර් මස 26 වැනි දින පෙත්සම්කරු එක පෙළට කැබලි පහකින් යුත් යෝජිත ගොඩනැගිල්ලක සැලැස්මක් නිවාස හා නගර සංවර්ධන ආඥා පනත යටතේ බලයලත් නිලධාරියා වන වගඋත්තරකරු වෙත අනුමැතිය සඳහා ඉදිරිපත් කළේය. යථෝක්ත ආඥා පනතේ 10(අ) වගන්තිය යටතේ අවශ්‍ය වන දැන්වීම් 1963 ජූනි 2 වැනි දින දීමෙන් ඉක්බිනිව පෙත්සම්කරු ගොඩනැගිලි තැනීම ආරම්භ කොට 1964 පෙබරවාරි මාසයේදී වැඩ හමාර කළේය. මෙම ගොඩනැගිල්ලේ පදිංචියට යාම සඳහා ඉහත කී ආඥා පනතේ 15(2) ඡේදය යටතේ අනුකූලතා සහතිකයක් සඳහා පෙත්සම්කරු සභාපතිගෙන් ඉල්ලුම් කළේය. මෙම ඉල්ලීමට පිළිතුරක් නොලැබුනෙන් ඉහත කී ආඥා පනතේ 88 වන වගන්තියෙන් අභියාචනාධිකරණයක් ලෙස ස්ථාපිත වූ උසාවිය වන දිස්ත්‍රික් උසාවියට පෙත්සම්කරු ඉහත කී අනුකූලතා සහතිකය ලබා ගැනීමේ අදහසින් අභියාචනයක් ඉදිරිපත් කළේය. 1968 නොවැම්බර් මස 23 වැනි දින දෙපක්ෂය එකඟතාවයකට පැමිණි බව පෙනෙන අතර දිස්ත්‍රික් විනිශ්චයකරු පහත දැක්වෙන තීන්දුව වාර්තා කළේය. ''30.11.69 වැනි දින හෝ ඊට පෙර වගඋත්තරකාර නගර සභාවේ සභාපති මේ ඉල්ලීමට අදල ගොඩනැගිල්ල සම්බන්ධයෙන් පැමිණිලිකරුට අනුකූලතා සහතිකයක් නිකුත් කිරීමට දෙපක්ෂයේම කැමැත්තෙන් දැන් එකඟත්වයක් ඇති විය. ..... ඉහත දැක්වෙන එකඟත්වය නිසා පැමිණිලිකරුගේ යථෝක්ත අභියාචනයට ඉඩ දෙමින් ඉහත දැක්වුනු පරිදි පැමිණිලිකරුට අනුකූලතා සහතිකයක් නිකුත් කරන ලෙස වගඋත්තරකාර නගර සභාවේ සභාපතිවරයාට මම නියෝග කරමි.

ඒ කෙසේ වුවද මෙයින් ඉඩම සම්බන්ධයෙන් දෙපක්ෂයේ අයිතිවාසිකම්වලට හානියක් නොවනු ඇත.''

දිස්ත්‍රික් උසාවියේ නියෝගයට අනුව වගඋත්තරකරු 1968 නොවැම්බර් මස 30 වැනි දින පැමිණිලිකරුට ගොඩනැගිල්ලේ පදිංචිවීමට අවසර දෙන අනුකූලතා සහතිකයකැයි කියනු ලබන ලියවිල්ලක් නිකුත් කළේය. එහෙත් එහි ''නගර සභාවේ අවශ්‍යතාවයන්ට අනුකූල වෙයි'' යන වචන වගඋත්තරකරු විසින් කපා හරින ලදී.

එකී සහතිකය අනුකූලතා සහතිකයක ප්‍රතිඵලය දීමට අවශ්‍ය වනුයේ ඒ අන්දමින් කපා හරින ලද වචනය වූ හෙයින් පෙත්සම්කරු අභියාචනාධිකරණය අදහස් කළ එකම අනුකූලතා සහතිකය වන නිවාස හා නගර සංවර්ධන ආඥා පනතේ 15 වැනි වගන්තියේ දැක්වෙන අන්දමේ අනුකූලතා සහතිකයක් තමා වෙත නිකුත් කළ යුතු බව වගඋත්තරකරුට ලිපියකින් දැන්වීය. මේ ලිපියට වගඋත්තරකරු පිළිතුරක් දුන්නේ නැත. යථෝක්ත ගොඩනැගිල්ල සම්බන්ධයෙන් ගෘහ හා නගර සංවර්ධන ආඥා පනතේ 15(1) වගන්තියේ විධිවිධානයන්ට තමාට අනුකූලතා සහතිකයක් නිකුත් කිරීමට වගඋත්තරකරුට නියෝග කරමින් මැන්ඩාමුස් ආඥාවක් නිකුත් කරන මෙන් මෙම උසාවියට ඉල්ලීමක් ඉදිරිපත් කිරීමට තුඩු දුන් කරුණුයි මේ.

සාමාන්‍යයෙන් කියනවා නම් මැන්ඩාමුස් ආඥාවක් මගින් දෙනු ලබන සහනය කෙසේ වුවත් මෙම උසාවියේ අභිමතය අනුවම දෙනු ලබන සහනයක් වන අතර ඒ සහනය ක්‍රියාවට නැංවීමේ ක්‍රමයකින් තොරව විශේෂිතවූ නීත්‍යානුකූල සහනයක් පවතින විට දෙනු ලබන්නකි. එවැනි අවස්ථාවක දී ක්‍රියාත්මක කිරීමේ මාර්ගයක් නොමැති වීම නීතියේ දෝෂයක් වන අතර මැන්ඩාමුස් ආඥාවක් මගින් ඉල්ලීමේ ක්‍රියාපටිපාටිය එම දෝෂය දුර හැරලයි. පොදු අයිතිවාසිකමක් ක්‍රියාත්මක කර ගැනීම සඳහා විධිවිධාන නොමැති විටෙක දී පමණක් නොව නීතියෙන් සලසා දැති ප්‍රතිකර්මය ප්‍රතිඵලදයි නොවන විට ද මෙම ප්‍රතිකර්මය ලබා ගත හැකි බව පෙත්සම්කරුගේ අධිනිඥවරයා තර්ක කළේය. වෙනත් වචනවලින් කියනහොත් මැන්ඩාමුස් ආඥාව මගින් ලැබෙන ප්‍රතිකර්මය අහිමි කිරීමට නම් ඒ සඳහා වෙනත් ඵලදයි ප්‍රතිකර්මයක් තිබිය යුතු යැයි ඔහු තර්ක කරයි.

සිරිසේනා එ. සීමාසහිත කොටවෙර උඩගම සමූපකාර සමිතිය, 51 න.නී.වා. 262 නඩුවේදී අන්‍ය ප්‍රතිකර්මයක් පැවැතියේ වුවද, උසාවියක් වෙත නීතියෙන් පැවරුණු සීමිත බලතල ප්‍රකාශිත ව ම ඉක්මවා එය ක්‍රියාකර ඇති විට එම නඩු විභාගය නිෂ්ප්‍රභා කිරීම සඳහා **''සර්ටියෝරේරයි''** ආඥාව ලද හැකි බව ග්‍රෙෂන් විනිශ්චයකාරතුමා තීරණය කළේය. මේ නඩු තීන්දුව අද අප ඉදිරියේ ඇති ඉල්ලීම හා ඇත්තේ ඉතාම ඇත් වූ අදලත්වයකි. එම නඩුවේදී ග්‍රෙෂන් විනිශ්චයකාරතුමා සලකා බැලුවේ සමූපකාර ආඥා පනත යටතේ බේරුම්කරුවකු විසින් දෙන ලද්දවූ තීන්දුවකි. අදල කාල සීමාවේ දී තමා සමිතියේ සාමාජිකත්වයෙන් ඉවත් වී සිටි හෙයින් ආරාවුල බේරුම්කරුවකු වෙත යොමු කිරීම සමූපකාර සමිති රෙජිස්ට්‍රාර්වරයා වෙත 29 වැනි රෙගුලාසියෙන් පැවරී ඇති බලය ඉක්මවා යාමකැයි යන හේතුව මත පෙත්සම්කරු විසින් බේරුම්කරුගේ තීන්දුවට අභියෝග කරන ලදී. ආරාවුලක් බේරුම්කරුවකුට යොමු කිරීමට පෙර සමිතිය සාමාජිකත්වයෙන් ඉවත් වී ඇති පුද්ගලයකු හා සමිතියක් අතර ඇති ආරාවුලක් අනිවාර්යයෙන්ම බේරුම් කිරීමක් සඳහා යොමු කිරීමට 29 වැනි රෙගුලාසියෙන් බලයක් නොලැබෙන හෙයින් පෙත්සම්කරු විසින් අභියෝගයට පත් කරන ලද තීන්දුව දෙවැනි වගඋත්තරකරු තමාට ඇතැයි කියා සිටි බලසීමාව ඉක්මවා යෑමක් බව පැහැදිලිය. ග්‍රෙෂන් විනිශ්චයකාරතුමා එම නඩුව තීන්දු කිරීමේදී රජු එ. වොන්ඩ්ස්වර්ත් විනිශ්චයකාරවරු ඒක පාක්ෂිකව **(Ex Parte)** රිඩ් නඩුවේ කෝල්ඩ්කොට් සහ හම්ප්‍රිස් යන විනිශ්චයකරුවන් අභියාචනයකට අවකාශ ඇති විට සර්ටියෝරේරයි ආඥාව ලැබිය හැකිද යන්න ගැන ප්‍රකාශ කළ අදහස්වලින් මෙහෙය වී ඇති බව පෙනේ. ඉල්ලීමට ඉඩ දෙමින් ග්‍රෙෂන් විනිශ්චයකාරතුමා මෙසේ ප්‍රකාශ කළේය. ''අධිකරණමය නොවන විනිශ්චය මණ්ඩලයක් සහ රාජ්‍ය නිලධාරියෙක් නොදන්නා කමින්ම වුවද සමූපකාර සමිති ආඥා පනතින්

ඔවුන් වෙත පැවැරී ඇති සීමිත ව්‍යවස්ථාපිත බලතල නිර්දය ලෙස ඉක්මවා කටයුතු කර ඇති බවට මත භෙදයක් නැත. ..... නීතිවිරෝධී තීන්දුව නිෂ්ප්‍රභා කර දැමීමට මෙම උසාවියට ඇති අභිමතානුසාරී බලය සීමාකිරීමට තරම් ප්‍රබල නීතිමය මූලධර්මයක් නොමැති බව මගේ කල්පනාවයි.''

ග්‍රෙෂන් විනිශ්චයකාරතුමාගේ තීන්දුවත් කෝල්ඩිකොට් හා හම්ප්‍රිස් විනිශ්චයකාරවරුන්ගේ අදහසුත් සියුම් ලෙස පරීක්ෂා කර බැලුවහොත් ඔවුන් සකස් කිරීමට අදහස් කළ නීතිමය මූල ධර්මය වූයේ පහළ අධිකරණ මණ්ඩලයක් පැහැදිලි ලෙසම සිය බලතල ඉක්මවා ක්‍රියා කළ විට සර්ටියෝරේරයි ආඥාව යෝග්‍ය ප්‍රතිකර්මයක් වන බව පෙනී යනවා ඇත. මේ වූකලි කිසියම්ම නියෝගයක් කිරීමට බලයක් නොමැති අධිකරණයක් විසින් දෙන ලද තීන්දුවක් කරණකොට ගෙන පීඩාවට පත් කෙනකුට සහනයක් ලබා දීම සඳහා අදහස් කරන ලද්දකි. මෙවැනි තත්වයකදී ඉහළ උසාවිය කරන්නේ පහළ අධිකරණයේ තීන්දුව නිරීක්ෂණය කිරීම හෝ සංශෝධනය කිරීම හෝ නොව එම නියෝගය නිෂ්ප්‍රභා වී ඇති බව ප්‍රකාශ කිරීමයි. අධිකරණ බලතල ඉක්මවාක්‍රියාකිරීම් අභියාචනාධිකරණය විසින් සලකා බැලීමේ සිරිතක් ඇත්තේ වී නමුදු අභියාචනාධිකරණයන්හි බලතල සම්බන්ධයෙන් පවත්නා උසාවි ආඥා පනතේ විධිවිධාන ප්‍රවේසමින් සලකා බැලුවහොත් යථා අන්දමින් බලතොත් අභියාචනාධිකරණයට කළ හැක්කේ පහළ උසාවියක් සිය නීත්‍යානුකූල බලතල පාවිච්චි කිරීමේදී කරුණු හෝ නීතිය සම්බන්ධයෙන් කර ඇති සදෙස් නිදෙස් කිරීම පමණක් බවත් එවැනි නීත්‍යානුකූල බලතල ක්‍රියාත්මක කිරීමක් නොමැතිව, එනම් බලතල නොමැතිව ක්‍රියාකර ඇති විටදී යෝග්‍ය වන පිළියම වන්නේ සර්ටියෝරේරයි ආඥාවක් මගින් කටයුතු කිරීම බවත් ය යන මතය සාධාරණ මතයක් බව පෙනී යනවා ඇත. මක්නිසාද යත් තමන් සතුව නොපවත්නා බලයක් පවරා ගනිමින් ඉනික්බිතිව පැවැත්වෙන සම්පූර්ණ නඩු විභාගය නිෂ්ප්‍රභා කරවමින් උසාවියක් සිදු කරන වරදකුත් හරියාකාර අන්දමින් අධිකරණ බලතල පවරා ගත් උසාවියක කරුණු හෝ නීතිය සම්බන්ධයෙන් සිදු කරන වරදකුත් අතර පැහැදිලි වෙනසක් පවත්නා හෙයිනි. සාධාරණ මතයක් හැටියට මා කලින් ගෙන හැර දැක්වූ මතය අනුව මුලින් වරද නිවැරැදි කිරීම සර්ටියෝරේරයි ආඥාවක සීමාව තුළට වැටෙන අතර අනික අභියාචනාධිකරණයක සීමාව තුළට වැටෙයි. කෝල්ඩිකොට් හෝ හම්ප්‍රිස් හෝ ග්‍රෙෂන් යන විනිශ්චයකරුවන්ගේ තීන්දුවලින් මෙවැනි වෙනසක් මත පදනම්වූ තර්කයක් ඔවුන්ගේ සලකා බැලීම සඳහා ඉදිරිපත් කරන ලද බවක් නොපෙනේ. එසේ කරන ලද නම් ඔවුන් පැමිණියාවූ තීරණවලට ම පැමිණියද වෙනත් මගකින් ඒ තීරණයන්ට පැමිණෙනවා ඇත. අධිකරණ බලතල නොමැති උසාවියක් විසින් සිදුකර ඇති නිෂ්ප්‍රභාවක (Nullity) පුනරීක්ෂණය කිරීම සඳහා අභියාචනා අයිතියක් නොමැති හෙයින් ඔවුන්ගේම තීන්දුවලින් ප්‍රකාශිත මූල ධර්මය; එනම් සර්ටියෝරේරයි ආඥාවක් ලැබෙන්නේ අභියාචනයක් මගින් ප්‍රතිකර්මයක් නොලද හැකි විටදී ය යන මූල ධර්මය මත තීන්දුව ලැබිය යුතු වූයේ සර්ටියෝරාරි ආඥාවකට ඉඩ ලබා දෙමිනි. මීට ප්‍රතිවිරුද්ධ තත්වය ගැන සලකා බැලීමේදී වුවද මා ගත් මතය තහවුරු වනු ඇත. මක්නිසාද යත් ඉහත සඳහන් කරන ලද නඩු තීන්දුවල සර්ටියෝරාරි ආඥාවක් ඉල්ලන ලද්දේ නියමාකාරයෙන් බලතල පවරා ගත් උසාවියක් විසින් කරන ලද්දවූ නීතිය පිළිබඳ වරදක් සම්බන්ධයෙන් වී නම් ඉල්ලුම්කරු යථා පරිදි සිය ප්‍රතිකර්මය අභියාචනයක් මගින් ඉල්ලා සිටිය යුතුව තිබුනේය යන හේතුව උඩ එවැනි ඉල්ලීම් ප්‍රතික්ෂේප විය යුතු යයි මම සිතමි. මා ප්‍රකාශ කොට ඇති මතය නිවැරැදි නම් වෙනත් ප්‍රතිකර්මයක් ඇති කල සර්ටියෝරේරයි ආඥාවක් නොලද හැකිය යන මූල ධර්මය මෙහි දී ද බලපවත් වනැයි මට පෙනේ. මක්නිසාද යත් අධිකරණ බලතල ඉක්මවා යැමක දී නියම අන්දමට නම් අභියාචනයකට අයිතියක් නොපවත්නා හෙයිනි. මෙය වඩාත් යුක්තිසහගත මතය යැයි ගැනීමට පවා මා පොළඹවන තත්ව හේතුවක් නම් අධිකරණ ආඥා මගින් ලබන ප්‍රතිකර්ම අති විශේෂ ප්‍රතිකර්ම වන අතර, ඒවා මුල සිටම හැඩ ගැසී ඇත්තේ වෙනත් කිසිම ප්‍රතිකර්මයක් නොමැති අවස්ථාවන්හි දී සහනය සලසා දීම සඳහාය යන්න සාමාන්‍යයෙන් පිළිගැනී ඇති නිසාත් මෙම ප්‍රතිකර්මය වෙනත් ප්‍රතිකර්මයක් ඇති අවස්ථාවන් හිදීත් භාවිතයට ගෙන ඇත යන්න සැක සහිත වීමත්ය.

ග්‍රෙෂන් විනිශ්චයකාරතුමා සිය නඩු තීන්දුවේදී පැමිණිනිරණයට එන අතරම වෙනත් ප්‍රතිකර්මයක් හෝ ඒ හා පමණට ම පහසු වූ ප්‍රතිකර්මයක් පවත්නා විට ඉහළ උසාවිය ප්‍රතිපත්තියක් වශයෙන් මැන්ඩාමුස් හෝ සර්ටියෝරාරි හෝ ආඥාවක් නිකුත් කරන බව පිළිගත් බවද සැලකිල්ලට ගත යුතුව තිබේ. ඉහත සඳහන් කෙරුණු මතය සැකයට තුඩු දෙන කාරණයක් වන්නේ නම්, එම සැකය පැන නැගිය හැක්කේ සර්ටියෝරේරයි ආඥාවක් සම්බන්ධයෙන් මිස ඉල්ලුම්කරුට වෙනත් ප්‍රතිකර්මයක් නොමැති විට පමණක් දිය යුතුය යන මූල ධර්මය අනුව දෙනු ලබන මැන්ඩාමුස් ආඥාව සම්බන්ධයෙන් නොවේ. අන්‍යතර ප්‍රතිකර්මය හුදෙක් ව්‍යවහාර නීතිය යටතේ පැන නගින්නක් නොව එම අයිතිය බිහි කළ ව්‍යවස්ථාව මගින්ම ස්ථාපනය කෙරුනු ප්‍රතිකර්මයක් වූ කල්හි පීඩාවට පත් පක්ෂයට ව්‍යවස්ථාපිත ප්‍රතිකර්මය නොඉල්වා ගැලවී යාමට මගක් නැත.

අන්‍ය ප්‍රතිකර්මයක් පැවතීමෙන් මැන්ඩාමුස් ආඥාවක් ලැබීමට බාධාවක් නැත යන පදනම පිළි ගත්තේ වුවද, දැනට අප ඉදිරියේ ඇති ඉල්ලීම සම්බන්ධයෙන් වෙනත් බාධා පැන නගී. මක් නිසාද යත් මෙය පළමුවරට ම්මම උසාවියට කරන ලද්දක් නොව උචිත අධිකරණයෙහි අඩක් දුර ගොස් ඉන් නියෝගයක්ද ගෙන ඉක්බිතිව මෙම උසාවියට කරන ලද්දක් වන හෙයිනි. වගඋත්තරකරුගේ අධිනීතිඥවරයා විසින් ඉතා යුක්තිසහගත ලෙස ගෙන හැර දක්වන ලද පරිදි මේ වූ කලි නියම වශයෙන්ම අභියාචනාධිකරණයේ නියෝගය ක්‍රියාත්මක කිරීමට කරන ඉල්ලීමකි. මේ අරමුණ උදෙසා මැන්ඩාමුස් ආඥාවක් ලද හැකිය යන මතය තහවුරු කරන මෙම උසාවියේ නඩු තීන්දුවක් ගැන මා අසා නැති අතර, පෙත්සම්කරුගේ අධිනීතිඥවරයා එවැන්නක් ගැන මෙම උසාවියට දන්වාද නැත. උසාවියේ නියෝගය අඩංගු

'අ' අක්ෂරය දරණ ලියැවිල්ලෙන් හා එම නියෝගය අනුව නිකුත් කරන ලදැයි කියැවෙන 'බී' අක්ෂරය දරණ ලියැවිල්ලෙන් පෙනී යන්නේ පෙත්සම්කරු මැන්ඩාමුස් ආඥාවක් ඉල්ලා ඇත්තේ හුදෙක්ම ඔහු වෙත නිකුත් කරන ලද සහතිකය නිවාස හා නගර සංවර්ධන ආඥා පනතේ 15 වැනි ඡේදය අනුව නිකුත් කරන ලද්දක් නොවන නිසාය. එසේ නැති නම් පෙත්සම්කරුගේ අයිනිතිඥවරයා තර්ක කළ පරිදි වගඋත්තරකරු නියෝගය අනුව ක්‍රියාකිරීම ප්‍රතික්ෂේප කළ හෙයිනි.

ආඥා පනතේ 95 වැනි ඡේදයෙන් එම උසාවියෙන් කෙරෙන කිසියම් තීරණයක් වෙතොත් එය දිස්ත්‍රික් උසාවිය මගින් එම උසාවියේම නඩු තීන්දුවක් හෝ නියෝගයක් හෝ වූවා සේ ක්‍රියාවට නගනු ඇතැයි කියැවේ. මෙම විධිවිධානය අනුව සලකා බලන විට නඩු තීන්දුවක් ක්‍රියාවට නංවා ගැනීම සඳහා සිවිල් නීති විධිවිධාන සංග්‍රහයේ දක්වා ඇති ක්‍රියා පටිපාටිය පෙත්සම්කරු විසින් අනිවාර්යයෙන්ම අනුගමනය කළ යුතුව තිබින. අභියාචනාධිකරණයේ තීන්දුව ක්‍රියාත්මක කර ගැනීම සඳහා ඔහු විසින් මේ නිසා පළමුවෙන්ම එම ක්‍රියා පිළිවෙත අනුගමනය කළ යුතුව ඇත. පෙත්සම් කරු ක්‍රියාත්මක කරවා ගැනීමට උත්සුක වූ නියෝගය වැන්නක් සම්බන්ධයෙන් ඉහත කී ක්‍රියා පටියාටිය අදල නොවන්නේ යැයි තර්ක කිරීමටද උත්සාහයක් දරන ලදී. මෙම අවස්ථාවේදී එම ප්‍රශ්නය නිරාකරණය කිරීමට මෙම උසාවිය උත්සාහ දැරීම අකාලීන මෙන්ම අහිතකර ද වන්නේය. මොන යම් හේතුවක් නිසා හෝ පෙත්සම්කරු එම ක්‍රියාපටියාටිය අනුගමනය කොට එම ක්‍රියාපටිපාටියේ අඩුලුහුඩුකමක් නිසා සිය අභිමතාර්ථය මුදුන් පමුණුවා ගත නොහී මෙම උසාවියට පැමිණුනා නම් ප්‍රශ්නය මීට වඩා වෙනස් වන්නට තිබින. පෙත්සම්කරු මේ විධිවිධානවලින් ප්‍රයෝජනය නොගෙන දිස්ත්‍රික් උසාවියේ නඩු තීන්දුවක් ලෙස ක්‍රියාත්මක කර ගත යුතු නියෝගයක් ක්‍රියාත්මක කරවා ගැනීමට මෙම උසාවියට පැමිණ ඇත. මෙම ක්‍රියා පිළිවෙත නීතියේ නොදක්නා ලද්දක් වන අතරම උසාවියේ නියෝගය ක්‍රියාත්මක කර ගැනීම සඳහා එම අයිතිය බිහි කළ ව්‍යවස්ථාවෙන්ම විශේෂිතවූ ක්‍රියාපටිපාටිය පිටු දකිමින් ගෙනෙන ලද්දකි. වගඋත්තරකරුගේ අයිනිතිඥවරයා මෙම ප්‍රශ්නයම සලකා බලා ලද රජින එ. *වික්ටෝරියා උද්‍යාන සමාගම (1841) Q.B. 288* නම් නඩුව වෙත අපේ සැලකිල්ල යොමු කළේය. එම නඩු තීන්දුවේදී ඩෙන්මන් අග්‍රවිනිශ්චයකාරතුමා මෙසේ පැවසීය. ''නමුත් ඒ අන්දමට පැමිණෙන ලද නඩු තීන්දුව නිවැරැදි යැයි පූර්ව නිගමනය කළද, පැමිණිලිකරුට එය එසේ නොවේ යැයි කීමට ඉඩ ඇතැයි අපි නොසිතමු. මෙය යටත් පිරිසෙයින් පැමිණිලිකරුගේ ඉල්ලීමේ මුල් කොටසට තීරණාත්මක පිළිතුරක් වන්නේය. මක්නිසාද යත් පැමිණිලිකරුට එවිට තීන්දුව ක්‍රියාත්මක කර ගැනීමේ සාමාන්‍ය ප්‍රතිකර්මය තිබෙන අතර ගෙවීම් කරන ලෙස නියෝග කරමින් මැන්ඩාමුස් ආඥාවක් හුදෙක් පවත්නා කරුණු උඩ තීන්දුව ක්‍රියාත්මක කිරීම නිෂ්ඵල විය හැකි නිසා ම අපට යැවිය නොහැකි හෙයින්ය.'' එම නඩුවේ පැන නැගුනු ප්‍රශ්නයට පිළිතුර ලෙස ඩෙන්මන් සාමිවරයා සැලකූ දෙය වඩාත් ප්‍රබල ලෙස මෙම නඩුවේදී බලපවත්වයි. එසේ වනුයේ අභියාචන මණ්ඩලයේ තීරණයන් තමන්ගේ නඩු තීන්දු ලෙසින් දිස්ත්‍රික් උසාවිය විසින් ක්‍රියාත්මක කළ යුතුය යන ව්‍යවස්ථාපිත විධිවිධානය හේතු කොට ගෙනය. එවැනි තීන්දුවක් ලබා ගත්තකු එය දිස්ත්‍රික් උසාවිය මගින් ක්‍රියාත්මක කරවා ගැනීමට මෙම විධිවිධානය විසින් යොමු කරවන බව මෙයින් අවශ්‍යයෙන්ම පෙනී යනු ඇත.

තමාගේ තර්කය සනාථ කිරීම් වස් පෙත්සම්කරුගේ අයිනිතිඥවරයා තවත් නඩු තීන්දු ගණනාවක්ම අපගේ අවධානයට යොමු කරවීය. මෙම නඩු තීන්දු විභාග කර බැලීමේ දී ඔහුගේ තර්කයට ඒවායින් සීමිත ආධාරයක් එක් එක් විශේෂ අවස්ථාවන් සම්බන්ධයෙන් ලැබෙන බව පෙනේ. කෙසේ වුවත් වෙනත් ප්‍රතිකර්ම තිබිය දී වුව ද මැන්ඩාමුස් ආඥාවක් ලද හැකිය යන මූල ධර්මයට ඒවායින් පිහිටක් නොලැබේ. මා දැනට ප්‍රකාශ කොට ඇති මතයට පටහැනි මතයක් ගැනීමට මට ඒවායින් අනුබලයක් නොලැබෙන නිසා එම නඩු තීන්දු විස්තරාත්මකව සලකා බැලීමක් අවශ්‍ය වන්නේ නැත.

මේ අනුව මෙම ඉල්ලීම ගාස්තුවටද යටත් කොට මෙයින් ප්‍රතික්ෂේප කරනු ලැබේ.

සිව සුප්‍රමානියම් විනිශ්චයකාරතුමා:

මගේ සහෝදර ගරු වැඩබලන අග්‍රවිනිශ්චයකාරතුමාගේ තීන්දුව හා සමග මම එකඟ වෙමි. මේ නඩුවට සම්බන්ධ කරුණු එතුමාගේ නඩු තීන්දුවේ සම්පූර්ණ ලෙස විස්තර කර තිබේ.

මේ නඩුවේදී පෙත්සම්කරු ක්‍රියාත්මක කරවා ගැනීමට උත්සාහ කරන අයිතිවාසිකමත්, ඒ සමගම වගඋත්තරකරු වෙත පැවරෙන වගකීමත් පැන නගින්නේ ව්‍යවහාර නීතියෙන් නොව නිවාස හා නගර සංවර්ධන ආඥා පනතේ 15 වැනි ඡේදය යටතේය. එම වගකීම් පැහැර හැරියොත් ලැබෙන දඬුවමද එම ආඥා පනතින්ම නියම වී තිබේ. 16 වැනි ඡේදයෙන් මෙසේ දැක්වේ: 15 වැනි වගන්තියට අනුව ක්‍රියා කිරීමට සභාපති විසින් ප්‍රතික්ෂේප කරනු ලැබීමෙන් හෝ ..... සභාපතිගේ ප්‍රමාදයක් නිසා

හෝ ..... පිඩාවට පත් කෙනකුට අභියාචනාධිකරණයට අභියාචනය කළ හැක. මෙම ආඥා පනතේ හෝ වෙනත් ආඥා පනතක විධිවිධානයන්ට යටත්ව එවැනි අභියාචනයකදී අභියාචනාධිකරණයට යෝග්‍ය යැයි හැඟෙන තීන්දුවක් දිය හැකිය. 95 වැනි ඡේදයෙන් මෙසේ කියැවේ. ''මෙම අධිකරණයේ ඕනෑම තීන්දුවක් හෝ නියෝගයක් දිස්ත්‍රික් උසාවිය මගින් එම උසාවියේ තීන්දුවක් හෝ නියෝගයක් ලෙස ක්‍රියාත්මක කළ යුතුවේ.''

අනුකූලතා සහතිකයක් දීමට වගඋත්තරකරු අපොහොසත් වූ විට පෙත්සම්කරු ආඥා පනත අනුව ක්‍රියා කරමින් ඒ සඳහා ආඥා පනතේ 88(1) ඡේදයෙන් අභියාචනාධිකරණය වශයෙන් නියම වී ඇති මහනුවර දිස්ත්‍රික් උසාවියට අභියාචනයක් ඉදිරිපත් කළේය. ආඥා පනතේ 15 වැනි ඡේදය යටතේ අනුකූලතා සහතිකය දෙන ලෙස වගඋත්තරකරුට අණ කරන නියෝගයක් ඔහු එම උසාවියෙන් ලබා ගත්තේය. ඔහුගේ ප්‍රධාන පැමිණිල්ල වනුයේ වගඋත්තරකරු මේ නියෝගයට අනුව ක්‍රියා කොට නැති බවයි.

සිය පෙත්සමේ 17 වැනි හා 18 වැනි ඡේදවල ඔහු මෙසේ කරුණු දක්වා තිබේ.

> ''17. පෙත්සම්කරු ගෞරව සහිතව ගෙන හැර දක්වන්නේ නිවාස හා නගර සංවර්ධන ආඥා පනතේ 15 වැනි වගන්තිය යටතින් වගඋත්තරකරු අනුකූලතා සහතිකයක් නිකුත් කිරීමේ ව්‍යවස්ථාපිත වගකීමකට යටත්ව සිටින බව හා අභියාචනාධිකරණය වන මහනුවර දිස්ත්‍රික් උසාවියේ අංක 7547/ඉඩම් — අභියාචනයේ නියෝගයට අනුව ක්‍රියා කිරීමට බැඳී සිටින බවත්ය.
>
> 18. පෙත්සම්කරු ගෞරවයෙන් යුතුව කියා සිටින්නේ වගඋත්තරකරු අභියාචනාධිකරණයේ නියෝගය අනුව ක්‍රියා නොකිරීම නීත්‍යානුකූල නොවනවා මෙන්ම නීතිවිරෝධි බවත්ය.''

කෙසේ වුවද අභියාචනාධිකරණයේ තීන්දුව ක්‍රියාත්මක කර ගැනීම සඳහා ව්‍යවස්ථාවෙන් සැලසී ඇති අනිත් පියවරවල් ගැනීමට පෙත්සම්කරු අසමත් වී තිබේ. එසේ නොකොට ඔහු නිවාස හා නගර සංවර්ධන ආඥා පනතේ 15 වැනි වගන්තිය යටතේ අනුකූලතා සහතිකයක් තමාට නිකුත් කරන ලෙස වගඋත්තරකරුට අණ කරන ආඥාවක් ලබා ගැනීම සඳහා මෙම උසාවියට ඉල්ලීමක් ඉදිරිපත් කොට තිබේ.

දිස්ත්‍රික් උසාවියේ නියෝගය ක්‍රියාත්මක කිරීමට වගඋත්තරකරු පෙළඹවීම සඳහා මැන්ඩාමුස් නියෝගයක් ඉල්ලා සිටීමට පෙත්සම්කරුට අයිතියක් නොමැති බව ඔහුගේ අධිනීතිඥවරයා පිළිගත්තේය. කෙසේ වුවත් වගඋත්තරකරු ඉහත කී ආඥා පනතේ 15 වැනි වගන්තිය අනුව ක්‍රියා කිරීමට අසමත් වූ විට ප්‍රථම අවස්ථාවේදී ම මෙම උසාවියෙන් මැන්ඩාමුස් ආඥාවක් ලබා ගැනීමට පෙත්සම්කරුට අයිතියක් පැවැති බවක් එක්තරා අවස්ථාවක් වනතුරු ආඥා පනතේ 16 වැනි ඡේදය අනුව ක්‍රියා කොට තිබීම මෙයට බාධාවක් නොවන බවත් පෙත්සම්කරුගේ අධිනීතිඥවරයා තර්ක කළේය.

ඒ කෙසේ වුවද මෙහි දී පැන නගින ප්‍රශ්නය වනුයේ මුල් අවස්ථාවේදීම පෙත්සම්කරුට මෙම උසාවියෙන් ආඥාවක් ඉල්ලා සිටීමේ අයිතියක් තිබුනේද යන්නයි. *වුල්වහැම්ප්ටන් ජල කර්මාන්ත යමාගම එ. හෝක්ස් පෝඩ්*, 6 කොමන් බෙන්ච් වාර්තා (න.ස.) 336–356 පිට විල්ස් විනිශ්චයකාරතුමා මෙසේ පැවසීය.

> ''ව්‍යවස්ථාවක් පදනම් කොට ගෙන වගකීමක් තහවුරු කළ හැකි අවස්ථා තුන් වර්ගයක් ඇත. එකක් නම් ව්‍යවහාර නීතිය යටතේ වගකීමක් පැවති එය ව්‍යවහාර නීතියේ පැවැති ප්‍රතිකර්මයට වඩා විශේෂ වූත් අසාමාන්‍ය වූත් විධියක ප්‍රතිකර්මයක් ගෙන දෙන ව්‍යවස්ථාවක් මගින් සම්මත වූ විටයි. මෙතැනදී ව්‍යවහාර නීතියේ පැවැති ප්‍රතිකර්මයට ප්‍රකාශිත ලෙස හෝ ව්‍යංගයෙන් හෝ බැහැර කිරීමක් ව්‍යවස්ථාවේ නැත්නම් නඩු පවරන පාර්ශ්වයට එම ප්‍රතිකර්මය හෝ ව්‍යවස්ථානුගත ප්‍රතිකර්මය හෝ ලබා ගැනීමේ අයිතිය තිබේ. දෙවන වර්ගය නම් ව්‍යවස්ථාවෙන් නඩු පැවරීමේ අයිතිය ලබා දෙන අතර ප්‍රතිකර්මය සඳහා විධිවිධානයක් නොසලසන අවස්ථාවයි. මෙහිදී ව්‍යවහාර නීතිය යටතේම පමණක් ඒ පක්ෂය ක්‍රියා කළ යුතු වෙයි. තෙවැනි ගණයක්ද වේ. එනම් ව්‍යවස්ථාවකින් ව්‍යවහාර නීතියේ නොපවත්නා වගකීමක් කිහි කරමින් ඒ අතරම එය ක්‍රියාවට නැගීමට විශේෂවූ ප්‍රතිකර්මයක් නියම කරන අවස්ථාවයි. ව්‍යවස්ථාවෙන් දෙනු ලබන ප්‍රතිකර්මය අනුගමනය කළ යුතු අතර දෙවන වර්ගයට අයත් අවස්ථාවලදී මෙන් ක්‍රියා නොකිරීමට නඩු පවරන පක්ෂයට හැකියාවක් නොමැත.''

විල්ස් විනිශ්චයකාර තුමා විසින් දක්වන ලද තුන්වැනි ගණයට අප ඉදිරියේ ඇති නඩුවද වැටෙන්නේය.

පැස්මෝ සහ තවත් අය එ. ඔස්වල්ඩ්-ථිව්ස්වල් දිස්ත්‍රික් නගර සභාව (1898) ඇපැල් නඩු 387, කාරණයට අදල නඩුවකි. 1875 මහජන සෞඛ්‍ය පනතේ 15 වැනි ඡේදයෙන් මෙසේ කියැවේ. ''සෑම පළාත් ආණ්ඩු සභාවක්ම තමන් යතු කානු අළුත්වැඩියා කොට තබා ගත යුතු අතර, මේ පනතේ පරමාර්ථයන් සඳහා අවශ්‍යවන පරිදි සාර්ථක ලෙස තම දිස්ත්‍රික්කයේ ජල වහනය කිරීම සඳහා අවශ්‍ය කානු තැනිය යුතු වන්නේය.''

299 වැනි ඡේදය මෙසේය: ''කිසියම් පළාත් පාලන සභාවක් තමන්ගේ දිස්ත්‍රික්කයට සෑහෙන පරිදි කානු සපයා නොමැති බවට පළාත් පාලන මණ්ඩලයට පැමිණිලි කරනු ලැබූ කල්හි ..... යථා පරිදි විභාග කිරීමෙන් පසු එම පළාත් පාලන සභාව චෝදිත වරදකර ඇතැයි

පළාත් පාලන මණ්ඩලයට වැටහී ගියහොත්... ..නියෝග කළ යුතුය'' තමන්ගේ කර්මාන්ත ශාලාවෙන් පිටවන ද්‍රව්‍යයයන් ඉවත් කිරීම සඳහා පැවැති කානු ගැන තෘප්තියකට නොපත් පැමිණිලිකරු ඒ ගැන පළාත් පාලන මණ්ඩලයට පැමිණිලි නොකොට දිස්ත්‍රික්කයේ සෑහෙන පරිදි ජලය ඉවත් කිරීම සඳහා ප්‍රමාණවත් ලෙස කානු තැනවීමට පළාත් පාලන සභාවට නියෝග කරවමින් මැන්ඩාමුස් ආඥාවක් ඉල්ලා සිටියේය. පැමිණිලිකරුගේ කර්මාන්ත ශාලාවෙන් ගලා එන ද්‍රවයන් බැස යාම සඳහා කානු සැපයීමට වගඋත්තරකරුවන් මොනවිදියකින්වත් බැඳී ඇත්ද යන්න ප්‍රශ්නය වී පවතින විට 299 වැනි ඡේදය ඊට අදාළ නොවන බවත් ප්‍රකාශිතවම බැහැර කොට නොමැති නම් මේ කරුණ ගැන උසාවියකින් තීන්දුවක් ලබා ගැනීමට පැමිණිලිකරුට අයිතියක් ඇති බවත් පවසමින් චාල්ස් විනිශ්චයකාරතුමා ඉල්ලීමට ඉඩ දුන්නේය. 'පැමිණිල්ලක් කරනු ලැබූ කල්හි' යනුවෙන් කියැවෙන ඡේදය අනුව පළාත් පාලන මණ්ඩලයට පැමිණිලි කොට ව්‍යවස්ථාව පිළිබඳව ඔවුන්ගේ අර්ථ නිරූපණයට යටත්වීමට පැමිණිලිකරු අත්‍යාවශ්‍යයෙන්ම බැඳී නැතැයි ද එතුමා තීරණය කළේය. (1897) ඇපැල් නඩු 384. එහෙත් පැමිණිලිකරුට ඇති එකම ප්‍රතිකර්මය වනුයේ 299 වැනි ඡේදය යටතේ ක්‍රියා කිරීමය යන පදනම මත ආභියාචනාධිකරණය මෙම තීන්දුව ඉවත ලමින් මැන්ඩාමුස් ආඥාව සඳහා කරන ලද ඉල්ලීම ප්‍රතික්ෂේප කළාය. ඉහත පිට 625. අභියාචනාධිකරණයේ තීන්දුව සාමී මන්ත්‍රී මණ්ඩලය විසින්ද අනුමත කරන ලදී. හෝල්ස්බරි සාම්වරයා සිය කථාවේදී මෙසේ පැවසිය (1898) ඇපැල් නඩු 394:

''ව්‍යවස්ථාවක් මගින්ම විශේෂ ප්‍රතිකර්මයක් දෙනු ලැබූ විට ව්‍යවස්ථාපිත ප්‍රතිකර්මයක් ඉල්ලන කෙනකුට එය අහිමි කරවන බවට ඇති මූල ධර්මය අපට හුරුපුරුදු, නීතිය පුරා දිව යන එකකි. ඩෝ එ. බ්‍රජස් (1831) 1 බී. සහ ඇඩ්. 847, 859 නඩුවේ ටෙන්ටර්ඩන් සාම්වරයා එය නිවැරදි ලෙස ප්‍රකාශ කර ඇතැයි සිතමි. එහිදී එතුමා මෙසේ පවසයි. 'ආඥා පනතක් කිසියම් වගකීමක් බිහිකොට එය ක්‍රියාවට නැඟීමට විශේෂ ක්‍රමයක් දක්වා ඇති කල්හි වෙනත් කිසිම ක්‍රමයකින් එය ක්‍රියාවට නැඟිය නොහැකිය යන්න පොදු රීතියක් ලෙස අපි සලකමු.''

විල්කින්සන් එ. බැංකුසංස්ථාව (1948) 1 කේ.බී. 721, නඩුවේ ඇස්ක්විත් විනිශ්චයකාරතුමා මෙසේ පැවසිය.

''කිසියම් ව්‍යවස්ථාවක් විසින් අයිතිවාසිකමක් බිහිකොට එය ක්‍රියාවට නැඟීම සඳහා පැහැදිලි බසින් විශේෂිත ප්‍රතිකර්මයක් හෝ විශේෂිත උසාවියක් නියම කර ඇති විට එම අයිතිවාසිකම ක්‍රියාවට නැඟීමට උත්සාහ කරන පක්ෂය එකී ප්‍රතිකර්මයට හෝ උසාවියටම මිස වෙනත නොපිවිසිය යුතුය යන්න නිසැක වශයෙන්ම යැබෑ නීතිය වන්නේය.''

ඉහත සඳහන් නඩුවලදී තීන්දු කරන ලද මූල ධර්මය මෙම උසාවිය විසින් හෙන්ද්‍රික් අප්පුහාමී එ. ජෝන් අප්පුහාමී, 69 න.නි.වා. 29, නඩුවේදී අනුගමනය කරන ලදී.

මේ නඩුවේදී, ඉහත සඳහන් කළ පරිදි පැමිණිලිකරුට අයිතිවාසිකමකුත් ඊටම සම්බන්ධව වගඋත්තරකරුට වගකීමකුත් පවරන ව්‍යවස්ථාව මගින්ම වගඋත්තරකරු සිය වගකීම පැහැර හැරිය විට පැමිණිලිකරුට අයිති වන ප්‍රතිකර්මයද නියම කොට තිබේ. ඉහත දක්වා ඇති නීතිමය මූල ධර්මය පැමිණිලිකරු මැන්ඩාමුස් ආඥා වකට කරන ඉල්ලීමට සෑහෙන පිළිතුරක් වන්නේය. මේ නිසා එම ඉල්ලීම අසාර්ථක වන අතර එය ගාස්තුවටද යටත් කොට ප්‍රතික්ෂේප කෙරේ.

ගාස්තුවටද යටත්කර
ඉල්ලීම ප්‍රතික්ෂේප කරන ලදී

ද ක්‍රෙට්සර් ශ්‍රේෂ්ඨාධිකරණ විනිශ්චයකාරතුමා ඉදිරිපිටදී

ඒ. අබුසාලි එ. මහනුවර මිල පාලක*

ශ්‍රේෂ්ඨාධිකරණයේ නඩු අංකය 964/68 — මහනුවර මහේස්ත්‍රාත් උසාවි නඩු අංකය 53132

විවාද කළේ: 1969 මාර්තු 16 ද සහ 19 ද
තීන්දු කළේ: 1969 අප්‍රෙල් 26 ද

මිල පාලන පනත — කටු සහිත මස් විකිණීමේදී කටුවල බර ප්‍රමාණය විකුණන මුළු බරවූ රාත්තලට සියයට 25 නොඉක්මවිය යුතු යයි කරන නියෝගය — නියම සියයට ප්‍රමාණය දැන ගැනීමට නොහැකි නිසා නියෝගයෙහි ඇති යුක්තිසහගත බව — නීතිමය බලයෙන් පිට බව. (ultra vires)

(අ) කටු සහිත මස්වල පාලන මිල රු. 2.25 ක්ට තිබියදී, රු: 2.50 ක වැඩි මිලකට විකිණූ චෙයයි ද

(ආ) කටු සහිත මස් රාත්තලක කටුවල බර ප්‍රමාණය මුළු බරවූ රාත්තලකින් සියයට විසිපහ නොඉක්මවිය යුතුය යන්න, 7.8.62 දින දරණ අංක 13255 රජයේ ගැසට් පත්‍රයෙහි 3 වැනි ඡේදයෙහි පළ කරණ ලද අංක කේ.ඩී. 107 මිල නියෝගයට විරුද්ධව කටු සහිත එළුමස් රාත්තලක් කටුවල බර ප්‍රමාණය මුළු බරින් සියයට විසිපහ ඉක්මවා විකුණුවේ යයි ද යන චෝදනාවලට මස් වෙළෙන්දකු වූ විත්තිකරු වරදකරු විය.

තීන්දුව: (1) එම මිල පාලන නියෝගය නීතිමය බලයෙන් පිටය. එසේ වන්නේ කටු සහිත මස් විකුණන විට, කටු ප්‍රමාණය සියයට 25 ට වැඩි නොවිය යුතුය යනු දැන ගැනීමට මස් වෙළෙන්දකුට කටුවලින් මස් ඉවත් නොකොට එය දැන ගැනීමට බැරි බැවිනි.

(2) විත්තියේ සාක්ෂිය බොරුවූ පමණින් පැමිණිල්ලේ සාක්ෂි සත්‍ය බව කිව නොහැක.

ඇන්. සත්යේන්ද්‍ර මහතා, විත්තිකාර ඇපැල්කරු වෙනුවෙන්.

ටිරොන් ප්‍රනාන්දු (රජයේ නීතිඥ) මහතා, නීතිපතිවරයා වෙනුවෙන්.

ද ක්‍රෙට්සර් විනිශ්චයකාරතුමා:

මහනුවර මහේස්ත්‍රාත්තුමා (ඩී. ඊ. ධර්මසේකර මහතා) අබුසාලි නමැති මස් වෙළෙන්දකු වන විත්තිකරු, ඔහුට විරුද්ධව ඉදිරිපත් කර තුබූ පහත දැක්වෙන චෝදනා දෙකට වරද කරු කළේය.

1. පාලන මිල රු. 2.25 ක් ව තිබියදී කටු සහිත එළු මස් රාත්තලක් රු. 2.50 ට විකිණීම.
2. මස් රාත්තලක මුළු බරින් සියයට විසිපහකට අධික ප්‍රමාණයක් කටු සහිත එළු මස් රාත්තලක් විකිණීම.

මහේස්ත්‍රාත්තුමා එක් වරදකට විත්තිකරුට බරපතල වැඩ ඇතිව සති හතරක සිර දඬුවමක් සහ රු. 250/- ක දඩයක් ද බැගින් නියම කළේය. දඩය නොගෙවුවහොත් බරපතල වැඩ ඇතිව දෙ-සතියක හිර දඬුවමක් නියම කළ අතර, හිර දඬුවම් එක් වර ගෙවී යාමට නියම විය. විත්තිකරු ඇපැල් ගත්තේය. මෙයට අදාල අංක කේ.ඩී. 107 දරන මිල නියෝගය 62.8.7 වැනි දින ජී.ජී. 13255 හි දැක්වෙන අතර, නියෝගය සඳහා එළුමස් යනු බැටළු හෝ එළු මස් යයිද එහෙත් සියලුම වර්ගවල බොකු බඩවැල් බැහැර වන බවද එළු මස් මිල පහත දැක්වෙන සේ පාලනය කෙරෙන බවද දෙවැනි ඡේදයේ දක්වයි:

1. කටු රහිත මස් රාත්තලක් රු. 2.50 යි.
2. කටු සහිත මස් රාත්තලක් රු. 2.25 යි.

''කටු සහිතව මස් විකුණන විට ඒ හා විකුණනු ලබන කටුවල බර විකුණන මුළු බරින් සියයට විසිපහක් නොඉක්මවිය යුතුය'' යි නියෝගයේ 3 වැනි ඡේදයෙන් අණ කෙරෙයි. කටු සහිතව මස් විකුණන්නාට නොකළ හැක්කක් කළ යුතු යයි ඉන් දැක්වෙන නිසා ඇපැල් කරුගේ නීතිඥයා සාවද්‍යයයි කියා සිටින්නේ මෙම නියමයයි. මසින් කටු වෙන් නොකරන ලද කල, එය මුළු බරින් කවර සියයට ප්‍රමාණයෙක් දැයි කියන නිරවද්‍ය තාවට එහි අඩංගු කටු ප්‍රමාණය නිසැකව දැන ගැනීම කළ නොහැක්කක් බව හේ කියා සිටියි. නිදසුනක් වශයෙන් මස් වෙළෙන්දකු එළු මස් කැබැල්ලක් විකුණන විට මස් කැබැල්ලේ මස් සූරා ගෙන මස් හා කටු වෙන් වෙන්ව කිරා, එනම් මිලට ගන්නාට අවශ්‍ය දෙය වන මස් කැබැල්ලක් නොවන තත්ත්වයට පත් නොකොට විනා එහි කවර සියයට ප්‍රමාණයක් කටු දැයි ඔහුට නිවැරැදිව නිශ්චය කළ නොහැකිය. එළු මස් රාත්තල් තුන් කාලක් සහ කටු රාත්තල් කාලක්ද විකිණීම එළු මස් රාත්තලක් විකිණීම වුවද, එය විකුණන අවස්ථාවේ බෙදා නොදැක්විය හැකි සමස්තයක් වන කටු සහිත එළු මස් රාත්තලක් විකිණීමට වඩා වෙනස්ය. මස් කඩවලදී මිලට ගනු ලබන එළු මස් කැබලිවල මස් හා කටු එක්ව තිබීම එය මිලට ගන්නා අභිප්‍රායයට අවශ්‍ය වන අතර එළු මස් හා කටු වෙන් වෙන්ව විකිණීම ආදේශයක් වශයෙන් ප්‍රමාණවත් ලෙස යෙදිය නොහැකිය. මිල නියෝගය මෙය පිළිගනී. මිල නියෝගය එළු මස් මිල විනා කටු මිල පාලනය නොකරන බැවින් එළු මස් දෙවර්ගයකින් යුත් විය යුතු බව එය පිළිගනියි. 1. කටු සහිත එළු මස්, 2. කටු රහිත එළු මස් යනුවෙනි. එය එසේ නොවිණි නම් එළු මස් මිල පමණක් පාලනය කොට බොකු බඩවැල් සහිත එළු මස් පිළිබඳව මෙන් එය දැක්වීමෙන් පමණක් සෑහීමට පත් වන්නට එයට තිබිණ. (මිල නියෝගයේ 5 වැනි ඡේදය බලන්න.) එළු මස් කටු සහිතව විකුණන විට කටුවලින් වෙන්ව කිරිය යුතුය.

නොකළ හැකි යමක් කිරීමට නීතිය කිසිවකුට බල නොකරයි. නොකළ හැක්කක් කරන ලෙස මිල නියෝ-

*ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංගයෙහි 77 වෙනි කාණ්ඩයෙහි 70 වෙනි පිට බලනු.

ගය කෙනකුට නියම කරන විට, එවැනි නියෝගයක් කිරීමට මිල පාලකට බලය දීමට පාර්ලිමේන්තුව කිසි විටක අදහස් නොකළ අතර එය අසාධාරණ හා නීතියෙන් පිට බවද උසාවියට ස්ථිරවම කිව හැකිය. මෙහිදී ද කටු සහිත එළු මසේ ඇති කටු සියයට ප්‍රමාණය කොපමණදැයි කිව නොහැකි බවට මම සම්පූර්ණයෙන් සෑහීමට පත්ව සිටිමි. මෙහිදී පවා පශු වෛද්‍යවරයකු කැඳවීමට සිදුවුණු අතර, තමා මස්වලින් කටු ඉවත් කොට බර කිරුවූ බව හේ කියයි. මෙම පැමිණිල්ල කරන ලද්දේ එම බර කිරුම් අනුවයි. කටු සහිත එළු මස් චිකිණීමක් කැරුණු තැන කටුවල සියයට ප්‍රමාණය සියයට 25 නොඉක්ම විය යුතුයයි කියා සිටීම කොතරම් අසාධාරණදැයි කිවහොත්, ඒ බව පළ කෙරෙන මිල නියෝගය නීතියෙන් පිට බව මම තීරණය කෙරෙමි. කටුවල බර මුළු මස් ප්‍රමාණයෙන් සියයට 25 ක් ඉක්මවන පරිදි කටු සහිත එළු මස් රාත්තලක් චිකිණීමේ චෝදනාවට චිත්තිකරු වරදකරු කැර තිබීම මින් ඉවත් කෙරෙයි. 1 වැනි චෝදනාවට වරද කරු කිරීම දැන් ඉතිරිව තිබේ. තමාගෙන් ඉල්ලන ලද්දේද, තමා සැපයුවේ ද කටු සහිත එළු මස් රාත්තලක් බව චිත්තිකරුගේම සාක්ෂියයි. කටු එක් කිරීමෙන් බර සම්පූර්ණ කළ බව පෙනී යන කටු සහිත එළු මස් රාත්තලක් ඔහු සැපයූ බව පැමිණිලිකරුගේ සාක්ෂිය පශු වෛද්‍ය වරයාගේ සාක්ෂිය හා කියැවූ විටද තහවුරු වේ. සාක්ෂිවල ගැටුම ඇත්තේ අය කරන ලද මිල පිළිබඳව ය. මුදල් ගෙවීමේදී තමාට දෙන ලද රු: 5/- න් ඉතිරි මුදල වශයෙන් රු: 2/50 ක් දුන් බව චිත්තිකරු පිළිගන්නා අතර, තවත් සත 25 ක් ආපසු දීමට තමා අදහස් කළේ යයි ද මාරු කාසි නොතුබූ බැවින් ඒ සඳහා සත 50 ක් මාරු කිරීමට යැවූ බවද හේ කියයි. මාරු කාසි සත 25 ක් තිබෙදැයි තමාගෙන් ඇසූ බව පිළිගන්නා අතර සත 25 ක් තිබෙදැයි චිත්තිකරු අවට සිටියවුන්ගෙන් ඇසීද යන්න හා චිත්තිකරු මාරු කිරීම සඳහා සත 50 ක් දුන් බවද තමාට මතක නැතැයි හේ පුදුමාකාර ලෙස කියයි. එහෙත් තමා චිත්තිකරුගෙන් ''ගණන හරිද?'' යි අසා චිත්තිකරු ''ඔව්'' යයි කී විට අනෙක් පරීක්ෂක වරුන්ට පැමිණීමට දෙන, එකහවූ සංඥාව වශයෙන් පාර්සලය එසවූ බව හේ කියා සිටී. තමා ඒ ප්‍රශ්නය ඇසුවේ නැතැයි යන්න හරස් ප්‍රශ්න ඇසීමේදී ඔහු නොපිළිගෙන ඇත.

මහේස්ත්‍රාත්තුමා චිත්තිකරු වරදකරු කිරීමට මේ සාක්ෂිය පදනම් කොට ගෙන ඇත. ඔහු සත්‍යවාදී ලෙස තම සාක්ෂිය දුන් බව මහේස්ත්‍රාත්තුමා කියයි. එහෙත් සත්‍ය සිද්ධියක් ගැන කියන තැනැත්තකුට සත්‍යවාදී ලෙස සාක්ෂි දිය හැකි නමුදු හැඟීමේ වෙනසක් ඇති නොකොට බොරුවක් ඇතුළු කළ හැකිය යන්න ගැන එතුමා සිත මෙහෙයවා නැත. මෙහි ඇති කාරණය නම් ගණන හරිදැයි ඇසූ බව සත්‍ය ද යන්නයි. මෙම තත්ත්වය යටතේ මෙය ඇසීම අමුතු ප්‍රශ්නයකියි මට පෙනේ. චිත්තිකරු මාරු කාසි ඉල්ලූ බව පිළිගෙන තිබියදී නිසැකයෙන්ම ඔහු විසින් ඇසිය යුතුව තුබුණේ ''ඉතිරි සත 25 කෝ?'' යන්නයි. ගනු දෙනුව බලා සිටීමේ නියමිත කාර්යය පිණිස යවන ලදුව උගුල්කරු (decoy) කී පරිදි අඩි හතරකට හෝ පහකට හෝ ඇතින් එසේ කරමින් සිටි පරීක්ෂකවරයාව කැඳවීමෙන් ඔහුගේ සාක්ෂිය මෙම වැදගත් කරුණ මත තහවුරු කිරීමට පැමිණිල්ලට ඉඩ තිබිණ. එහෙත් පැමිණිල්ල ඔහු කැඳවූයේ නැත. චිත්තිය වෙනුවෙන් කැඳවන ලද සාක්ෂිකාර පෙරේරා සත්‍යවාදී සාක්ෂිකරුවකු නොවේ යයි මහේස්ත්‍රාත්තුමා කීම නිවැරදි විය හැකි අතර චිත්තිය වෙනුවෙන් දෙන ලද සාක්ෂිවල අසත්‍යතාව, පැමිණිල්ලේ සාක්ෂි සත්‍ය යයි අවශ්‍යයෙන්ම නොදක්වයි.

මහේස්ත්‍රාත්තුමා සාක්ෂිවල මෙම පැති කෙරෙහි සිත් යොමු කොට නැති බැවින්, සැකයේ වාසිය චිත්තියට දීමට අයිතියක් ඇතැයි මට පෙනී යයි. ''සත 25 දිය හැකිවීමට පෙර මා අත් අඩංගුවට ගත්තා'' යි යනුවෙන් චිත්තිකරු කියන දේ සත්‍යයකැයි යනු මා සිතෙහි පහළ වන සැකයයි. මෙම චෝදනාවට වරදකරු කර තිබීමද මම ඉවත් කරමි. චිත්තිකරුගේ ඇපැලට මින් ඉඩ දෙනු ලැබේ.

ඇපැලට ඉඩ දෙන ලදී.

(පරිවර්තනය: කුමාරදස ජයසේකර විසිනි)

අලස් විනිශ්චයකාරතුමා ඉදිරිපිටදී

ආර්. ඒ. වයි. පෙරේරා එ. ඇම්. එච්. මැණිනෝනා හාමිනේ*

ශ්‍රේෂ්ඨාධිකරණ අංකය: 67/68 — කොළඹ රික්වැස්ට් උසාවි අංකය: 95996

විවාද කළේ: 1969 ජූලි 2 වැනිද
හේතු ප්‍රකාශ කළේ: 1969 ඔක්තෝම්බර්, 8 වැනි ද

ගෙවල් හිමියා සහ බදුකරු — බදුකරු මාස තුනකට වැඩි කාලයක්ම ගෙවල් කුලී නොගෙවා ඇත—මාසික කුලිය රු: 100 ට අඩුය — නඩු පැවරීමට පසු කුලියත් හිඟ මුදලත් නගර සභාවේ බලය ලත් නිලධාරියාට කොටස් වශයෙන් ගෙවා ඇත — ගෙවල් හිමියා එම මුදල් භාර ගෙන ඇත — එයින් ගෙවල් හිමියා සිය අයිතිවාසිකම් අත්හැර බදුකරුට නැවත ගෙය බදු දීමක් සිදු කළාද? — ගෙවල් කුලී සීමාකිරීමේ පනත — 1966 දෙළොස්වන සංශෝධනය — බදුකරු තමාගේ උත්තරයේ ප්‍රමාදයට කරුණු ඉදිරිපත් නොකර මේ අනුව උසාවියේ විසඳීමට කරුණක්ද නොනැඟ නමුත් නඩුවේ සාක්ෂි වශයෙන් කරුණු ඉදිරිපත් කොට ඇත — එම සාක්ෂි උසාවිය විසින් භාරගත යුතුද?

*ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 77 වෙනි කාණ්ඩයෙහි 68 වෙනි පිට බලනු.

මාසික ගෙවල් කුලිය රු: 100 ට අඩුවූ ගෙයක වෙසෙන බදුකාරයෙක් මාස තුනකට ගෙවල් කුලී ගෙවීවේ නැත. එවිට ගෙවල් හිමියා ඔහුව ගෙයින් පිට කිරීම පිණිස පිටවීමේ දැන්වීමක් යවා නඩු පැවරිය. මේ සියල්ලට පසු, බදුකරු හිඟ කුලී සියල්ල කොටස් වශයෙන් නගර කරුණු අනුව උසාවිය මගින් විසඳීමට කරුණක් ගෙවල් කුලී සීමා ඛිරිටම පනත 1966 12 වැනි සංශෝධනයේ 12ඒ(1)(ඒ) සහ 12ඒ(2) ඡේද යටතේ නොනැඟිය.

තීන්දුව: (1) මේ නඩුවේ කරුණු අනුව බදුකරු ඔහුගේ ප්‍රමාදයට සාක්ෂි මගින් පමණක් ඉදිරිපත් කළ කරුණු ප්‍රතික්ෂේප කිරීමෙන් උගත් කොමසාරිස්තුමා හරියාකාර අන්දමට ක්‍රියා කළේය.

(2) ගෙවල් කුලී සීමාකිරීමේ පනතේ ආරක්ෂාව ලබන බදුකරුට (ගිවිසුම් බද්ද නිමවුවාට පසු) ගෙවල් හිමියා නඩු පැවරූ පසු මාසික කුලිය භාරගත් හේතුවෙන්ම නැවත ගෙයි විසිමට අයිතිවාසිකම් අත් වෙන්නේ නැත.

අනුගමනය කළ නඩුව: ප්‍රනාන්දු එ. සමරවීර, 52 න.නී.වා 278

සළකා බැලූ නඩු: සමරවීර එ. රණසිංහ, 59 න.නී.වා. 295
කඩි බෝයි එ. කේසයානු, 53 න.නී.වා. 420
ඩැකෝ එ. මෝඩි, 54 න.නී.වා. 354

එස්. එස්. බස්නායක මහතා, චෝදිත ඇපැල්කරු වෙනුවෙන්.

ඩී. ආර්. පී. ගුණතිලක මහතා, පැමිණිලිකාර වගඋත්තරකරු වෙනුවෙන්.

අලස් විනිශ්චයකාරතුමා:

තමා සතු ගෙයින් පිටවී යාමට දෙන ලද නිවේදනයට සහ මෙම නඩුව පැවරුවාට පසුව ගෙහිමියා විසින් එහි කුලිය භාර ගැනීමේ ප්‍රතිඵලයක් වශයෙන් දෙපාර්ශ්වය අතර අලුත් ගෙවල් කුලී කොන්ත්‍රාත්තුවක් ඇතිවී නැද්ද යන ප්‍රශ්නය ඇපැල්කරු වෙනුවෙන් පෙනී සිටි උගත් අයිනීතිඥවරයා පළමු වනවරට මෙම අභියාචනය මා විසින් අසන ලද අවස්ථාවේදී ඉදිරිපත් කළේය. එසේ කළ ඔහු මෙම ප්‍රශ්නය නිරාකරණය කිරීම සඳහාම විසඳීම් ප්‍රශ්නයක් ඝකස්කොට නැවැත මෙම නඩුව ඇසීමට කටයුතු සලස්වන සේ මාගෙන් ඉල්ලීමක්ද කළේය. නමුත් මෙම ප්‍රශ්නය නිරාකරණය කිරීමෙහි ලා උපකාරී වන නීතිමය කරුණු සහ අනිකුත් සාධක කරුණු ද මෙම අධිකරණය ඉදිරියේ තබන ලද්දෙන් නීතිවේදියාගේ කරුණු සැලකිරීමවලට මා එකඟ වුවත් නඩුව නැවැත වාරයක් ඇසීමට සැලැස්වීම මෙහිදී අවශ්‍ය වේ යැයි මම නොසිතමි. කෙසේ හෝ මෙම නඩුවේ කරුණු සලකා බලන විට එයට අදල වන විනිශ්චයාත්මක තීරණවලින්ද පිටුවහල ලැබෙන නිසා මේ පිළිබඳව මගේ මතය වන්නේ නීතිවේදියාගේ එකී ඉල්ලීම සාර්ථක වීමට තරම් සුදුසුතාවයක් නොතිබූ බවය.

මෙහි කරුණු සැකෙවින් ගත් කල සිදුවී ඇත්තේ පහත සඳහන් පරිදිය.

මසකට ගෙවල් කුලිය රු: 55/75 කි. පසුව එය රු: 60/50 දක්වා වැඩි කරන ලද ගෙයක් දෙමටගොඩ ඩෙස්ලයින් පාරේ නො. 426 දරණ භූමි භාගයේ පිහිටා ඇත. මේ ගෙයින් ඇපැල්කාරිය පිටමං කිරීමට පැමිණිලිකාර වග-උත්තරකරු නඩු දැමීය. ගෙවල් කුලී ගෙවිය යුතුව තිබුනේ සෑම මාසයකම අගදී ය. විත්තිකාරිය වර්ෂ 1966 මැයි මාසයට ගෙවල් කුලී ගෙවීමට අපොහොසත් වූවාය. නමුත් නඩුව විසඳූ උගත් කොමසාරිස්වරයා මේ මාසයේ ගෙවල් කුලිය විත්තිකාරිය විසින් ගෙවීමට සුදුනම් වී ඉදිරිපත් කළ නමුත් එය පැමිණිලිකරු විසින් ආපසු එවීමේ හේතුවෙන් එම තැනැත්තිය වර්ෂ 1966 මැයි මාසයට ගෙවල් කුලී හිඟ හිටවා නැතැයි නිවැරැදි ලෙස තීන්දු කොට තිබේ. වර්ෂ 1966 ජූනි මාසයේ ගෙවල් කුලිය 1966 සැප්තැම්බර් මස 1 වැනිදු ගෙවා තිබේ. (පී3) බලන්න. වර්ෂ 1966 ජූලි මාසයේ කුලිය ගෙවා ඇත්තේ වර්ෂ 1966 ඔක්තෝබර් මස 7 වැනිදායි. (පී4 බලන්න) වර්ෂ 1966 අගෝස්තු මාසයේ ගෙවල් කුලිය ගෙවිය යුතු දිනය 1966 නොවැම්බර් මස 30 වැනි දින වුවද එය ගෙවා ඇත්තේ එම වර්ෂයේ දෙසැම්බර් මස 5 වැනි දිනය. (පී5 බලන්න). වර්ෂ 1966 සැප්තැම්බර් මාසයට ගෙවිය යුතු කුලිය සහ එයට පසු ඒ ඒ අවස්ථාවන්හි ගෙවිය යුතු කුලිය නොගෙවන ලද නිසා වර්ෂ 1967 ජූනි මස 30 වැනි දින ගෙයි බුක්තිය තමාට භාර දෙන ලෙස ඉල්ලමින් වර්ෂ 1967 මාර්තු 23 වැනි දින විත්තිකාරියට ගෙයින් පිටව යන ලෙස නිවේදනයක් යැවිවේය. ඉක්බිති වර්ෂ 1967 ජූලි මස 8 වැනි දින මෙම නඩුව දමා තිබේ. විත්තිකාරිය වර්ෂ 1966 සැප්තැම්බර් මාසයේ සිට ඒ මාසයේ දෙසැම්බර් දක්වා ගෙවිය යුතු ගෙවල් කුලිය 1967 ජූලි මාසයේ 1 වැනි දින එසේ කුලී ලැබීමට බලය ලත් නාගරික සභාවේ නිලධාරියා වෙත යවනු ලැබූ එය ඒ වර්ෂයේ ජූලි මස 23 වැනි දින පැමිණිලිකරු වෙත යැවීය. ඒ ආකාරයෙන්ම පැමිණිලිකරුට පී9 සළකුණින් යුත් ලියමන අනුව වර්ෂ 1967 අගෝස්තු මස 10 වැනි දින 1967 වර්ෂයේ ජනවාරි සිට ජූලි දක්වා ගෙවල් කුලියද ගෙවන ලදී. මේ අතර පී10 සළකුණ සටහන් වන ලිපියෙන් 1967 අගෝස්තු මාසයේ ගෙවල් කුලිය 1967 සැප්තැම්බර් මස 8 වැනි දින සහ 1967 සැප්තැම්බර් මාසයට ගෙවන කුලියද 1967 ඔක්තෝබර් මස 17 වැනි දින ගෙවා තිබේ. මේ නයින් බලන කල විත්තිකාරිය විසින් වර්ෂ 1967 සැප්තැම්බර් මාසය තෙක්ම ගෙවල් කුලිය මුලු මනින්ම ගෙවා ඇති බව පෙනියේ. වර්ෂ 1967 ඔක්තෝබර් මස 30 වැනි දින උසාවියට ඉදිරිපත් කරන ලද විත්තිකාරියගේ උත්තරයෙහි වර්ෂ 1966 අගෝස්තු මාසයේ සිට ඊට පසු කාල පරිච්ඡේදයක් වන තෙක්ම ඔහුට ගෙවල් කුලී නියමිත දිනට ගෙවීමට නොහැකි වූයේ මන්ද යන්න ගැන විත්තිකාරිය පැහැදිලි කොට නැත. ඵ මතුද නොව වැඩිදුරටත් 1966 අංක 12 දරණ පණතින් සංශෝධනය කළ ගෙවල් කුලී පාලන සංශෝධන පනතෙහි 12ඒ(1)(ඒ) යන ඡේදයෙන් සහ 12ඒ(2) යන ඡේදයෙන්ද ඔහුට පිළිසරණ ලැබීමට සුදුසු තාවයක් ඇති බව ප්‍රකාශ වන පරිදි නඩුවෙහිදී විසඳිය යුතු ප්‍රශ්නයකි. එවැනි ප්‍රශ්න මතු කිරීමෙහිදී මතු කොට නැත. මෙවැනි කරුණු හේතු කොටගෙන ඒ අනුව සලකා බැලීමේදී විත්තිකාරිය විසින් ගෙවල් කුලී එවීමට පමාවූයේ මන්ද යන්න ගැන කරන ලද පැහැදිලි කිරීම උගත් කොමසාරිස්වරයා විසින් ඉවත හෙලීම යුක්තියුක්තය. මෙහිදී විත්තිකරුගේ තත්වය ලෙස දක්වා

ඇත්තේ වියදම් දැරීමට අවශ්‍ය වන ගෙවල් කුලි පාලන මණ්ඩලයේ පරීක්ෂණවලට භාජනය වීමේ ප්‍රතිඵලයක් වශයෙන් සහ තමා මාස කිහිපයක් ක්‍රියාවිරහිත වන අයුරුන් තමාගේ බයිසිකලයෙන් වැටීමේ ප්‍රතිඵලයක්ද වශයෙන් චිත්තිකරුට ගෙහිමියා කෙරෙහි තමා විසින් ඉටු කළ යුතු නීතිමය යුතුකම් ඉටු කිරීමට නොහැකි වූ බවයි. එම නිවෙසෙහි චිත්තිකරු ඉකුත්වූ අවුරුදු 41 කාල පරිච්ඡේදයක් තුලම කුලියට සිටින බව ප්‍රකාශ කරමින් එම භූමිභාගයෙන් ඔහු බැහැර කළහොත් ඔහුට සැළකිය යුතු තරමේ අමාරුකම් විඳීමට සිදුවන බවද කියා තිබේ. නමුත් ඔහු කියන ප්‍රවෘත්තිය ඇත්තක් නම් මෙම කරුණු නොපමාව ඔහුගේ නීතිඥයන්ට නොදන්වා මෙබඳු කරුණු පැහැදිලි කිරීමක් ප්‍රථම වරට උසාවියේදී කීම නිසා ඔහු විසින් වරද කියා ගත යුත්තේ ඔහුටමය.

වර්ෂ 1966 අගෝස්තු මාසයට පසු ගෙවල් කුලිය මාස තුනකට අධික කාලයක් හිඟ හිටි ඇති බව පෙනී යන නිසා මෙහි ලා විසඳීමට ඉතිරි වී ඇති එකම ප්‍රශ්නය ලෙස සැලකෙන්නේ නඩුව පැවරීමට පසු ගෙහිමියා විසින් වර්ෂ 1966 සැප්තැම්බර් මාසයටද එයට පසු කාලයටද ගෙවල් කුලි භාරගෙන සිටීම නිසා දෙපාර්ශ්වය අතර අලුත් ගෙවල් කුලි කොන්ත්‍රාත්තුවක් ඇතිවිද යන්නයි. බස්නායක විනිශ්චයකාරතුමා විසින් ප්‍රනාන්දු එ. සමරවීර 52 න.නී.වා. 278 වැනි පිටුවේ සඳහන්ව ඇති නඩුවේදී මේ ප්‍රශ්නය අනුකරනාත්මක අගය ඇති වන සේ විනිශ්චයකොට තිබෙන අතර එහි ගෙවල් කුලි පනතින් ප්‍රතිපාදන යටතේ ගෙහිමියා සහ ගෙවල් කුලි ගෙවන්නා අතර ඇති අයිතිවාසිකම් හා යුතුකම් සවිස්තරව සළකා බලා ඇති බව මගේ මතයයි. ප්‍රනාන්දු එ. සමරවීර යන නඩුවෙහි තීරණ සාරය (*Ratio Decidendi*) අප ඉදිරියේ දැනට ඇති නඩුවේ කරුණු වලට අදල නොවන බව ඇපැල්කරු වෙනුවෙන් පෙනී සිටින උගත් නීතිවේදියා සැළකර සිටියේය. එයට හේතුව ඔහුගේ කරුණු සැලකිරීමේ හැටියට යම් අවස්ථාවක ගෙවල් කුලි ගෙවන්නා තමාට ගෙවල් කුලී පාලන පනතේ ඇති ආරක්ෂාව තුන් මසකට අධික කාලයක් ගෙවල් කුලී නොගෙවා බල රහිත තත්වයට පත්කර ගත් අවස්ථාවක ගෙහිමියා ඒ බව දැන ගෙවල් කුලි භාර ගතහොත් නීතිවේදියාගේ කරුණු සැලකිරීම් වලට අනුව ඒ නිසා අලුත් ගෙවල් කුලී කොන්ත්‍රාත්තුවක් නිර්මාන වේ. කරුණු අනුව වුවද එම නඩුව වෙනස් මගක් ගත් බව කියමින් ඔහු වැඩිදුරටත් කරුණු සැල කළේය. ප්‍රනාන්දු එ. සමරවීර යන නඩුවේ ගෙවල් කුලී ගෙවන්නා විසින් යවන ලද වැක්පත් මාරු කරනු නොලැබ පසුව ඔහු විසින් ඒවා ගෙවල් කුලී ගෙවන්නාට ආපසු දී ඇති නමුත් අප ඉදිරියේ ඇති බව යවන ලද මුදල් පැමිණිලිකාර ගෙහිමියා විසින් පරිහරණය කොට තිබේ. කරුණු සළකා බලන විට මේ වෙනස්කම නඩුවල පෙනී යන බවට මා එකඟ වන නමුත් අප ඉදිරියේ ඇති නඩුව ප්‍රනාන්දු එ. සමරවීර යන නඩුවේ දක්වා තිබෙන ප්‍රතිපත්ති අදල නොවන බව කියමින් නීතිවේදියා කරන සැලකිරීම්වලට මට එකඟ විය නොහැක. එම නඩුවේදී ''කොන්ත්‍රාත්තුවක් මත ගොඩ නැගුණු ගෙවල් කුලී ගනුදෙනුවකදී පවා ගෙවල් කුලිය ගත් තැනැත්තාගේ ගෙයි පදිංචිය නිමාවට ගිය පසු යලිත් ගෙවල් කුලී ගෙවීම ගෙවල් කුලී ගෙවන්නා ගේ වාසිය පිණිස ක්‍රියාත්මක වන්නේ දෙපාර්ශ්වය විසින් අලුත් ගෙවල් කුලී කොන්ත්‍රාත්තුවක් ඇතිවිය යුතු යැයි අදහස් කොට ඊට එකඟවූ කලෙක පමණකැ'' යි බස්නායක විනිශ්චයකාරතුමා තීරණය කළේය. අප අත දැන් ඇති නඩුවේ එවැනි සාක්ෂියක් නොපෙනේ. බස්නායක විනිශ්චයකාරතුමා කියා ඇති පරිදිම ගෙවල් කුලී ගෙවන්නකු විසින් ගෙවල් කුලී පාලන පනතේ ආරක්ෂාව ලබන වකවානුවේ (ගෙවල් කුලී කොන්ත්‍රාත්තුව නිමාවට ගිය පසු) ඔහුට ගෙවල් කුලී ගෙවීමට සහ එම කුලිය ගෙහිමියාට භාර ගැනීමට යුතුකමක් තිබේ. ගෙහිමියා විසින් මෙම යුතුකම් ඉටුකිරීම ඔහුගේ අයිතිවාසිකම්වලින් බැහැරව අලුත් ගෙවල් කුලී කොන්ත්‍රාත්තුවක් නිර්මානය වීමේ සංඛ්‍යාවට වැටීමට හේතුවක් නොවේ. සමරවීර සහ රණසිංහ අතර කියැවී 59 න.නී.වා. 395 වැනි පිටෙ වාර්තා වී ඇති නඩුවේදී ගෙය අත්හැර යෑමට දෙන ලද නිවේදනයකින් ගෙවල් කුලී කොන්ත්‍රාත්තුව නිමවූ පසුව පවා ගෙවල් කුලී ගෙවන්නෙකු මත එම කුලිය ගෙවීමට නීතිමය බෙදීමක් ගෙවල් කුලී පාලන පනතට අනුව පැවැරෙන බව තීන්දු කරන ලදී. අයිතිවාසිකමක් අත්හැරීමේ සංඛ්‍යාවට වැටෙන්නේ කුමක්ද යන්න ගැන බස්නායක විනිශ්චයකාරතුමා විසින් පල කරන ලද හැඟීම්වලට මම ගෞරව පෙරටුව එකඟ වෙමි. 285 වැනි පිටෙහි ඔහු කියා ඇත්තේ මෙසේය.

> ''යම්කිසි පුද්ගලයකු සතු අයිතිවාසිකමක් හෝ වාසියක් ඔහු විසින් අත්හැරීමට අදහසක් තිබෙය යන්න සලකා ගැනීම කවදාවත් නොකෙරෙන්නෙකි. සලකා ගැනීම පවතින්නේ අයිතිවාසිකමක් අත්හැරීමට විරුද්ධවයි. අපේ නීතියට අනුව කෙනකු සතු අයිතිවාසිකමක් හෝ වාසියක් අත්හැර දැමීමට නිදහස ඇති නමුත් එබඳු අයිතිවාසිකමක් හෝ වාසියක් සතු කෙනකු එය අත්හැරීමට අදහස් කළේය යන්න සැහැල්ලුවට සළකා ගත හැක්කක් නොව, එය ඔහුගේ වචනවලින් හෝ ක්‍රියා කලාපයෙන් පැහැදිලි විය යුතුයි. මෙබඳු අයිතිවාසිකමක් හෝ වාසියක් අත්හැරිය බව ඔප්පු කිරීමේ භාරය එසේ අත්හැර තිබෙන බව කියන තැනැත්තා පිට පැවරේ. ගෙහිමියා සතු අයිතිවාසිකම් අත්හැර තිබෙන බව ගෙය කුලියට ගත් තැනැත්තා කියා සිටින අවස්ථාවක එම ගෙහිමියා තමාගේ අයිතිවාසිකම ගැන සම්පූර්ණ දැනීමක් ඇතිව එය අත්හැරීමට ඔහු විසින් අදහස් කරන බව ඔහුගේ ඒ බව අනිවාර්යයෙන්ම විද්‍යමාන වන එසේම එම අයිතිවාසිකම ක්‍රියාත්මක කිරීමට ඔහු තුල අදහසක් තිබීම පෙනියාම ඔහුගේ එම ක්‍රියා කලාපයට විරෝධී බව ඔප්පු කළ යුතුය.''

මෙම නඩුවෙහි ගෙහිමියා තමාගේ එබඳු අයිතිවාසිකම් අත්හැරීමට අදහස් කළ බවට කරුණු මුලුමනින්ම ගත් කල කිසිම සාක්ෂියක් නොපෙනේ. මෙම නඩුව දැමූ පසු ගෙහිමියා විසින් එවකට හිඟ සිටිය ගෙවල් කුලී භාර ගැනීමෙන් කර ඇත්තේ නීතියට අනුව තමා පිට පැවැරෙන යුතුකම් ඉටු කිරීමක් පමණකි.

53 න.නී.වා වෙහි 420 වැනි පිටුවේ ඇති කඩිබෝයි එ. කේසයානු යන නඩුවේ වැඩබලන අග්‍රවිනිශ්චයකාර නාගලිංගම් මහතා විසින්ද 54 න.නී.වා. 354 වැනි පිටුවේ ඇති වැකෝ එ. මෝඩි යන නඩුවෙහි ස්වෝත් විනිශ්චයකාරතුමා විසින්ද ප්‍රනාන්දු එ. සමරවීර අතර කියැවුන එම නඩුව අනුගමනය කරන ලදී. බස්නායක විනිශ්චයකාරතුමාගේ තීන්දුව ගෞරව පෙරටුව අනුගමනය කරන මම එම නඩු තීන්දුවෙහි ඇතුලත් කොට ඇති ප්‍රඥප්තීන්ට අනුව සළකා බලන කල මෙම අභියාචනයෙන් ජය ගැනීමට චිත්තිකාර ඇපැල් කරුට නොහැකි බව නිගමනය කරමි. එම නිසා මෙම අභියාචනය නඩු ගාස්තුවටද යටත් වී නිෂ්ප්‍රභා වේ.

අභියාචනය නිෂ්ප්‍රභා කරන ලදී.

අලස් විනිශ්චයකාරතුමා ඉදිරිපිටදී

සී. මර්ලින් පෙරේරා එ. කේ. ඩී. සිම්ප්ලීනු ජයවර්ධන*

ශ්‍රේෂ්ඨ. අංක 87/67 (ගෙවල් කුලිය සහ බැහැර කිරීම) — කොළඹ රික්වැස්ට් උසාවියේ අංක 93675

විවාද කළ දිනය: 1968 සැප්තැම්බර් 16 වැනිද
තීන්දු කළ දිනය: 1968 ඔක්තෝම්බර් 23 වැනිද

ඉඩම් හිමියා සහ බදුකරු — වැටිලි රහිත හිස් ඉඩමක් සඳහා බිම් බද්දක් ගෙවීමේ බදුකරයක් — තමාගේ වියදමින් ගරාජයක් ඉදිකොට දස අවුරුද්දකට පසු එය කඩා දමා සුන්බුන් ඉවත්කර ගැනීමට බදුකරු එකඟවීම — තුන් මසක දැනුම්දීමකින් පසු එම ගිවිසුම සමාප්ත කිරීමට දෙපක්ෂයටම අවකාශ තිබීම — ඉඩම් හිමියා දස වැනි අවුරුද්දේ ගරාජය බිඳ දමා එම ගොඩනැගිල්ල තැනීමට යොදූ ඇති ද්‍රව්‍ය ඉවත්කර ගැනීමට දැනුම් දීම — බදුකරු එයට පිළිතුරක් යැවීමට අසමත්වීම — ඉඩමෙන් ඉවත් කිරීමේ නියෝගය — ගෙවල් කුලී පාලන ආඥා පනත මෙයට අදාළ වන්නේද?

යුළු නගර සභා සීමාවක් ඇතුළත මසකට රු: 2.50 ක බිම් කුලියක් ගෙවමින් දහ අවුරුදු කාලයක්ම ගරාජයක් ලෙස පාවිච්චි කිරීම සඳහා තාවකාලික ගොඩනැගිල්ලක් ඉදිකිරීමට 1956 වර්ෂයේ පී1 දරණ ගිවිසුමෙන් පැමිණිලිකරු වගඋත්තරකරුට අවසර දුන්නේය.. දෙපක්ෂයෙන් එක් පක්ෂයක් තුන් මයක දැනුම් දීමක් කිරීමෙන් මෙම ගිවිසුම අවසාන කළ හැකි බවට එසේ ගිවිසුම අවසාන කිරීමෙන් පසු ගොඩනැගිල්ල බිඳදමා එය තනා ඇති ද්‍රව්‍ය ගෙන යාමට ද වගඋත්තරකරුට අවසර ලැබිය යුතු යැයි ද ගිවිස ගත්තා ලදී.

තමාගේ වියදමින් බිත්ති කනු මත යවිකරන ලද සින්ක් තහඩුවලින් තැනූ වහලක් සහිත ගරාජයක් ඉදිකළ වගඋත්තරකරු යන්ත්‍රෝපකරණවලින් එය සමන්විත කොට මෝටර් රථ අළුත්වැඩියා කිරීම ඇරැඹීය. ගරාජය තැනීමෙන් පසු වගඋත්තරකරු රු: 5/- ගණනේ මසකට බිම් බදු ගෙවිය. 1966 දී පැමිණිලිකරු පී2 දරණ ලියැවිල්ලෙන් ඉඩමෙන් ඉවත්වන ලෙස වගඋත්තරකරුට දැනුම් දෙමින් එසේ කිරීමේදී ගරාජය තැනීමට යොදූ ඇති ද්‍රව්‍ය ඉවත්කර ගැනීමට වගඋත්තරකරුට අවකාශ ඇති බවද දන්වීය. වගඋත්තරකරු මෙයට පිළිතුරක් නොයැවිය. පැමිණිලිකරු වගඋත්තරකරු ඉඩමෙන් ඉවත් කරවන නඩු තීන්දුවක් ලබා ගත්තේය.

නඩුවට අදාළ භූමි භාගය ගෙවල් කුලී ආඥා පනත්වලට යටත්වන හෙයින් පැමිණිලිකරුට මෙම නඩුව පවත්වාගෙන යා නොහැකි යැයි ඇපෑලේ දී තර්ක කරන ලදී.

තීන්දුව: (1) පී1 සහ පී2 යන ලියැවිලිවලින්, පී2 දරණ ලියැවිල්ලට පිළිතුරක් යැවීමට අසමත්වීමත් මෙම ගිවිසුම හිස් භූමිභාගයක් සඳහා බව ඔප්පු කරයි.

(2) රු: 2/50 සිට රු: 5!- දක්වා බිම් කුලිය වැඩි කිරීමෙන් මෙය වෙනත් අන්දමක ගිවිසුමක් බවට පත් වී නැත.

(3) වගඋත්තරකරුට ජය ගැනීමට නම් බදු ගිවිසුමට අදාළ භූමි භාගය ගොඩනැගිල්ලක් හෝ ගොඩනැගිල්ලක කොටසක්ද, ඊට අයත් භූමියද සහිත වූවක් බව ඔප්පු කළ යුතුය.

වෙනස්කොට දක්වන ලදී: කොරනේලිස් එ. දෙහිවල-ගල්කිස්ස සුළු නගර සභාව, 59 (න.නී.වා.) 115
එස්.සී.ඇම්. 15.6.1964, ශ්‍රේ.අං. 121/1963 කොළඹ රික්වැස්ට් උසාවි අංක 84575

රාජනීතිඥ එච්. ඩී. පෙරේරා මහතා, මොරින් සෙනෙවිරත්න මෙනෙවිය සමග, විත්තිකාර-ඇපැල්කරු වෙනුවෙන්.

රාජනීතිඥ සී. රෙංගනාදන් මහතා, බී. ජේ. ප්‍රනාන්දු මහතා සමග, පැමිණිලිකාරවගඋත්තර-කරු වෙනුවෙන්.

අලස් විනිශ්චයකාරතුමා:

මෙම නඩුවෙහි පී1 දමා සළකුණු කොට ඉදිරිපත් කරන ලද වර්ෂ 1956 නොවැම්බර් මස 8 වැනි දින දරණ සම්මුතියෙන් පැමිණිලිකරු වත්තල නගරසභා ප්‍රදේශයෙහි පිහිටි අංක 367 දරණ බිම් පෙදෙසක් විත්තිකරුට කුලියට දුන්නේය. බිම් කුලිය වශයෙන් මසකට රුපියල් 2.50 බැගින් ගෙවිය යුතු විත්තිකරුට තමාගේ වියදමින්ම එකී භූමිභාගයේ ගරාජයක් වශයෙන් භාවිතා කිරීමට තාවකාලික ගොඩනැගිල්ලක් ඉදිකිරීමට එකී සම්මුතියේ කොන්දේසි අනුව විත්තිකරුට අවසරය ලැබේ. අවුරුදු දහයක කාල සීමාවක් තුළ මෙම සම්මුතිය බලපවත්වන අතර, එම කොන්ත්‍රාත්තුව නිමාවට ගෙන යාමට පෙර එක් පාර්ශ්වයක් විසින් අනිකාට තුන් මසක නිවේදනයක් දිය යුතු යැයි පාර්ශ්වකරුවන් විසින් තීරණය කරන ලදී. මෙම කොන්ත්‍රාත්තුව නිමවූ පසු විත්තිකරුට එම ගොඩනැගිල්ල කඩා එය ඉදිකිරීමට ඉවහල් වූ උපකරණ එතැනින් ඉවත්කරගෙන යාමට

*ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 77 වෙනි කාණ්ඩයෙහි 85 වෙනි පිට බලනු.

ඉඩහැර තිබේ. විත්තිකරු සාක්ෂි කීමේදී පී1 දමා ලකුණු කරන ලද එම සම්මුතියට තමා අත්සන් කළේ නැතැයි කී නමුදු උගත් කොමසාරිස්වරයා ඔහුගේ කියමන විශ්වාස නොකොට පැමිණිලිකරු විසින් කියන ලද පරිදි එය ඔහු ඉදිරියේම විත්තිකරු විසින් අත්සන් කරන ලදැයි කී සාක්ෂිය පිළිගෙන තිබේ.

තමාගේ වියදමින් විත්තිකරු මෙම ගරාජය සාදන ලද්දේ වර්ෂ 1959 දී ය. මෙම ගරාජයෙහි පොළොව සිමෙන්ති දමා තිබුණු අතර ටකරන් ගසන ලද වහලයක් උසුලා සිටි කුළුණු 12 ක් ද එහි විය. විත්තිකරු විසින් මෙම ගොඩනැගිල්ල තුළ යන්ත්‍රෝපකරණ සවිකොට මෝටර් රථ අළුත්වැඩියා කිරීමේ වැඩ පිළිවෙලක් ගෙන යන ලදී. ගරාජය ගොඩනැගුණු පසු විත්තිකරු විසින් ඔහුට බිම් කුලිය වශයෙන් රුපියල් 5/- ක් ගෙවූ බව පැමිණිලිකරු කීවේය. විත්තිකරු විසින්ද මේ බව පිළිගත්තා ලදී. වර්ෂ 1966 ජනවාරි මස 27 වැනි දින දරණ පී2 දමා ලකුණු කරන ලද ලිපියෙන් පැමිණිලිකරු වර්ෂ 1966 අප්‍රෙල් මාසයේදී එම භූමි භාගයෙන් බැහැර වී යාමට යයි විත්තිකරුට නිවේදනය කොට ඉහත සඳහන් ගරාජය ඉදිකිරීමට භාවිතා කළ ද්‍රව්‍ය ඉවත්කරගෙන යාමට ඔහුට නිදහස ඇති බවද සැළ කළේය. පී2 දරණ ලියමනට විත්තිකරුගෙන් පිළිතුරක් නොලැබුණු නිසා, පැමිණිලිකරු පැවරූ නඩුව සාර්ථක වී ඔහුට විත්තිකරුගෙන් අලාභයත් අයකරගෙන එතැනින් බැහැර කිරීමට තීන්දුව ලැබුණි.

මේ පිළිබඳව ඉදිරිපත් වූ අභියාචනයේදී විත්තිකාර-ඇපැල්කරු සැළකර සිටියේ එකී භූමි භාගය ගෙවල් කුලී පාලක පනතට යටත්වන නිසා පැමිණිලිකරුගේ නඩුව ඒ විධියට පවරා කටයුතු කරගෙන යා නොහැකි බවකි. මට මෙයට එකඟ වීමට නොහැක. පී1 සහ පී2 දමා ලකුණු කරන ලද ලිපි දෙකෙනුත්, විත්තිකරු පී2 දරණ ලිපියට පිළිතුරු එවීම පැහැර හැරීමෙනුත් කුලියට දීමේ මෙම කොන්ත්‍රාත්තුව විත්තිකරුට තාවකාලිකව යම්කිසි ගොඩනැගිල්ලක් ඉදිකර ගැනීමට බලය දී ඇති හිස් ඉඩමක් පිළිබඳව ඇතිකරගත් එකක් බව තහවුරු කෙරෙයි. රුපියල් 2.50ක් වූ කුලිය රුපියල් 5/- කට වැඩිකිරීමෙන් එය මීට වෙනස් විදියකට කුලියට දීමේ කොන්ත්‍රාත්තුවක් බවට නොපෙරළේ. ඇපැල්කරුට මින් ජය ගැනීමට නම් කුලියට දීමට හේතුභූත වූ ද්‍රව්‍යය හැටියට හැඳින්විය හැකි දෙය ''එයට අදල භූමියක් සමග වූ ගොඩනැගිල්ලක් හෝ ගොඩනැගිල්ල කින් කොටසක් හෝ'' විය යුතුය. එම නිසා සම්මුතියට එළැඹෙන අවස්ථාවෙහි භූමියෙහි පිහිටා ඇති ගොඩනැගිල්ලක් හෝ ඉන් පසුව ගොඩනැගිල්ලක් එහි ඉදිවෙය යන බලාපොරොත්තුවෙන් සිටි ඉඩම්හිමියාගේ අනුමැතිය ඇතිව විත්තිකරු විසින් ගොඩනගන ලද ස්ථිර ගොඩනැගිල්ලක් සහ හිස් ඉඩමකට අයකරන කුලියට භාත්පසින් වෙනස්වූ, ගොඩනැගිල්ලකට අය කරන කුලියක්ද තිබිය යුතුවේ. *කොරනේලිස් එ. දෙහිවල-ගල්කිස්ස නගර සභාව* (59 න.නී.ඩා. 115) යන නඩුවේ පැමිණිලිකාර නගර සභාව විත්තිකරුට හිස් ඉඩමක පදිංචි වීම සඳහා අවසර පත්‍රයක් නිකුත් කළේය. මෙම අවසර පත්‍රයෙහි ගොඩනැගිලි ඉදිකිරීම නියම වශයෙන්ම තහනම් කර තිබුණු නමුත් එම නගර සභාවේ ද එකහත්වය ලැබ එම ඉඩමේ ගොඩනැගිලි ඉදිකරන ලදී. මෙම අවසර පත්‍රය එක් එක් වාරයට අලුත් කරන ලද අතර නගර සභාව එම ගොඩනැගිලි වලට කුලිය ද අයකර තිබිණ. එමතුද නොව පැමිණිලිකාර නගර සභාව විසින් එම ගොඩනැගිලි සඳහා නියම කරන ලද වරිපනම් බදුද විත්තිකරු විසින් ගෙවන ලදී. ඒ නඩුවේ මෙම පරිසරය අනුව විත්තිකරු අවසර ලද පදිංචිවූ තැනැත්තකු පමණක් නොව එම ගොඩනැගිලි සම්බන්ධයෙන් සළකා බලන කල ඔහු පැමිණිලිකාර නගර සභාවට මාස්පතා කුලී ගෙවන පදිංචිකරුවකු බවද එම හේතුව නිසා ඔහු ගෙවල් කුලි පාලන පනත්වල ආරක්ෂාව ලැබීමට සුදුසු කෙනකු බවද අධිකරණය විසින් තීරණය කරනු ලැබිය. ශ්‍රේෂ්ඨාධිකරණයේ 15/6/64 දරණ අංක 121/1963* දරණ ශ්‍රේෂ්ඨාධිකරණ නඩුවේ වාර්තාගත නොවූ නඩුවේ පෙනෙන පරිදි කුලියට ගත් තැනැත්තා පැමිණිලිකරුට අයිති ඉඩමෙහි රුපියල් 8,000/- මුදලක් වැයකොට බේකරියක් සැදුවේය. මෙම මුදල් ඔහුට සපයා දෙන ලද්දේ පැමිණිලිකරු විසිනි. මෙසේ බේකරිය ගොඩනැගීමෙන් පසු විත්තිකරු, පැමිණිලිකරුට බේකරියට මසකට රු: 20/- ක් ද දර තැන්පත් කොට තැබීමට ඉදිකරන ලද යම්කිසි ඔඩුවකට මසකට රු: 20/- බැගින් ද ඔහුට ලැබුණු රු: 8,000/- මුදල පියවෙන තුරු ගෙවිය යුතු තත්වයෙන් කුලියට පදිංචි වී සිටින කෙනෙක් වූහ. ඊට පසු ඔහුට නියමිත කුලී මුදල ගෙවීමට යැයි කියන ලදී. මේ නඩු දෙකේම හිස් ඉඩම කුලියට දුන් පැමිණිලිකරුගේ ස්වභාවය ඔහු විත්තිකරු විසින් සාදනු ලැබූ එසේම ඔහු විසින් වැඩි කුලියක් ගෙවීමට කැමැත්ත දැක්වූ ගෙවල් කුලී පාලන පනතට අසුවන එම ගොඩනැගිලිවල තමාගේම ක්‍රියා කලාපය නිසා ගෙහිමියා බවට පත්වූ පසු ඔහුගේ ස්වභාවය වෙනස් වී තිබේ. නමුත් දැනට අප ඉදිරියේ ඇති නඩුවේ කරුණු මෙයට භාත්පසින්ම වෙනස්ය. කුලියට දෙන ලද්දේ හිස් බිම් කැබැල්ලක් බව මෙහි පාර්ශ්වකරුවන් දෙපක්ෂයම නිරන්තරයෙන්ම පිළිගත්තා ලදී. ප්‍රශ්නයට හේතු වී ඇති ගරාජය එහි ස්වභාවය අනුව ම පහසුවෙන්ම කඩා දැමිය හැකි තාවකාලික වර්ගයේ

* කොළඹ රික්වැස්ට් උසාවිය අංක 84575

ඉදිකිරීමකි. මෙම ඉදිකිරීම කඩා දමා එහි ද්‍රව්‍ය කොන්ත්‍රාත්තුව නිම වූ විට විත්තිකරුට රැගෙන යා හැකි බව සහ කුලිය (මෙය මසකට රුපියල්) 2.50 වුවද රුපියල් 5/- වුවද) හිස් ඉඩමට ගෙවන කුලියක් බව නියමිත ලෙස ඒ අයුරින් සළකා තිබෙන බවද දෙපැත්තේ කැමැත්ත පරිදි අනුමත වී හිඳෙ.

මේ කරුණු අනුව සළකා බලන විට, මම උගත් කොමසාරිස්වරයාගේ නිගමනයට එකඟවෙමි. උසාවි දෙකේම ගාස්තුවටද යටත්කොට මෙම ඇපැල නිෂ්ප්‍රභා කරමි.

ඇපැල නිෂ්ප්‍රභා කරනා ලදී.

ජී. පී. ඒ. සිල්වා විනිශ්චයකාරතුමා සහ සිවසුබ්‍රමනියම් විනිශ්චයකාරතුමා ඉදිරිපිටදී

රැජින එ. ඒ. ඒ. ඇම්. හමීඩ් සහ තවත් අය*

ශ්‍රේෂ්ඨාධිකරණයේ අංක 3-4/66 — ගම්පහ දිස්ත්‍රික් උසාවියේ අංක (අල්ලස්) 1/බී

විවාද කොට තීන්දු කළ දිනය: 1967 මැයි 10 වැනිදා

අල්ලස් පනත — 19 වැනි ඡේදය යටතේ චෝදනා කිරීම — එය ඔප්පු කිරීමේ කාර්යභාරය පැමිණිලි පක්ෂය මත පැවරෙන බව — පොලිස් නිලධාරියකුට අල්ලසක් ගැනීම නීතිය අනුව හෝ ඔහුගේ පත්කිරීමේ කොන්දේසි අනුව හෝ නොහැකියයි ඊට සාක්ෂි නොමැති විටක විනිශ්චයාත්මකට සලකා ගැනීම උසාවියට හැකිද?

තීන්දුව: පොලිස් සේවයේ නිලධාරියකු වශයෙන් සේවය කරන අතර නීතියෙන් හෝ තමන්ගේ රැකියාවට අදල කෝන්දේසි අනුව හෝ ලබා ගැනීමට අවසර නොමැති අල්ලසක් ලබා ගැනීමේ වරදට අල්ලස් පනතේ 19 වැනි ඡේදය යටතේ ඉදිරිපත්වූනු චෝදනාවක දී පොලිස් නිලධාරියකුට නීතිය මඟින් හෝ රැකියාවේ කොන්දේසි අනුව හෝ එලෙස අල්ලසක් ගැනීමට නොහැකි බව අධිකරණයකට හෝ විනිශ්චය සභාවකට හෝ ඊට සාක්ෂි නොමැති විටකදී විනිශ්චයාත්මක ලෙස සලකා ගත හැකි කරුණක් නොවේ. මෙම තර්කය පිළිගතහොත් විනිශ්චය සභාවක් ඉදිරියේ චෝදනාවක් ඔප්පු කිරීමේ කාර්යභාරය පිළිබඳ පිළිගත් මූල ධර්මවලට පරස්පර මතයක් ගැනීමක් සිදුවේ. එය යුක්තිය ඉටුකළ යුතු මාර්ගයට බාධාවන් දමීමක් වැන්නකි.

ජී. පී. ඒ. සිල්වා, විනිශ්චයකාරතුමා: "විට්ටි මහතා විසින් ඉදිරිපත් කරන ලද තවත් තර්කයක ද සැහෙන පමණ සාරාංශයක් ඇති බව කිව යුතුය. මෙම උසාවිය ඉහත සඳහන් කරුණු විනිශ්චයාත්මක ලෙස ගැනීමට සූදානම් වුවත්, නඩුව විනිශ්චය කළ විනිශ්චයකාරවරයාගේ අවධානය එබඳු දෙයක් සාක්ෂි නැතිව විනිශ්චයාත්මක ලෙස සලකා ගැනීමට යයි යොමු කරන ලද බවක් ඒත්තු නොගියහොත් මෙම අධිකරණයෙන් එබඳු වරදට පත් කිරීමක් තහවුරු නොකළ යුතු බව විට්ටි මහතාගේ තර්කයයි. මෙම කැරණ දිස්ත්‍රික් විනිශ්චයකාරවරයාගේ අවධානයට මේ නඩුවේදී එල්ල නොකළ බව පිළිගත යුතුයි. එසේම එය ස්වේච්ඡාවෙන් විනිශ්චයකාරවරයා තමාගේ අවධානයට යොමු නොකළ බව ද පැහැදිලිව පෙනේ."

සලකා බැලූ නඩුව: මහමද් අවුප් එ. මහ රැජිනිය, 69 න.නී.වා. 337.

රාජනීතිඥ ජී. ඊ. විට්ටි මහතා, ඊ. එච්. සී. ජයතිලක මහතා සමඟ චෝදිත-ඇපැල්කරු වෙනුවෙන්.

කෙනත් සෙනෙවිරත්න රජයේ අධිනීතිඥ මහතා ඇටෝර්නි-ජනරාල්තුමා වෙනුවෙන්.

ජී. පී. ඒ. සිල්වා විනිශ්චයකාරතුමා:

මෙම නඩුවෙහි පළමුවැනි චෝදිත ඇපැල්කරුට විරුද්ධව පහත සඳහන් චෝදනාව ඉදිරිපත් කර ඔහුට නඩු පවරන ලදී. එනම්: මීගහවත්ත පොලිසියේ නොමැති 1775 දරණ පොලිස් සාජන්ට් තැන වශයෙන් රජයේ සේවකයකුව සිටියදී නීතියෙන් හෝ තමන්ගේ රැකියාවට අදල කොන්දේසිවලින් හෝ ලබා ගැනීමට අවසර නොමැති ලෙස රුපියල් 25 ක අල්ලසක් බී. පී. සිමන් නමැත්තකුගෙන් ලබා ගැනීම නිසා ඔහු අල්ලස් පනතේ 19 වැනි ඡේදය 89 බී ඡේදය සමඟ එකට කියැවූ කල දඬුවම් ලැබිය යුතු වරදක් කර තිබෙය යන්නයි. දෙවැනි චෝදිත ඇපැල්කරුට විරුද්ධව චෝදනා ඉදිරිපත් කර තිබුණේ රජයේ සේවකයකුව සිටියදී මීගහවත්ත පොලිසියේ අංක 26 දරණ පොලිස් කොස්තාපල් තැන වන ඔහු පළමුවන චෝදිතයාට ඉහත සඳහන් වරද කිරීමට ආධාර දීම සම්බන්ධයෙනි. චෝදිතයන් දෙදෙනාම එකී චෝදනාවලට වැරදිකරුවන් ලෙස තීරණය කර තිබේ.

*ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 77 වෙනි කාණ්ඩයෙහි 87 වෙනි පිට බලනු.

ඇපැල්කරුවන් වෙනුවෙන් පෙනී සිටි උගත් නීතිවේදියා රජයේ අධිනීතිඥවරයා විසින් ද විරෝධයක් නොදක්වන ලද තර්කයක් ඉදිරිපත් කළේය. එනම් මෙම නඩුවෙහි පළමුවැනි විත්තිකරුට නීතියට හෝ තමන්ගේ රැකියාවෙහි ප්‍රඥප්තීන්ට අනුව හෝ එකී අල්ලස ගැනීමට බලයක් නැති බවට සාක්ෂි ඉදිරිපත් වී නොතිබීම එම තර්කයයි. මෙසේ සාක්ෂි නොමැති කලෙක චෝදිතයා වරදට පත් කිරීම අයෝග්‍ය යයි කරුණු සැළකළ ඔහු ඒ සඳහා නොබෝද මහමද් අවුෆ් එ. මහ රැජිනිය අතර (69 න.නී.වා. 337) කියැවුණු නඩුවෙහි මෙම උසාවියේ දෙන ලද තීරණය පිළිසරණ පිණිස ගත්තේය. එහිදී තීරණය වූයේ රක්ෂාවෙහි ප්‍රඥප්තීන්ට අනුව අල්ලසක් ලබා ගැනීමට බලයක් නැති බව ඔප්පු කිරීමේ කාර්යභාරය පැමිණිලි පක්ෂය මත පැවරෙන බවත් එබඳු කාර්යභාරයක් ඇති විට ඊට සාක්ෂි නොමැති කලෙක පැමිණිලි පක්ෂයට එම පැමිණිල්ල සඵල කර ගත නොහැකි බවත්ය. කෙසේ වෙතත් රජයේ අධිනීතිඥවරයා මෙම නඩුව ඉහත සඳහන් නඩුවට වඩා වෙනස් බවත්, ප්‍රතිෂ්ඨාපිත වී ඇති කරුණු අනුව සලකා බලන විට පොලිස් නිලධාරියකුට තමන්ගේ රැකියාවේ ප්‍රඥප්තීන්ට අනුව අධිකරණයකින් යුක්තිය ඉටුකිරීමේ පරමාර්ථය වැළකෙන අයුරින් කෙරෙන ක්‍රියාවකට අල්ලසක් ගැනීමට බලයක් නොමැති බව විනිශ්චයාත්මක ලෙස සලකා ගතහැකි බවත්, පෙන්වා දුන්නේය. ඔහුගේ තර්කය රැඳී පැවතුනේ කිසියම් පැනවීම් විශේෂයක් මත නොවේ.

නමුත් ඔහු කියා සිටියේ සමහර කරුණු කොතරම් ප්‍රකටද යන්න සලකා බැලුවහොත් ඒ අනුව පොලිස් නිලධාරියකු ලෙස කාර්යයන්හි නිරත වන අයකු ලබා ඇති තත්ත්වය නිසා කිසියම් මුදලක් අල්ලසක් වශයෙන් ලබා ගැනීමට ඔහුට බලයක් නැති බව ඉතාම පහසුවෙන් විනිශ්චයාත්මක ලෙස සලකා ගත හැකිය යන බවකි. මෙබඳු කරුණු සැලකර සිටීමක් අප විසින් පිළිගතහොත් එයින් සිදු වන්නේ පැමිණිලි පක්ෂය විසින් චෝදනාවකදී ඔප්පු කළ යුතු යම් යම් සාධක පිළිබඳ කාර්යභාරය සමහර පැමිණිලිවල දී පමණක් බල පවත්වන බවක් එයින් නිගමනය වීමය. ඉහත සඳහන් නඩුවේ ශ්‍රේෂ්ඨාධිකරණ අංශය විසින් දෙන ලද තීරණය අනුව එබඳු තීරණයක් අප විසින් ගැනීමට ඉඩ ඇති බවක් සලකා ගත නොහේ.

විවිධි මහතා විසින් ඉදිරිපත් කරන ලද තවත් තර්කයක් ද සැහෙන පමණ සාරාංශයක් ඇති බව කිව යුතුය. මෙම උසාවිය ඉහත සඳහන් කරුණු විනිශ්චයාත්මක ලෙස ගැනීමට සූදානම් වුවත් නඩුව විනිශ්චය කළ විනිශ්චයකාරතුමාගේ අවධානය එබඳු දෙයක් සාක්ෂි නැතිව විනිශ්චයාත්මක ලෙස සලකා ගැනීමට යයි යොමු කරන ලද බවක් ඒත්තු නොගියහොත් මෙම අධිකරණයෙන් එබඳු වරදට පත් කිරීමක් තහවුරු නොකළ යුතු බව විවිධි මහතාගේ තර්කයයි. මෙම කරුණ දිස්ත්‍රික් විනිශ්චයකාරවරයාගේ අවධානයට මේ නඩුවේ දී එල්ල නොකළ බව පිළිගත යුතුයි. එසේම එය ස්වේච්ඡාවෙන් විනිශ්චයකාරවරයා තමාගේ අවධානයට යොමු නොකළ බව ද පැහැදිලිව පෙනේ. එම නිසා ඇත්ත වශයෙන් ම චෝදිතයා වරදකරු බවට පත් කිරීමේ නිගමනයට බැස ගන්නා ලද්දේ චෝදනාවට ඔප්පු කළ යුතු අවශ්‍ය සාධකයක් වන පළමු වන චෝදිතයාගේ රැකියාවේ ප්‍රඥප්තීන්ට අනුව හෝ නීතියෙන් හෝ ඔහුට අල්ලසක් ලබා ගත නොහැකි බව ඔප්පු කිරීමට සාක්ෂි ඉදිරිපත් නොකළ අවස්ථාවකය. එම නිසා කලින් සඳහන් කරන ලද නඩුවේ දී චෝදනාවේ අවශ්‍ය සාධක ඔප්පු කිරීම ගැන සලකා ගන්නා ලද තීරණයට වෙනස්ව තීරණයක් දිය හැකි කරුණු ප්‍රමාණවත් ලෙස මෙම නඩුවෙහි ඇතැයි මම නොසිතමි. මේ කරුණු උඩ චෝදිතයා වරදට පත් කිරීමේ නියෝගය නිෂ්ප්‍රභා කරන අතර චෝදිත ඇපැල්කරුවන් ද නිදහස් කර හරිමි.

සිව සුබ්‍රමනියම් විනිශ්චයකාරතුමා:

මම එකඟවෙමි.

නියෝගය නිෂ්ප්‍රභා කරනලදී.

1968 අංක 11 දරණ රාජාධිකරණ ඇපැල

හොඩසන් සාමි, වයිකවුන්ට ඩිල්හෝන්, ඩොනවන් සාමි, පියර්සන් සාමි සහ ඩිජ්ලොක් සාමි ඉදිරිපිටදී

නිරුමන් පලනිමලෙයි විරජ්පන් එ. නීතිපතිතුමා*

ලංකාවේ ශ්‍රේෂ්ඨාධිකරණයෙනි.

රාජාධිකරණයේ අධිකරණ කොමිටියේ සාමිවරුන්ගේ තීන්දුවයි

තීන්දුව ප්‍රකාශ කළේ: 1969 ඔක්තෝබර් 6 වැනි දා

''ඕත්‍රුපුවා අකී'' යන ප්‍රඥප්තිය — විත්තිකරු චෝදනාවට උත්තර දීමට පෙර ඔහුට විරුද්ධව නඟා ඇති චෝදනාව ඔප්පු කිරීමට සාක්ෂි ඉදිරිපත් නොකරන බව පැමිණිල්ල ප්‍රකාශ කිරීම — විත්තිකරු නිදහස් කිරීම — දෙවනුව එම චෝදනාවම පිට පවරන ලද නඩුවක් සම්බන්ධයෙන් ඕත්‍රුපුවා අකී'' හෙවත් 'කලින් නිදහස් කරන ලදැයි'යන ප්‍රඥප්තියේ වාසිය නිදහසට ප්‍රමාණවත් හේතුවක් ද? — උත්තර දීමට තරම් දෙයක් නැතැයි යන පදනම උඩ විත්තිය සාක්ෂි නොකැඳවන විට අනුගමනය කළ යුතු ක්‍රියාපටිපාටිය — නිදහස් කිරීමේ නියෝගය ඇපැලේ දී වෙනස් කර වැරදිකරු කිරීම — දඬුවම් ගැන සහනය පතා අයැදීම.

තීන්දුව: (1) වරදක් සම්බන්ධයෙන් චෝදනා කරනු ලැබ සිටියකුගේ නඩු විභාගය ආරම්භයේ දී පැමිණිල්ල වෙනුවෙන් සාක්ෂි කැඳවීමට අදහස් නොකරන බව පැමිණිල්ලේ නීතිඥවරයා කියා සිටීමෙන් අනතුරුව විත්තිකරු චෝදනාවට උත්තර දීමට පෙර ඔහු නිදහස් කරනු ලැබීමෙන් පසු දෙවනුව ඔහුට විරුද්ධව ගෙනෙන ලද පැමිණිල්ලක දී පළමු වතාවේ දී ඔහු වරදකරු වීමේ අන්තරායකට කිසිසේත් ම පාත්‍ර නො වූ නිසා කලින් නිදහස් කරන ලද්දේය හෙවත් ''ඕත්‍රුපුවා අකී'' යන ප්‍රඥප්තිය නිදහසට කාරණයක් ලෙස ගත හොඳකිය.

(2) එවැනි අවස්ථාවකදී දෙවැනි පැමිණිල්ලෙන් හා පලමුවෙනි පැමිණිල්ලෙන් මතුවන ප්‍රධාන හඹ ප්‍රශ්නවල සමානත්වය විසඳීම උචමනා නැත.

(3) ''ඕත්‍රුපුවා අකී'' යන්න නිදහසට කාරණයක් ලෙස දක්වන කල එය ඔප්පු කිරීමේ භාරය විත්තිකරු වෙත පැවරේ.

(4) පැමිණිල්ලේ සාක්ෂි අවසන් වීමෙන් පසුව උත්තර දීමට තරම් දෙයක් නැතැයි යන පදනම උඩ විත්තිය සාක්ෂි කැඳවීමට අදහස් නොකරන බව උසාවියට දන්වා ''ඕත්‍රුපුවා අකී'' හෙවත් කලින් නිදහස් කරන ලදී යන කාරණය මත පිහිටා කලින් නඩුවක චෝදනා පත්‍රයක් සහ වාර්තාවක් ඉදිරිපත් කළ පමණින් විත්තිකරුට දෙවැනි වරට සාක්ෂි කැඳවීමේ අවස්ථාවක් දීමට උසාවිය බැඳී නැති අතර චෝදනාව තහවුරු වී ඇතැයි හැඟී ගියහොත් විත්තිකරු වරදකරු කිරීමට උසාවියට හැකිය.

(5) නිදහස් කිරීමේ තීන්දුවක් ඇපැලේ දී වෙනස් කොට, විත්තිකරු වරදකරු කරන තීන්දුවක් බවට හැරුවූ විට, විත්තිකරුට දඬුවම් දීම පිළිබඳ සහනය පතා අයැදීමේ අවස්ථාවක් නො දී දඬුවම් නො කළ යුතු ය.

රාජාධිකරණ මණ්ඩලයේ ප්‍රකාශය: ''සහනය පතා අයැදීමක් නොමැතිව දඬුවම් සම්බන්ධයෙන් ක්‍රියාකිරීමේ පිළිවෙතක් ඇත්නම් එය සතුටුදායක එකක් ලෙස ගරු විනිශ්චයකාරතුමන්ලාට නොපෙනේ.

නිදහස් කිරීමේ තීන්දුවලින් කෙරෙන අභියාචන සංඛ්‍යාව ඉතා සුළු වීමට ඉඩ ඇතත් එවැනි අවස්ථාවල දී වරදකරු කිරීමෙන් පසු විත්තිකරුවන්ට දඬුවම් ලිහිල් කරවා ගැනීම සඳහා සහනයක් පතා අයැදීමේ අවස්ථාවක් ඇපැල් උසාවිය විසින් දීම ඉතාමත් වැඩදායක ය යන්න ගරු විනිශ්චයකාර සාමිවරුන්ගේ අදහසයි.''

රාජනීතිඥ ඊ. ඇෆ්ස්. ඇන්. ග්‍රෙෂන්, ජෝන් බෙකර් සමඟ, ඇපැල්කරු වෙනුවෙන්.

මොන්ටෙගු සොලමන්, වගඋත්තරකරු වෙනුවෙන්.

හොඩසන් සාමිවරයා

ලංකා දණ්ඩ නීති සංග්‍රහයේ 454 වැනි ඡේදය යටතේ අවුරුදු පහක වැඩිම සිර දඬුවමක් දිය හැකි හොර අත්සන් තැබීමේ චෝදනාවට ලංකාවේ ශ්‍රේෂ්ඨාධිකරණය විසින් 1967 පෙබරවාරි 27 වැනි දින ඇපැල්කරු වරදකරු කොට ඔහුට බරපතල වැඩ ඇතිව දැවුරුද්දක සිර දඬුවමක් දෙන ලදී.

1967 නොවැම්බර් මස 13 වැනි දින මහ රැජිනගේ රාජ සභා ආඥාවකින් මෙම තීන්දුවෙන් ඇපැල් ගැනීමේ විශේෂ අවසරය ඔහුට දෙන ලදී.

''පුරවැසි ආඥා පනතේ (ව්‍යවස්ථා මාලාව, 349 වැනි පරිච්ඡේදය) 6 වැනි වගන්තිය යටතේ ආරක්ෂක හා විදේශ කටයුතු පිළිබඳ ඇමතිවරයා විසින් පරවේණි පුරවැසි සහතිකයක් දෙනු ලැබීම සඳහා ඉල්ලුම් පත්‍රයක් එකී ලියැවිල්ලට අත්සන් කරන ලද්දේ තිරුමන්ගේ පුත්‍ර විරජ්පන් යැයි ඇමතිවරයාට ඒත්තු ගැන්වීමේ

*ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 77 වෙනි කා., 96 වෙනි පිට බලනු.

අදහසින් (ඉහත කී තැනැත්තා ඉපදුනේ තිරුමන්ට සහ ලෙවවම්ට දව 1918 මැයි 1 වැනි දින ෂර්වුඩ් වත්තේ දී ය. 12.6.58 වැනි දින බදුල්ලේ දිස්ත්‍රික් රෙජිස්ත්‍රාර් විසින් අංක 41904 දරණ උප්පැන්න සහතිකය ඔහුට නිකුත් කරන ලදී. එකී තිරුමන් විසින් හෝ ඔහුගේ අනුදැනුම ඇතිව හෝ ඉහත කී ඉල්ලුම් පත්‍රය නොකරන ලද බව දැන දැන එකී ලියැවිල්ලට අත්සන් තැබීමෙන් දණ්ඩ නීති සංග්‍රහයේ 454 වැනි වගන්තිය යටතේ දඩුවම් ලද හැකි වරදක් කළේ යැයි 1966 මාර්තු 10 වැනි දින බණ්ඩාරවෙල මහේස්ත්‍රාත් උසාවියේ දී ඇපැල්කරුට චෝදනා කරන ලදී.

ඔහුට විරුද්ධව නගා තිබුණු චෝදනාව සාමාන්‍යයෙන් මහේස්ත්‍රාත් උසාවියක් විසින් ලඝු අන්දමින් විභාග කළ හැක්කක් නොවී ය. එහෙත් එම මහේස්ත්‍රාත්වරයා අතිරේක දිස්ත්‍රික් විනිශ්චයකාරවරයකු ද වූ හෙයින් (1) නඩුවේ කරුණු සරලය. (2) 1958 දී කරන ලද්දක් වූ මේ අපරාධය ගැන විභාගය ඉක්මනින් නිම කිරීම වඩාත් හිතකරය (3) ගැටලු සහිත නීති ප්‍රශ්න පැන නොනගිය යන හේතු උඩ ඔහු දිස්ත්‍රික් විනිශ්චයකරුවකු සතු බලතල මේ නඩුව විභාග කිරීම සඳහා තමන් වෙත පවරා ගත්තේය. අපරාධ නඩු විධිවිධාන සංග්‍රහයේ 152(3) වැනි ඡේදය යටතේ දිස්ත්‍රික් විනිශ්චයකරුවකු සතු බලතල පවරා ගැනීමට මහේස්ත්‍රාත්වරයාට බලය ඇතත් නීත්‍යානුකූලව දිස්ත්‍රික් උසාවියක් මගින් පැවරිය නොහැකි කිසි දඬුවමක් පැවරීමට ඔහුට බලයක් නොවිය. මේ නිසා ඔහු ඇපැල්කරු වරදකරු යැයි තීරණය කළේ නම් දණ්ඩ නීති සංග්‍රහයේ 454 වැනි ඡේදයේ දැක්වෙන උපරිම දඬුවම අවුරුදු පහක බන්ධනාගාරගත කිරීම වුව ද ඔහුට පැනවිය හැකි වූයේ අවුරුදු දෙකක සිර දඬුවමක් පමණි.

ඇපැල්කරු නිවරදකරු යැයි කියා සිටි අතර ඔහු සාක්ෂි දීමට නොකැඳවන ලදී. පසුවට සඳහන් කරනු ලබන එක්තරා ලියැවිල්ලක් ඉදිරිපත් කළා විනා ඔහු වෙනත් සාක්ෂි ඉදිරිපත් කළේ ද නැත. පැමිණිල්ල විසින් ඔප්පු කරන ලද කරුණු අනුව, හොර අත්සන් තැබීමේ චෝදනාව ඔප්පු වී නැති අතර ඔහු අපරාධයක් කළා නම් ඒ වංචා කිරීමේ වරදය යන පදනම මත ඔහු නිදහස් කරන ලදී.

මෙම නිදහස් කිරීමට විරුද්ධව ඇටෝර්නි ජනරාල් වරයා විසින් ශ්‍රේෂ්ඨාධිකරණයට අභියාචනය කරන ලදුව මහේස්ත්‍රාත්වරයා වෙත ඉදිරිපත් කරන ලද කරුණු අනුව දණ්ඩ නීති සංග්‍රහයේ 453 වැනි ඡේදය යටතේ හොර අත්සන් තැබීමේ වරද ඔප්පු වී ඇති බව එම ඇපැල් උසාවිය විසින් තීරණය කරන ලදී.

ඇපැල්කරු ලංකාවේ පදිංචිව සිටී ඉන්දියානු දෙමළ ජාතිකයෙක් විය. හපුතලේ වත්තක මුරකරුවකු ලෙස ඔහු සේවය කොට තිබින. 1958 ජුලි මස ඔහු කොළඹ විදේශ හා ආරක්ෂක අමාත්‍යාංශයේ ස්ථිර ලේකම් තුමාට 1948 අංක 18 දරණ පුරවැසි ආඥා පනතේ 6 වැනි ඡේදය යටතේ ලංකාවේ උපන් පුරවැසියකු ලෙස තමාගේ තත්ත්වය පැහැදිලි කර දෙන ලෙසත්, පුරවැසි භාවය සඳහා ඉල්ලුම් පතක් එවන ලෙසත් දන්වා ලිපියක් යැවී ය. මේ ලිපියේ ඔහු අත්සන් කළේ දෙමළෙනි.

ඔහු වෙත ඉල්ලුම් පතක් යවන ලදුව එය තිරුමලෙයි හෙවත් පලනිමලෙයි විරප්පන් යනුවෙන් ඔහු පිරවීය. තිරුමන් හා තිරුමලෙයි යන නම් දෙකේ වෙනස ගැන තර්කයක් ඉදිරිපත් නොවින. ඉල්ලුම් පත්‍රයෙහි ප්‍රශ්න මාලාවට පිළිතුරු වශයෙන් ඇපැල්කරු තමාගේ පියා ලංකාවේ උපන් බවත්, තමාත් ලංකාවේ උපන් බවට ලිඛිත සාක්ෂි ඉදිරිපත් කිරීමට හැකි බවත් ප්‍රකාශ කොට තිබිණ. එසේ වූ විට ලංකාවේ පරවේණි පුරවැසියකු ලෙස පුරවැසි ආඥා පනතේ 4 වැනි වගන්තිය යටතේ ඔහුට සුදුසුකම් ලද හැකිවීම ඔහුගේ අරමුණ විය. ඉක්බිතිව ඇපැල්කරු තමාගේ උපන් දිනය හා ස්ථානය 1.5.1918 ෂර්වුඩ් වතුයාය, හපුතලේ බවත් තමාගේ පියාගේ උපන් දිනය හා ස්ථානය 1898, කොස්ලන්ද බවත් සඳහන් කරමින් ලියා අත්සන් කරන ලද ඉල්ලුම් පතක් දෙපාර්තමේන්තුවට යවමින් තමාත් තම පියාත් ලක්දිව උපත ලද්දන් බව දක්වා සිටියේ ය. ෂර්වුඩ් වතුයායෙහි දී 1918 මැයි 1 වැනි දින තිරුමන්ගේ පුත් විරප්පන් නමැත්තකුගේ උපත දක්වන උප්පැන්න සහතිකයක් මේ ඉල්ලුම් පතට අමුනා තිබිණ. මේ අනුව ඉල්ලුම් පත්‍රයෙහි සඳහන් පරිදි ඔහුගේ නම හා උපන් ස්ථානය ද ඇතුළත් වූ පුරවැසිභාවය පිළිබඳ සහතිකයක් ඇපැල්කරු වෙත නිකුත් කරන ලදී.

ඇපැල්කරු උප්පැන්න සහතිකයේ සඳහන් වූ තැනැත්තා නොවන බව පැමිණිල්ල විසින් ඔප්පු කරන ලදී. පැමිණිල්ල විසින් පහත දැක්වෙන ලියැවිලි ඉදිරිපත් කරන ලදී. (1) ඇපැල්කරු විසින් සපයන ලද කරුණු අනුව සකස් වූ ඔහුගේ මුණුපුරාගේ උප්පැන්න සහතිකය. ඇපැල්කරු ලංකාවේ උපත ලද්දකු නොවන බව ඉන් පෙනිණ. (2) ඇපැල්කරු දකුණු ඉන්දියාවේ උපන් බව පෙන්වන ඇපැල්කරු විසින්ම දෙන ලද කරුණු අනුව සකස් වූ අර්ථ සාධක අරමුදල් වාර්තා පත්‍රයත් (3) මේ තරම්ම වැදගත් නොවූ කම්කරු සේවයෙන් නිදහස් කිරීමේ සහතිකයක්.

මහේස්ත්‍රාත්වරයාගේ තීරණය වූයේ තම ඉල්ලුම් පත්‍රය සමඟ බොරු උප්පැන්න සහතිකයක් යැවීමෙන් ඇපැල්කරු උත්සාහ කළේ පරවේණි පුරවැසිකමට සුදුසුකම් ලැබ සිටි තිරුමන්ගේ පුත් විරප්පන් ලෙස පෙනී සිටීමට බවයි.

මහේස්ත්‍රාත්වරයාගේ තීරණය ඉවත තැබූ ශ්‍රේෂ්ඨාධිකරණය මේ කරුණු උඩ චිත්තිකරු හොර අත්සන් තැබීමේ වරදට වරදකරු කරන තීන්දුවක්, වාර්තා කළාය. හොර අත්සන් තැබීම් ලංකා දණ්ඩ නීති සංග්‍රහයේ 452 හා 453 වැනි ඡේදයන්හි මෙසේ විග්‍රහ වේ.

452 වන ඡේදය:

"මහජනයාට හෝ යම් තැනැත්තෙකුට හෝ ආණ්ඩුවට හෝ හානියක් හෝ පාඩුවක් හෝ කිරීමේ අදහසින් හෝ යම් අයිතිවාසිකම් කිමක් හෝ අයිතියක් තහවුරු කිරීමට හෝ යම් දේපලක් යම් තැනැත්තකුගෙන් වෙන් කරවීමට හෝ ප්‍රකාශිත හෝ ඇහවෙන හෝ ගිවිසුමකට යම් තැනැත්තකු ඇතුළු කරවීමට හෝ වංචාවක් කිරීමේ අදහසින් හෝ වංචාවක් සිදුවන ලෙස යම් තැනැත්තකු අසත්‍ය ලේඛනයක් හෝ ලේඛනයක කොටසක් සැදුවහොත් ඔහු කුට ලේඛන සැදීම කරයි."

453 පළමුවැනිව:

"යම් ලේඛනයක් හෝ ලේඛනයක කොටසක් හෝ සාදන ලද්දේ හෝ ලියා අත්සන් කරන ලද්දේ යම් තැනැත්තකු විසින් හෝ යම් තැනැත්තකුගේ බලය ප්‍රකාර නොවන බව දනිමින් ම

හෝ එය සාදන ලද්දේ හෝ අත්සන් කරන ලද්දේ හෝ මුද්‍රා තබන ලද්දේ හෝ ලියා අත්සන් කරන ලද්දේ හෝ එය සාදන ලද්දේ හෝ ලියා අත්සන් කරන ලද්දේ හෝ මුද්‍රා තබන ලද්දේ හෝ ලියා අත්සන් කරන ලද්දේ එකී තැනැත්තා විසින් බව හෝ එකී තැනැත්තා ගේ බලය ප්‍රකාර බව හෝ එකී වේලාවේ දී බව විශ්වාස කරවීමේ අදහසින් වංක ලෙස හෝ වංචනික ලෙස එබඳු ලේඛනයක් හෝ ඉන් කොටසක් හෝ සාදන, අත්සන් කරන හෝ මුද්‍රා තබන හෝ ලියා අත්සන් කරන හෝ යම් ලේඛනයක් ලියා අත්සන් කරනු ලැබූ බව දක්වන ලකුණක් කරන තැනැත්තකු හෝ.....''

හොර අත්සන් තැබීම සම්බන්ධයෙන් ශ්‍රේෂ්ඨාධිකරණයේ නිගමනය පිළිගත නොහැකි යැයි ඇපැල්කරුසිය අධිනීතිඥයා මගින් මෙම අධිකරණයේ දී තර්ක කළේ නැත. ශ්‍රේෂ්ඨාධිකරණයේ තීන්දුව නිෂ්ප්‍රභා කිරීම සඳහා සැහෙන හේතු වශයෙන් ඔහු වෙනත් කරුණු මත විශ්වාසය තැබී ය.

පළමු කොට ඔහු ''ඕත්‍රපුවා ඇක්වි'' (Autrefois Acquit) හෙවත් කලින් නිදහස් කරන ලද්දේය යන ප්‍රඥප්තිය නිදහස වශයෙන් දැක් විය. මෙම තර්කය ඇපැල්කරුගේ අධිනීතිඥවරයා විසින් 1968 මැයි 7 වැනි ද මහේස්ත්‍රාත්වරයා වෙත ඉදිරිපත් කරන ලදී. කොළඹ ඒකාබද්ධ මහේස්ත්‍රාත් උසාවියේ අංක 29980 දරණ නඩුවේ 1963 ඔක්තෝබර් 28 සිට 1965 පෙබරවාරි දක්වා නඩු වාර්තා, හා චිත්තිකරු නිදහස් කිරීමේ නියෝගය හා චෝදනා පත්‍රය ද ඒ අවස්ථාවේ දී ඇපැල්කරුගේ අධිනීතිඥවරයා විසින් මහේස්ත්‍රාත්වරයා වෙත ඉදිරිපත් කරන ලදී. චෝදනා පත්‍රය යට දැක්වේ:

''චිත්තිකරු — පලනිමලෙයි වීරප්පන් —

1. 1958 ජූලි මස 2 වැනි දින හා 1959 සැප්තැම්බර් 22 වැනි දින අතරතුර දිනයක දී මෙම උසාවියේ අධිකරණ සීමාව තුළ කොළඹ දී පුරවැසි ආඥා පනතේ 6 වැනි ඡේදය (349 පරිච්ඡේදයේ ලංකා ව්‍යවස්ථා මාලාව) යටතේ පුරවැසි සහතිකයක් සඳහා එවූ ඉල්ලුම් පත්‍රයත් සමග බද්ධලේ දිස්ත්‍රික් උප්පැන්න රිජිස්ට්‍රාර් විසින් නිකුත් කරන ලද අංක 41904 දරණ උප්පැන්න සහතිකය ඉදිරිපත් කිරීමෙන් 1918 මැයි 1 වැනි දින හපුතලේ ඡර්වුඩ වතුයායේ උපන් තිරුමන්ගේ පුත්‍ර වීරප්පන් ඉහත කී උප්පැන්න සහතිකය තමාගේ උප්පැන්නය යැයි ආරක්ෂක හා විදේශ කටයුතු පිළිබඳ ඇමති ගරු ඇස්. ඩබ්ලිව්. ආර්. ඩී. බණ්ඩාරනායක මහතා මුලාවට පත් කිරීමෙන් පුරවැසි ආඥා පනතේ 6 වැනි ඡේදය යටතේ පුරවැසි සහතිකයක් තමා වෙත නිකුත් කිරීමට එකී ගරු ඇස්. ඩබ්ලිව්. ආර් ඩී. බණ්ඩාරනායක මහතා වංචනික ලෙස පොළඹවීමට උත්සාහ කළ අතර, යථොක්ත පරිදි ඔහු මුලා කරන ලද නෝ'වී නම් ඔහු එම ක්‍රියාව නොකරනුවා මෙන්ම එම ක්‍රියාවෙන් ආණ්ඩුවට පාඩුවක් හෝ අලාභයක් හෝ සිදුවීමට අවකාශ නිබුන හෙයින් ඔබ එමගින් දණ්ඩ නීති සංග්‍රහයේ 400 වැනි වගන්තිය එකී සංග්‍රහයේ 490 වැනි වගන්තිය හා එක්ව ගත් කළ දඩුවම් ලද හැකි වරදක් කර තිබේ.

2. ඉහත කී දිනයේ හා එකී ස්ථානයේ එකී කටයුත්තෙහි ලා යුෂ්මතා පුරවැසි ආඥා පනතේ 6 වැනි ඡේදය (349 පරිච්ඡේදය ලංකා ව්‍යවස්ථා මාලාව) යටතේ පුරවැසි සහතිකයක් ලබා ගැනීම සඳහා තමා 1918 මැයි 1 වැනි දින ලංකාවේ දී හපුතලේ ඡර්වුඩ වත්තේ උපන් තිරුමන්ගේ පුත්‍ර වීරප්පන් එකී කරුණු — එනම් තමා පරවේණි පුරවැසිකම ලැබීමට සුදුසුකම් ලත් තිරුමන්ගේ පුත්‍ර වීරප්පන් යන්න අසත්‍ය බව දැන දැන ඒ වගට අසත්‍ය ප්‍රකාශයක් කිරීමෙන් පුරවැසි ආඥා පනතේ 25 වැනි ඡේදය යටතේ දඩුවම් ලද හැකි වරදක් කර තිබේ.

මේ නඩුවේ චිත්තිකරු නිදහස් කිරීමේ වාර්තාව අනුව චිත්තිකරු එදින උසාවියේ පෙනී සිටි වග පෙනේ.

ඊට පසු ''සාක්ෂි'' යන්න සඳහන් වන අතර ඉනික්බිතිව පහත සඳහන් දේ දැක්වේ.

''සිව සුප්‍රමානියම් මහතාගේ උපදෙස් පිට අධිනීතිඥ සිත්තම්පලම් චිත්තිකරු වෙනුවෙන්.

රජයේ අධිනීතිඥ ඩබ්ලිව්. පෝල් මහතා පැමිණිල්ල වෙනුවෙන් පෙනී සිටිමින් තමා මේ නඩුවේ දී චිත්තිකරු වෙනුවෙන් කිසිදු සාක්ෂියක් ඉදිරිපත් නොකරන බව කියා සිටියි.

මම චිත්තිකරු නිදහස් කරමි.''

චෝදනාවට වගඋත්තර කීමට ඇපැල්කරු කැඳවන ලද බවට කිසිවක් මෙහි පෙනෙන්නට නැත. මෙය මෙම ඇපැලට තුඩු දුන් නඩු විභාගය හා සමග සැසඳිය හැකි ය. ඒ නඩු විභාගයේ දී තමා වරදකරු නොකිරීමට කිසියම් හේතුවක් ඇද්දැයි ඇපැල්කරුගෙන් ඇසූ කල ඔහු ''මම නිවැරැදිකරු'' යැයි කියා සිටියේය.

'ඕත්‍රපුවා ඇක්වි' හෙවත් කලින් නිදහස් කරන ලද්දේ යැයි චිත්තිකරු නිදහසට දැක්වූ කරුණ 454 වැනි ඡේදය යටතේ කෙරුණු චෝදනාව අංක 29950 දරණ නඩුවේ චෝදනාවලින් එකක් නොවිය යන පදනම් මත මහේස්ත්‍රාත්වරයා විසින් ප්‍රතික්ෂේප කරන ලදී. එහෙත් අපගේ මතය අනුව නම් මේ සඳහා දෙවැනි නඩු විභාගයේ පැන නැඟී ඇති ප්‍රධාන ප්‍රශ්න මුල් විභාගයේ ඒවාම ද යන්න සලකා බැලීම අවශ්‍ය නැත.

මුල් අවස්ථාවේ දී කිසි විටෙක ඇපැල්කරු අත්තරාවට පත් කරන ලද බවක් නඩු වාර්තාවෙන් නොපෙනේ. ඉන් පෙනෙන්නේ ඊට හාත්පසින් ම වෙනස් දෙයකි. එනම් චිත්තිකරුට විරුද්ධව කිසිම සාක්ෂියක් ඉදිරිපත් නොකරන බව පැමිණිල්ලේ අධිනීතිඥවරයා කී බවත් ඒ අනුව චිත්තිකරු නිදහස් කරන ලද බවත් ය.

විත්තිකරු චෝදනාවට වගඋත්තර කීමට කැඳවන ලද බවක් පෙනෙන්නට එහි කිසිදු ලකුණක් නැත. එසේ කැඳවන ලද බවට ''නඩු වාර්තාව පරීක්ෂා කර බැලීමේ දී කිසිවක් පෙනී ගොස් නැත. ''ඕත්‍රප්‍රුවා අකී'' හෙවත් ''කලින් නිදහස්වීම'' නිදහස සඳහා ඉදිරිපත් කරන ඇපැල්කරුට එය ඔප්පු කිරීමේ බර පැටවෙන අතර, එය තහවුරු කිරීමට සාක්ෂි නොමැති නිසා ඇපෑලේ එම තර්කය තහවුරු නොවෙයි.

ඇපැල්කරු වෙනුවෙන් අත්හද බැලීමක් වශයෙන් නහන ලද දෙවැනි තර්කය වූයේ ඔහුගේ අධිනීතිඥවරයා තමා සාක්ෂි නොකැඳවන බව පවසා පැමිණිල්ලේ සාක්ෂිවලින් හොර අත්සන් තැබීමේ චෝදනාව ඔප්පු වී නැති වගට නීතිමය තර්කයක් නැගීමෙන් කළේ ''උත්තර දීමට තරම් නඩුවක් නොමැති'' යැයි කීමක් බවත් මහේස්ත්‍රාත්වරයා එම තර්කය ප්‍රතික්ෂේප කළා නම් යුක්තිය ඉටුවීම සඳහා ඇපැල්කරුට සාක්ෂි කැඳවීමේ අවස්ථාවක් ඔහු විසින් දිය යුතුව තිබුන බවත් ය. මහේස්ත්‍රාත්වරයා ඇපැල්කරු නිදහස් කරමින් දී ඇති තීන්දුව ශ්‍රේෂ්ඨාධිකරණය විසින් නිෂ්ප්‍රභා කරමින් විත්තිකරු වරදකරු කරන විට එම උසාවිය කරන්නේ ද ''උත්තර දීමට තරම් නඩුවක් නැතැ'' යන නීතිමය තර්කය ප්‍රතික්ෂේප කිරීමක් හෙයින් ශ්‍රේෂ්ඨාධිකරණයට ඇපැල් කරුට සාක්ෂි කැඳවීමට අවස්ථාවක් නො දී එසේ නො කළ හැකි බවත් තව දුරටත් තර්ක කරන ලදී.

මෙම තර්කයේ හරයක් නොමැත. 1966 ජූලි 8 වැනි දින පැමිණිල්ලේ සාක්ෂි අවසන් වූ පසු මහේස්ත්‍රාත්වරයා ඇපැල්කරුට තමාගේ නිදහසට කරුණු දක්වන ලෙස කීය. ඔහුගේ අධිනීතිඥවරයා තමා සාක්ෂි නොකැඳවන බව පවසා කලින් නඩුවේ චෝදනා පත්‍රය සහ නඩු විභාගයේ වාර්තාව ඉදිරිපත් කිරීමෙන් තෘප්තියට පත් විය. ඉහත සඳහන් වූ ලියකියවිලි හැර වෙනත් කිසිදු සාක්ෂියක් නොකැඳවන වග ඇපැල්කරුගේ නඩුවේ සම්පූර්ණ භාරකාරත්වය දැරූ අධිනීතිඥවරයා පැහැදිලි ලෙසම ප්‍රකාශ කළේ ය. ''උත්තර දීමට තරම් නඩුවක් නැතැයි'' අධිනීතිඥවරයා ඉදිරිපත් කළ තර්කය ගැන නඩුවේ කරුණුවලින් වටහා ගත හැකි අන්දමට නම් එකී තර්කය මහේස්ත්‍රාත්වරයා විසින් ප්‍රතික්ෂේප නොකරන ලද බවත් එය ඔහු විසින් පිළිගෙන ඇති බවත් පෙනේ. තමා ඉදිරියේ ඔප්පු වී ඇති කරුණු මත හොර අත්සන් තැබීමේ වරද ඔප්පු වී නොමැති බව මහේස්ත්‍රාත්වරයා තීරණය කළේ ය. මෙම තීන්දුව ශ්‍රේෂ්ඨාධිකරණය විසින් ඉවත් කරන ලදී.

ඇපැල්කරු විසින් ඉදිරිපත් කිරීමට තැත් කරන ලද ඉහත දැක් වූ කරුණු මත ශ්‍රේෂ්ඨාධිකරණය ඇපැල්කරු නිදහස් කරමින් දුන් තීන්දුව නිෂ්ප්‍රභා කොට ඒ වෙනුවට ඔහු හොර අත්සන් තැබීමේ වරදට වරදකරු කරමින් තීන්දුවක් දුන්නා ය.

සිය තීන්දුව දීමට ප්‍රථම සාක්ෂි කැඳවීමේ තවත් අවස්ථාවක් ඇපැල්කරුට නොදීමෙන් ශ්‍රේෂ්ඨාධිකරණය ඇපැල්කරුට අයුක්තියක් කර නොමැත.

ලිහිල් දඩුවමක් සඳහා සහනය අයැදීමේ අවස්ථාවක් ඇපැල්කරුට නොදී සිය තීන්දුවේ අවසාන ඡේදයේ බරපතල වැඩ ඇතිව අවුරුදු දෙකක දඩුවමක් ඇපැල්කරුට නියම කිරීමෙන් ශ්‍රේෂ්ඨාධිකරණය බලවත් අයෝග්‍ය ක්‍රියා මාර්ගයක් අනුගමනය කර ඇති බව අවසාන වශයෙන් ඇපැල්කරු වෙනුවෙන් තර්ක කරන ලදී.

මෙම විරෝධතාවය මෙම උසාවියට පිළිගත නොහැක. ප්‍රතිපත්තියක් වශයෙන් මෙම අධිකරණය දඩුවම් සම්බන්ධයෙන් මැදිහත් වන්නේ නැත. ගරු විනිශ්චයකාරතුමන්ලාට පෙනී යන අන්දමට මෙම දඩුවම ප්‍රමාණයට වඩා බරපතල එකක් ද නො වේ.

ශ්‍රේෂ්ඨාධිකරණය විසින් දෙපාර්ශ්වය ඉදිරියේ තීන්දුව දුන් පසු ඇපැල්කරුට තමා විසින් හෝ තමාගේ අධිනීතිඥවරයා මගින් හෝ දඩුවම් සම්බන්ධයෙන් සහනය අයැද සිටීමේ වෙනම අවස්ථාවක් නොදෙන ලද බව පිළිගත් කරුණකි. ඒ එසේ වුව ද ඇපැල් පෙත්සමින් නීතිපතිවරයා ඇපැල්කරු නිදහස් කිරීමේ මහේස්ත්‍රාත්වරයාගේ නියෝගය නිෂ්ප්‍රභා කර ගැනීමට පමණක් නොව ඇපැල්කරුට නීතියට අනුකූලව දඩුවම් ලබා දීමට ද ඉල්ලා ඇති බව ඇපැල්කරු වෙත දැනුම් දී තිබේ.

මේ නිසා අධිකරණයේදීම දඩුවම සම්බන්ධයෙන් කරුණු ගෙන හැර පෑමට ඇපැල්කරුට අවකාශ තිබිණ. වරදකරු කිරීමේ ප්‍රශ්නය ගැනම නිශ්චිතභාවයක් නොමැති විටෙක මෙය ඇපැල්කරුවකු කැමැත්තෙන් ම ගන්නා මාර්ගයක් නොවන බව ඇත්තකි. සහනයක් පතා අයැදීමක් නොමැතිව දඩුවම් සම්බන්ධයෙන් ක්‍රියා කිරීමේ පිළිවෙතක් ඇත්නම් එය සතුටුදායක එකක් ලෙස ගරු විනිශ්චයකාරතුමන්ලාට නොපෙනේ.

නිදහස් කිරීමේ තීන්දුවලින් කෙරෙන අභියාචන සංඛ්‍යාව ඉතා සුළු වීමට ඉඩ ඇතත්, එවැනි අවස්ථාවලදී වරදකරු කිරීමෙන් පසු විත්තිකරුවනට දඩුවම් ලිහිල් කරවා ගැනීම සඳහා සහනයක් පතා අයැදීමේ අවස්ථාවක් ඇපැල් උසාවිය විසින් දීම ඉතාමත් වැඩදායකය යන්න ගරු විනිශ්චයකාර සාමිවරුන්ගේ අදහසයි.

ඉහත දක්වන ලද හේතූන් නිසා ගරු විනිශ්චයකාර තුමන්ලා විසින් මෙම අභියාචනය ප්‍රතික්ෂේප කළ යුතු යැයි ගරුතර මහා රාජිනියට මින් උපදෙස් දෙනු ලැබේ.

ඇපැල නිෂ්ප්‍රභා කරන ලදී.

(පරිවර්තනය: චූල්පත්මෙන්ද්‍ර දහනායක විසිනි.)

ද ක්‍රෙට්සර් ශ්‍රේෂ්ඨාධිකරණ විනිශ්චයකාරතුමා ඉදිරිපිටදී

ඇස්. කේ. ජකුර් මහත්මිය එ. ඇස්. ඇම්. ඒ. අලිම් සයිබෝ සහ තවත් අය*

ශ්‍රේෂ්ඨාධිකරණ නඩු අංකය : 114/66 — මාතලේ රික්වෙස්ට් උසාවි නඩු අංකය: 15120

විවාද කැරුණේ: 1969 ජනවාරි, 26 වැනි දා
තීන්දු කැරුණේ: 1969 මැයි 11 වැනි දා

ගෙවල් හිමියා සහ බදුකාරයා —ගෙයින් පිටමංකිරීමට නඩුවක් — එවිට ගෙවල් හිමියාගෙන් බදු ගැනීමක ගිවිසුමක් නැති බව කියා සිටීම — ගෙයින් අස්වීමට නීත්‍යානුකූල නිවේදනයක් අවශ්‍ය ද?

තීන්දුව: ගෙවල් හිමියාගෙන් බදුගත්තේ නැතැයි කියා ඔහුගේ අයිතිවාසිකමට අභියෝග කරන බදුකරුවකු ඉඩමකින් අස්කිරීමට නීත්‍යානුකූල නිවේදනයක් කලින් ඔහුට දීම අවශ්‍ය නැත. එය නුදුන් නිසා නඩුව අහක දැමීමට නොහැක.

අනුගමනය කළ නඩු තීන්දු: මුතුනාවච්චියා එ. පාතුම්මානාවච්චියා (1895) 1 න.නී.වා. 21 පිට
සුන්දර අම්මාල් එ. ජුසේඅප්පු (1934) 36 න.නී.වා. 200 පිට
පේදිරික් එ. මැන්දිස් (1967) 62 න.නී.වා. 471 පිට

විත්තිකරුට යැවූ බැහැර කිරීමේ නිවේදනය නීත්‍යානුකූල ද යන ප්‍රශ්නය

පිළිගත් තීන්දුව: හනිෆා එ. සෙල්ලමුත්තු 70 න.නී.වා. 299 පිට

රාජනීතිඥ සී. රෙංගනාදන් මහතා, ඇම්. ඇස්. ඇම්. නසීම් සහ සී. සන්ද්‍රසාගර යන මහතුන් ද සමග, ඇපැල්කාරිය වෙනුවෙන්.

ඇන්. ආර්. ඇම්. දළුවත්ත මහතා, කෝසල විජේතිලක මහතා ද සමග පළමුවැනි විත්තිකාර වගඋත්තරකරු වෙනුවෙන්.

ද ක්‍රෙට්සර් විනිශ්චයකාරතුමා:

පැමිණිලිකාරිය ඉදිරිපත් කළ නඩුව මෙසේය: ආරාවුලට තුඩු දී ඇති ඉඩම පී1 දරන ඔප්පුවෙන් ඇය මිල දී ගැනීමෙන් පසු විකුණුම්කරු යටතේ එම ඉඩමේ බදුකරුවකු ව සිටි පළමු වැනි විත්තිකරු 1964 ජුනි 20 වැනි දින දතමින් යුත් පී2 දරන ලියුමේ ප්‍රතිඵලයක් වශයෙන් තමා පැමිණිලිකාරියගේ බදුකරු බව පිළිගත්තේ ය. බදුකරු ගෙවල් කුලි නොගෙවා හැරී අතර, පැමිණිලිකාරිය ඔහුට 1966 ජනවාරි 1 වැනි දා හෝ ඉන් පෙර ඉවත් වන ලෙස 1965.9.28 වැනි දා දැන්වූවා ය. ඔහු එම දැන්වීම නොතකා හැරි අතර පැමිණිලිකාරි 1964.12.1 වැනි දා සිට 1965.12.31 වැනි දා තෙක් හිඟ ගෙවල් කුලිය වශයෙන් රු: 260/- ක් ද තමාට යළිත් බුත්තිය ලැබෙන තුරු මසකට රු: 20-/ බැගින් වැඩිපුර අලාබය ද විත්තිකරුවන් ඉවත් කිරීම හා නඩු ගාස්තු ද ඉල්ලා මෙම නඩුව පැවරුවා ය. දෙවැනි හා තුන්වැනි විත්තිකරුවන් නඩුවට සම්බන්ධ කරන ලද්දේ පළමු වැනි විත්තිකරු මෙම ස්ථානය පැමිණිලිකාරියගේ අවසරය නැති ව ඔවුන්ට අතුරු බද්දක් වශයෙන් දී තිබීම හේතුකොටගෙන ය.

පළමු වැනි විත්තිකරු තමා පැමිණිලිකාරියගේ බදුකරු නොවන බව ද ගෙවල් කුලිය තමාගෙන් හිඟ නැතැයි ද දෙවැනි හා තුන්වැනි විත්තිකරුවන්ට මෙම ස්ථානය අතුරු බද්දට නුදුන් අතර, ඔවුන් තමා යටතේ වැඩ කළ වුන් යයි ද තම උත්තරයෙන් කියා සිටියේ ය. පළමු වැනි විත්තිකරු මෙම ස්ථානයේ ව්‍යාපාරයක් පවත්වා ගෙන ගිය අතර, තමන් එහි සිටියේ ඔහුගේ සේවකයන් වශයෙන් පමණක් බව, දෙවැනි හා තෙවැනි විත්තිකරුවෝ සිය උත්තරයෙන් කියා සිටියහ.

පහත දැක්වෙන විසඳිය යුතු ප්‍රශ්න යටතේ දෙපක්ෂය අතර නඩු විභාගය පැවැත්විණි:

*ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 77 වෙනි කා., 102 වෙනි පිට බලනු.

1. චිත්තිකරුගෙන් ගෙවල් කුලිය හිඟව තිබිණි ද?
2. පළමුවැනි විත්තිකරු පැමිණිලිකාරියගෙන් ලිඛිත අනුමැතිය නොලබා මෙම ස්ථානය අතුරු බදු දුන්නේ ද?
3. ප්‍රශ්න 1 හෝ 2 අස්ත්‍යර්ථයෙන් විසඳිණි නම් ඉවත් කිරීමේ නියෝගයක් ලබා ගැනීමට පැමිණිලිකාරියට හිමිකම් ලැබෙද?
4. චිත්තිකරු පැමිණිලිකාරියගේ බදුකරු ද?
5. කවර ආකාරයකින් හෝ 5 වැනි ඡේදයේ ඉදිරිපත් කොට ඇති දන්වීම නීත්‍යානුකූල ද?

උගත් මාතලේ රික්වෙස්ට උසාවියේ කොමසාරිස්තුමා, පළමු වැනි චිත්තිකරු පැමිණිලිකාරියගේ බදුකරු බව ද, 1964 දෙසැම්බරයේ සිට 1965 ඔක්තෝබර දක්වා කාලයට ඔහුගෙන් ගෙවල් කුලිය හිඟව තුබූ නමුත් දෙවැනි හා තෙවැනි චිත්තිකරුවන්ට ඔහු එම ස්ථානය අතුරු බදු නුදුන් බව ද තීරණය කළේ ය. කරන ලද දැන්වීම නීත්‍යානුකූල නොවන බව තීරණය කළ එතුමා, පැමිණිලිකාරියගේ නඩුව ගාස්තුවට ද යටත් කොට නිෂ්ප්‍රභා කළේ ය. පැමිණිලිකාරිය එම තීන්දුවට විරුද්ධ ව ඇපැලක් ඉදිරිපත් කළා ය.

සාක්කි පරෙස්සමින් කියවා බැලීමේ දී, පහත සඳහන් තීරණ අතින් උගත් කොමසාරිස්තුමා නිවැරදි බවට මම සැහීමට පත් ව සිටිමි:

1. චිත්තිකරු පැමිණිලිකාරියගේ බදුකරු ය.
2. 1964 දෙසැම්බරයේ සිට 1965 නොවැම්බරය දක්වා ගෙවල් කුලිය ඔහුගෙන් හිඟ ව තිබිණි.
3. ඔහු, දෙවැනි හා තෙවැනි චිත්තිකරුවන්ට අතුරු බද්දක් දී නොතිබිණි.

උගත් කොමසාරිස්තුමා, ඉවත් ව යන ලෙස කළ දැන්වීම නීත්‍යානුකූල නැතැයි යන හේතුව මත පැමිණිලිකාරියගේ නඩුව නිෂ්ප්‍රභා කිරීමේ දී 1 නව නීති වාර්තා 21 වැනි පිටුවේ වාර්තා කොට ඇති *මුතුනවිචියා එ. පකුමනවිචියා* නඩුව නොපෙනී ගොස් ඇත. තම ඉඩම් හිමියාගේ අයිතිය නොපිළිගන්නා අතර ඔහුට අවනත නොවන බදුකරුවකුට ඉවත් වී යාම සඳහා නීත්‍යානුකූල දැන්වීමක් නොතිබීමේ හේතුව මත, තමාට විරුද්ධ ව පැවැරුණු නඩුවක් නිෂ්ප්‍රභා කරවීමේ හිමිකම නොලැබෙන බව එම නඩු තීන්දුවෙන් දැක්වෙයි. මේ නඩු තීන්දුව ඩෝල්ටන් විනිශ්චයකාරතුමා විසින් *සුන්දර අම්මාල් එ. ජූසේ අප්පු* 36 නව නීති වාර්තා 400 නඩුවේ දී ද වඩාත් මැතක දී කේ. ඩී. ද සිල්වා විනිශ්චයකාරතුමා විසින් *පේදිරික් එ. මෙන්ඩිස්* 62 නව නීති වාර්තා 471 වැනි පිටුවේ නඩුවේ දී ද පිළිගෙන තිබේ. මේ නිසා, කොමසාරිස්තුමා විසින් කරන ලද නියෝගය ඉවත දැමිය යුතුය.

මෙය නීත්‍යානුකූල ඉවත් වී යාමේ දැන්වීමක් ඔප්පු කිරීම අවශ්‍ය කෙරෙන නඩුවක් වීණි නම්, 1966 ජනවාරි 1 වැනි දට පෙර ඉවත් ව යන ලෙස 1965.9.28 වැනි දින කරන ලද දැන්වීම් නීත්‍යානුකූල නැතැයි කොමසාරිස්තුමා කළ තීරණය ම-විසින් ඉවත දැමීමට ඉඩ තුබූ බව මෙහි ලා සඳහන් කළ යුතු ය. ටී. ඇස්. ප්‍රනාන්දු විනිශ්චයකාරතුමා සහ සිවසුප්‍රමනියම් විනිශ්චයකාර තුමා ද විසින් තීන්දු කරන ලදුව 70 නව නීති වාර්තා 299 වැනි පිටුවේ වාර්තා කොට ඇති *හනිෆා එ. සෙල්ලමුත්තු* නඩුවේ එවැනි දැන්වීමක් නීත්‍යානුකූල දැන්වීමක් බව දක්වා ඇත. එම තීරණයට දී ඇති හේතුවලට මම ගෞරවයෙන් එකඟ වෙමි. මෙම ඇපැලට ඉඩ දෙන අතර ඇපැල්ගෙන ඇති තීන්දු ප්‍රකාශය ඉවත් කෙරෙන අතර හිඟ ගෙවල් කුලී වශයෙන් ගෙවිය යුතු මුදල රු: 260/- ක් නොව රු: 240-/ ක් විය යුතුය යන්න හැර පැමිණිලිකාරිය ඉල්ලා ඇති අයුරු පළමු වැනි චිත්තිකරුට විරුද්ධව නඩුව තීන්දු කෙරෙමින් තීන්දු ප්‍රකාශය කරන මෙන් මම නියම කරමි. පළමු වැනි චිත්තිකරු මෙම ඇපැලේ ගාස්තු පැමිණිලිකාරියට ගෙවිය යුතුය.

ඇපැලට ඉඩ දෙන ලදී.

පරිවර්තනය : අධිනීතිඥ කුමාරදාස ජයසේකර විසිනි.

19 වෙනි කාණ්ඩය නිමි.