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 Sinhalese

VOLUME LXI

WITH A DIGEST

Hon'ble **HEMA H. BASNAYAKE**, Q.C.
Chief Justice
(*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.)
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)
G. P. S. de SILVA, B.A. (CEYLON)
Advocates of the Supreme Court
(*Asst. Editors*)

1962

G.A.N

Subscription payable in advance, Rs. **10/50** per Volume.
Copies available at: 50/3, Siripa Road, Colombo 5.

TABLE OF CASES

Action

Entertained without jurisdiction—Decree entered a nullity.

See under—Trusts

Affidavits

Attempt to admit affidavit from jurors in Appeal Court—Permissibility.

SHOUKATALLIE *vs.* THE QUEEN 36

Appeal

Can appellant challenge validity of the very Act of Parliament which confers on him a right of appeal.

DON ANTHONY *vs.* THE BRIBERY COMMISSIONER .. 100

Appeals (Privy Council) Ordinance

Privy Council—The Appeals (Privy Council) Ordinance (Cap. 85, Legislative Enactments, 1956 Edition) Rule 1 (a) of Schedule—Rent and ejectment action—Order of ejectment against tenant—Application for conditional leave to appeal as of right under Rule 1 (a)—Is it the value of the property or the value of the claim in question that is material in deciding whether petitioner should be given leave to appeal under Rule 1 (a)—Effect of uncontradicted affidavit that premises in suit worth more than Rs. 35,000 and right of occupancy more than Rs. 5,000.

The petitioner was a tenant who had been successfully sued by his landlord (in a rent and ejectment action) and whose ejectment had, in appeal, been ordered by a judgment of the Supreme Court. He now applied for conditional leave to appeal to Her Majesty in Council. The premises in question were subject to the Rent Restriction Act, 1948, and the monthly rental was Rs. 210.83. The present application was made on the basis that an appeal lay as of right under Rule 1 (*a*) of the Rules in the Schedule to the Appeals (Privy Council) Ordinance (Cap. 85). The petitioner had also filed an affidavit in support of his application in which he declared that the premises in question were worth more than Rs. 35,000 and valued his occupancy right at more than Rs. 5,000.

Held : That the petitioner should be granted conditional leave to appeal under Rule 1 (*a*) as,

(*a*) on the facts of the present application it is the *value of the property* and not the value of the claim in question, which was the determining factor ;

(*b*) his affidavit which declares that his right to occupation of the premises as a protected tenant is worth more than Rs. 5,000 stands uncontradicted.

KALIAPPA PILLAI *vs.* CASSIM AND ANOTHER .. 59

Privy Council—Application for conditional leave to appeal thereto—Appeals (Privy Council) Ordinance (Cap. 100, (1956 Edition) Legislative Enactments) —What is a final order within the meaning of rules in Schedule to Ordinance.

The plaintiff instituted an action for damages on the ground that the defendant had maliciously refused to issue to the plaintiff a licence under the Public Performances Ordinance authorising the use of the plaintiff's cinema for " public performances ". On a preliminary issue as to whether the plaint disclosed a cause of action, the District Judge held that if the refusal to grant the licence had been malicious, a cause of action for damages would have enured to the plaintiff, but that such an action would lie, not personally against the individual who had refused the licence, but against the person in his capacity as the authority empowered by law to grant the licence, that is, as the Chairman of the Urban Council of Puttalam. The District Judge therefore dismissed the action on the ground that it had been brought against the defendant personally and not in his capacity as Chairman of the Council. On appeal to the Supreme Court, the dismissal was affirmed, but on the different ground that the proper remedy, if any, open to the plaintiff was by way of an application to the Supreme Court for a mandamus calling upon the proper authority to issue the licence, and not by way of an ordinary action in a Civil Court. The plaintiff now sought to appeal from the order of the Supreme Court, and it was argued for the defendant that the order was not a final order within the meaning of the rules in the Schedule to the Appeals (Privy Council) Ordinance.

Held : (1) That the result of the order dismissing the action was that the question whether, in the circumstances alleged in the plaint, the plaintiff might recover damages on the ground that the licence was unlawfully refused, had been finally terminated. The plaintiff could not again seek to recover damages on the same ground from the defendant as an individual.

(2) That even though the ground of the dismissal of the plaintiff's action was that the District Court had no jurisdiction to entertain it, yet a plaintiff who alleges that a Court has jurisdiction is entitled to a determination on the question of jurisdiction ; and a determination that there is no jurisdiction would appear to be an order finally determining the rights of the parties unless there is a further explicit or implicit determination that some other authority has the jurisdiction to entertain the plaintiff's claim.

(3) That the order of the Supreme Court was, therefore, a final order from which an appeal lay under the rules to the Appeals (Privy Council) Ordinance.

DAVID *vs.* ABDUL CADER 87

Privy Council—Application for leave to appeal thereto—Appeals (Privy Council) Ordinance, rule 2 of Schedule—Two appellants—Proxy signed by one only—Effect—Sufficiency of notice given under rule 2—Whether appeal severable.

An application was made under the Appeals (Privy Council) Ordinance for leave to appeal to the Privy Council. The motion and petition filed with it were signed by a Proctor on behalf of the appellants, who were two in number. The proxy given to the Proctor for the purpose of making the application was, however, signed by only one of the appellants.

Further, notice of the intended application for leave to appeal, which is required to be given by rule 2 of the rules in the Schedule to the Appeals (Privy Council) Ordinance, was given in the following ways :—firstly, by a telegram, bearing the name of one of the appellants as sender, and sent by the Manager of the appellants' business in the name of that appellant and by a telegram bearing the name of the other appellant as sender, and similarly sent by the Manager of the business ; secondly, by a written communication sent by post, and signed by only one appellant, both on his own behalf and on behalf of the other appellant.

Held : (1) That the Proctor had no authority to make the application on behalf of both appellants, and that therefore the application was defective.

(2) That the application must also be disallowed in that no sufficient notice had been given in terms of rule 2 of the rules in the Schedule to the Appeals (Privy Council) Ordinance. For—

(*a*) The telegrams did not constitute notice given by the appellants and did not satisfy rule 2.

(*b*) The written communication did not constitute sufficient notice, inasmuch as it was not clear that the appellant who signed had authority to give notice on behalf of the other appellant.

The rule requires that, where there is more than one appellant, notice should be given by all of them.

(3) That it was not possible to allow the application in respect of that appellant alone who had given notice on his own behalf, because the appeal was not severable in that way.

MOTHA AND ANOTHER *vs.* PERERA AND ANOTHER.. 106

Autrefois Acquit

See ATTORNEY-GENERAL *vs.* PIYASENA 79

Bribery Act

Bribery Act, No. 11 *of* 1954, *as amended by Act, No.* 40 *of* 1958—*Ceylon (Constitution) Order-in-Council,* 1946—*Bribery Tribunal—Whether members exercise judicial power even at the stage prior to conviction—Validity of entire Bribery Act challenged—Right of appeal to the Supreme Court conferred by section* 69A *of the Act—Can an appellant challenge the validity of the very Act of Parliament which confers a right of appeal on him.*

It was submitted on behalf of the appellant that a Bribery Tribunal as constituted under the present Bribery Act purported to exercise judicial power not only at the stage of convicting and punishing a person but even at the stage of ascertaining and declaring the liabilities of persons charged before it. It would then follow from the decision in *Senadhira* v. *The Bribery Commissioner*, that such power could not be validly exercised by the Tribunal as the giving of such powers to the Tribunal was unconstitutional. Any statute which purported to confer such powers on the Bribery Tribunal would be invalid.

A preliminary objection was taken by Crown Counsel that the appellant could not attack the validity of the very Act of Parliament which gave him a right of appeal. (It might be noted that section 69A of the Bribery Act, as amended, gives a convicted person a right of appeal to the Supreme Court).

Held : (1) That the preliminary objection must be upheld and that the appellant could not attack as invalid the very statute which conferred on him a right of appeal to the Supreme Court. Any relief on the ground of the invalidity of the Act must be found by a process other than appeal.

(2) That, however, following the decision in *Senadhira* v. *The Bribery Commissioner*, the sentence of fine imposed on the appellant must be set aside.

DON ANTHONY *vs.* THE BRIBERY COMMISSIONER .. 100

Civil Procedure Code

Section 118—*Translations of documents—Must be signed by interpreter of a Court or sworn translator.*

NONIS *vs.* NONIS AND OTHERS 17

Chapter LIV—Procedure to be followed in administration proceedings thereunder—Property belonging to deceased claimed by person cited—Oral evidence given in support of claim—Effect of not filing affidavit as required by section 714 (3)—*No order as to delivery of immovable property to be made in proceedings under this Chapter.*

Held: (1) That although section 714 (3) of the Civil Procedure Code sets out that the proceedings as to the property claimed shall be dismissed on the person cited filing an affidavit claiming such property, the fact that the respondent in the present case had not filed an affidavit was no bar to dismissal of the proceedings as she had on affirmation claimed to be the owner of the property.

(2) That in proceedings under Chapter LIV of the Civil Procedure Code, no order for delivery of possession of immovable property can be made.

THAMBAGAMUWA KUMARIHAMY *vs.* THAMBAGAMUWA BUDDHARAKKITA 99

Chapter LIII—Summary Procedure on Liquid Claims —Summons required by section 703—*Application for leave to appear and defend under section* 706—*Computation of seven days mentioned in Form* 19—*Interpretation Ordinance, section* 8 (3), *section* 11.

The plaintiff instituted an action under Chapter LIII of the Civil Procedure Code, and summons issued to the defendants under section 703 in the Form 19 contained in the First Schedule to the Civil Procedure Code. The summons required the defendants to obtain leave from the Court within seven days from the service thereof, inclusive of the day of such service. Summons was served on the 1st December, 1959. On the 8th December, the Proctor for the defendants tendered to the Court office a proxy and affidavit signed by them together with a motion that the application of the defendants be

Civil Procedure Code—(*Contd.*)

fixed for inquiry. The District Judge treated the filing of these papers as an application by the defendants for leave to appear and defend within the meaning of section 704 of the Code, but made order that the application was made out of time. The defendant appealed.

Held: (BASNAYAKE, C.J., *dissentiente*). (1) That by reason of section 11 of the Interpretation Ordinance (Cap. 2, Legislative Enactments, 1938 Ed.), in computing the period of time which the defendant was required to apply for leave to appear and defend, the 1st day of December, 1959, had to be excluded. When the defendant applied on 8th December, 1959, therefore, he was within the time allowed by law.

(2) That as a result of the application of section 11 of the Interpretation Ordinance and the consequent exclusion of the first day in the computation of time, the period allowed in the summons for an appearance by the defendant is a period not exceeding six days. Form 19 being a written law within section 2 of the Interpretation Ordinance, the result was that section 8 (3) of the Interpretation Ordinance, also applied to the Form, and operated to exclude a Sunday which intervened in the relevant period from being included in the computation of time. For that reason also, the defendant appeared within the time allowed by law.

Sections 508, 511, 513 *and* 518.

Section 508

Section 772.

Contract

"Rent-a-Car" Service—Hiring of cars registered as private cars—Illegality of contract.

See under—Motor Traffic Act.

Co-owners

Co-owners—Entirety of land claimed by one co-owner—Prescriptive possession—Nature of evidence necessary to establish ouster.

Held: (1) That where a co-owner seeks to establish title by prescriptive possession to the common property on the basis of an ouster, very clear and strong evidence of the ouster is called for, and unless the evidence is compelling and convincing, the inference of an ouster should not be drawn.

(2) That the fact that damage compensation and rent compensation (under the Defence Compensation Regulations) was paid to one of several co-owners does not by itself establish anything in the nature of an ouster referable to a date prior to the date on which compensation had been paid.

Whether business carried on in partnership or co-ownership.

See under—Partnership

Criminal Procedure

Criminal Procedure—Jury—Nature of trial Judge's direction if jury disagree—Use of phrases importing coercion—Exhortation to reach a verdict.

Murder—Two persons charged with this offence—Disposal of body after shooting victim—One accused only assisting in such disposal—Victim found to have been yet alive when body thrown into river—Possibility of belief on part of person assisting in disposal that victim already dead—What should a trial Judge's directions to the jury on this point be—Non-direction—Effect.

Affidavits—Attempt to admit affidavit from jurors in Appeal Court—Permissibility.

The appellant *S.* and his brother *M.* were charged with the murder of one *P.* The prosecution story was that while *P.* was travelling along the river in his corial, the appellant shot him. They further sought to prove that after *P.* was shot, the appellant and *M.* had tied him to a log of wood by a vine and thrown him into the water. The medical evidence revealed that *P.* was yet alive at the time he was thrown into the river.

The trial lasted 15 days. On the final day of trial, after a summing-up lasting 5 1/2 hours, the jury retired at 4.50 p.m. At 8.40 p.m. they returned into Court and stated that they disagreed on their verdict. On the trial Judge inquiring whether they needed any further directions the Foreman replied in the negative. Thereupon, the learned trial Judge reminded them of the oath they had taken. He further pointed out that the evidence led by the Crown and by the accused persons was clear and that it would not be difficult to arrive at a verdict. He then went on to make *inter alia* the following observations :—"*When you get into that jury room you must put all extraneous matter away from your deliberations . . . It appears to me that this Colony is reaching a stage, or wants to reach a stage, when it can manage its own affairs. Well this kind of thing that is going on amongst the jury would not help. In my very humble submission I cannot see how it will help one way or the other. Now, you must return to the jury-room and consider the matter again and make up your minds one way or the other. If you feel one way and another member of the jury thinks another way, then you must examine the arguments of each and accept reason. You must not be pig-headed . . . Gentlemen of the jury, I am now going to order you to return to that jury-room and consider the matter calmly and dispassionately, and give you an opportunity of arriving at an honest verdict in this case. Please see that you do not besmirch the fair name of your country. Please return to the jury-room*". Thereafter, the jury retired again but returned at 10 p.m. to ask for further directions on the law. The learned trial Judge then directed them on the law concerning principals in the first and second degree, but he did

not deal with accessories *after* the fact. The jury retired again at 10.15 p.m. and at 1.35 a.m. early the next day they came back and returned a verdict finding both accused guilty of murder. There was a strong recommendation for mercy in the case of *M.*, the 2nd accused.

Both accused appealed to the Federal Supreme Court. There, the appeal of *M.* was allowed and that of the present appellant *S.*, dismissed. The ground on which the appeal of *M.* was allowed was that the trial had failed to direct the jury on the point that when *M.* assisted *S.* in disposing of *P's.* body, *P.* may have been dead or to all appearances dead and *M.* may have believed that *P.* was dead before he took any part in the matter. On this view of the matter *M.* may have been found guilty as an accessory *after* the fact. *S.* then appealed to the Privy Council on the ground that the trial Judge had exerted undue pressure on the jury—the gist of the complaint being that the learned trial Judge told the jury that they *must* return a verdict one way or the other, and that they may have thought that they might not be discharged till they agreed on a verdict.

Held : (1) That there was nothing wrong in a trial Judge exhorting the jury to reach a verdict, so long as he does not use phrases which import a measure of coercion. In the present case although the trial Judge's directions were perhaps too strongly worded and might have been differently put, there was not such a measure of coercion as to invalidate the verdict.

(2) That the Federal Supreme Court had rightly allowed the appeal of *M.* and set aside his conviction. In view of the trial Judge's non-direction on whether *M.* might have been only an accessory after the fact, the jury had been prevented from considering the possibility that he was guilty not of murder but of manslaughter, as it would have been open to them to take the view that despite the medical evidence *P.* was, in fact, dead before he was thrown into the water *or* that *M.* may have thought *P.* was dead when his body was thrown into the river.

(3) That the appeal of *S.* had been rightly dismissed by the Federal Supreme Court.

Held further : (4) That when the appellants had, before the Federal Supreme Court, sought to adduce affidavits from two of the jurors as to what took place in the jury-room, that Court had rightly refused to admit the affidavits.

See also under—Magistrate

Criminal Procedure Code

Sections 163, 165F (1A), 391, 425—*Non-summary proceedings before Magistrate—Sufficient evidence to commit accused for trial—Has the Attorney-General power to consolidate commitments and join together in one indictment counts relating to offences inquired into in separate non-summary proceedings—Does the District Court have jurisdiction to try accused on such commitment—Is this a defect curable under section* 425.

Held : (1) That every non-summary proceeding before a Magistrate must, if there be sufficient evidence to put the accused on trial, be followed by *a separate indictment.*

(2) That where the Attorney-General has purported to consolidate commitments and join together in one indictment counts relating to offences inquired into in separate non-summary proceedings, he would be acting *ultra vires* and the District Court would have no jurisdiction to try the accused on that particular indictment.

(3) That section 425 of the Criminal Procedure Code cannot be used to cure a defect of this nature, as an error which strikes at the root of jurisdiction can never be cured under section 425.

Counsel—Right of an accused person to be represented by counsel or pleader—Conviction vitiated by denial of such right—Proceedings under section 439 *of the Criminal Procedure Code.*

Criminal Procedure Code, section 253*A—Regulation* 1 *of the regulations made thereunder—Is trial Judge empowered to order forfeiture of a witness's batta.*

Held : (1) That under our law an accused person has a right to be represented by counsel or pleader and the refusal to give him reasonable time to retain counsel is a denial of that right. The conviction of the accused in the present case should, therefore, be quashed.

(2) That the learned trial Judge had no power to order that a witness should not be paid his batta, as there is no provision in our law for the forfeiture of batta.

Sections 172 *and* 413—*Firearms Ordinance, section* 44—*Rural Courts Ordinance, section* 11—*Penal Code, section* 484—*Charge of intimidation—Altered to insult charge after evidence led—Jurisdiction of Magistrate to try such charge—Order of confiscation of licensed gun—Legality of order.*

The appellant was charged with criminal intimidation. After receiving some evidence the learned Magistrate recorded that the complainant was " not speaking the truth when he refers to a gun " and purported to amend the charge of intimidation to one of insult. The accused pleaded guilty and he was sentenced. Thereafter the learned Magistrate recorded that " the accused does not need a gun " and ordered the confiscation of the gun. He also directed that it be sent to the Government Agent.

In his petition of appeal the appellant complained of two matters : (1) A charge of insult was triable exclusively by the Rural Court. (2) The order of confiscation of the gun was wrongly made.

Held : (1) That according to section 11 of the Rural Courts Ordinance, No. 12 of 1945, a Magis-

Criminal Procedure Code (*Contd.*)

trate's Court has jurisdiction to try an offence punishable under section 484 of the Penal Code, when the prosecution is instituted by a Police Officer.

(2) That the order of confiscation could not be justified either on the facts of the case or on the law applicable, viz., section 413 of the Criminal Procedure Code and section 44 of the Fire-arms Ordinance.

EDWIN *vs.* CHELVARAJAH, S.I. POLICE, WELIGAMA.. 29

Section 182—*Conviction for offence other than one mentioned in charge—When may this be permitted.*

Held : That except in a case to which section 182 of the Criminal Procedure Code applies, an accused person cannot be convicted of an offence with which he has not been charged.

PETER *vs.* INSPECTOR OF POLICE, MIRIGAMA .. 30

Sections 148 (1) (*d*), 151 (2), 187 (1), 189 (1)—*Witness giving evidence at pre-trial stage—Must he be recalled or tendered for cross-examination at trial—Evidence Ordinance, section* 138.

Proceedings were initiated in the Magistrate's Court under section 148 (1) (*d*) of the Criminal Procedure Code, by the accused being brought before the Magistrate in custody without process, accused of having committed an offence under section 315 of the Penal Code. Thereupon the Magistrate, acting in terms of sections 151 (2) of the Criminal Procedure Code, examined the injured person, *M.*, and the constable who produced the accused in custody. The constable stated in evidence that he knew nothing of the facts of the case. The Magistrate then proceeded to frame a charge in terms of section 187 (1) of the Criminal Procedure Code, and evidence was led for the prosecution and defence. Although the prosecution called *M.* as a witness, the constable was neither called nor tendered for cross-examination. At the conclusion of the trial, the Magistrate upheld an objection raised by Counsel for the accused that the trial was illegal because the constable had not been called or tendered for cross-examination, and discharged the accused. The Attorney-General appealed from this order.

Held : That a witness who gives evidence at a pre-trial stage, and states that he knows nothing of the facts of the case, need not be called at the trial.

ATTORNEY-GENERAL *vs.* N. SUPPIAH AND ANOTHER.. 69

Criminal Procedure—Witness giving evidence at pre-trial stage—Requirement that such witness be tendered for cross-examination at trial—Does failure to do so vitiate trial.

Held : That in the present case the Sub-Inspector who gave evidence before the accused was charged should have been called and tendered for cross-examination at the subsequent trial. The failure to do this was a grave irregularity which vitiated the trial.

ABDUL WADOOD *vs.* S.I. POLICE, MATARA 71

Autrefois acquit—Accused charged with offences under Excise Ordinance—Charge illegal owing to non-compliance with section 187 (1) *of the Criminal Procedure Code—Order of acquittal—Second prosecution for same offences—Plea of autrefois acquit—Is such plea available in the circumstances—Criminal Procedure Code, sections* 2, 187 (1), 190, 191, 194, 195, 290, 330, 338 (2), 347.

The accused in this case was charged with certain offences under the Excise Ordinance. The charges were read to the accused who pleaded not guilty. Thereafter, the prosecution called its witnesses who were cross-examined by the defence and re-examined by the prosecution and the prosecution case was closed. When the accused was called upon for his defence, his pleader stated that he was not calling any evidence on the accused's behalf and submitted that the proceedings were illegal in that the accused who had appeared otherwise than on summons or warrant had been charged without any evidence being led as required by section 187 (1) of the Criminal Procedure Code. The learned Magistrate upheld this submission and purported to acquit the accused. There was no appeal against this purported acquittal. However, a second prosecution was subsequently launched against this accused in respect of the same offences. At the second trial the plea of *autrefois acquit* was raised on behalf of the accused by his pleader and this plea was tried as a preliminary issue. The learned Magistrate upheld this plea. The Attorney-General then appealed.

Held : (BASNAYAKE, C.J., *dissentiente*) : (1) That the charge in the first case was illegal in view of the decision in *Mohideen* v. *Inspector of Police, Pettah.*

(2) That since the charge in the first case was illegal, there could have been no valid trial at all and neither a conviction nor an acquittal could have followed on such a charge.

(3) That in the circumstances, the plea of *autrefois acquit* was not available to the accused, as the order made by the learned Magistrate in the first case operated merely as a discharge and not as an acquittal.

ATTORNEY-GENERAL *vs.* PIYASENA 79

Section 168—*Charge of criminal breach of trust—Date of offence specified in charge—Evidence disclosing that offence not committed on specified date—Effect of such evidence—Failure of prosecution to prove charge.*

The charge against the accused was in the following terms :—". . . that you did . . . at Galle, on 18th December, 1951, you being entrusted with property to wit, a sum of Rs. 340.09 in your capacity as agent . . . did commit criminal breach of trust in respect of the said property and that you have thereby committed an offence punishable under section 392 of the Penal Code ".

At the trial, it was contended on behalf of the accused that the charge meant that the offence was

Criminal Procedure Code (*Contd.*)

committed on 18th December, 1951, but that there was no evidence to prove the commission of an offence on that day. Upholding this contention the learned Magistrate discharged the accused. The Attorney-General appealed against this order.

In appeal, it was submitted on behalf of the Attorney-General that the charge did not mean that the offence was committed on 18th December, 1951, but that it was committed in respect of money that was entrusted to the accused on that date. It was further argued : (*a*) that the averments in the charge, taken together, were reasonably sufficient to give the accused notice of the matter with which he was charged ; (*b*) that it was not necessary that the charge should particularize the time of offence ; (*c*) that even if the Magistrate thought the time should have been stated, he should have amended the charge to supply the omission. It was further contended that the Magistrate should have convicted the accused as he had held both that the money had been entrusted to the accused on 18th December, 1951, and that the accused had misappropriated it.

Held : (1) That the charge meant that the offence was committed on 18th December, 1951, and that the prosecution had failed to prove this charge. All the accused had to do was to show that there was no evidence that he misappropriated any money on the day in question.

(2) That there was no omission in the statement of the particulars of the offence that had to be supplied by an amendment.

(3) That as the accused was not tried on a charge of having committed an offence at any time other than the 18th December, 1951, it was not open to the learned Magistrate to find that the accused misappropriated the money.

ATTORNEY-GENERAL *vs.* DIIEFN 74

Sections 148, 150, 151, 187 (1)—*Cases where an accused is brought to Court other than on summons or warrant—Must a Magistrate hold the examination directed by section* 151 (2) *in every such case or only in cases falling under section* 148 (1) (*d*)—*Nature of evidence to be recorded at such examination—Is hearsay excluded—Evidence Ordinance, sections* 2 (1), 60.

Held : (1) That in all cases where an accused is brought before Court otherwise than on summons or warrant, a Magistrate must hold the examination directed by section 151 (2) of the Criminal Procedure Code. The decision in *Mohideen* vs. *Inspector of Police, Pettah*, is applicable to all such cases and is not confined to proceedings instituted under section 148 (1) (*d*) of the Criminal Procedure Code.

(2) (H. N. G. FERNANDO, J., *dissentiente*) : That when a person is being examined in terms of section 151 (2) of the Criminal Procedure Code, hearsay evidence must be excluded. The case of *Tikiri Banda* v. *Perimpanayagam* was, therefore, correctly decided.

MARTIN APPUHAMY *vs.* SUB-INSPECTOR OF POLICE, JAFFNA 90

Section 122—*Statements recorded in an investigation under Chapter* 12 *of Code to be used only for the purposes set out in section* 122 (3)—*Tendering of oral evidence in proof of such statements illegal—Evidence Ordinance, section* 145.

Evidence in rebuttal—Not to be called at stage of Crown Counsel's address—Police Officer's evidence of statements made to him by accused not substantive evidence if denied.

Held : (1) That the learned Commissioner was wrong in allowing Crown Counsel to call evidence in rebuttal after the close of the defence case and during Crown Counsel's address to the jury.

(2) That it is illegal to use statements made by an accused in the course of an investigation under Chapter 12 of the Criminal Procedure Code, for any purposes other than those provided in section 122 (3) of the Code.

(3) That the tendering of oral evidence as proof of statements made by a person in the course of an investigation under Chapter 12 of the Criminal Procedure Code, is illegal.

(4) That statements said to have been made by an accused to a Police Officer and denied by the accused at the trial, cannot be used as substantive evidence of the facts stated therein. Such statements are relevant only for the purpose of impeaching the credit of the accused.

THE QUEEN *vs.* SUMANATISSA THERO 97

Section 122—*Statements recorded thereunder—Can such statements be used corroborate applicant's evidence in application for Maintenance*

JAYAWEERA *vs.* KARUNAWATHIE 72

Decree

Court entertaining action without jurisdiction—Decree entered a nullity.

See under—Trusts.

Divorce

Divorce—Husband suing wife on grounds of adultery with 2*nd defendant and constructive malicious desertion—Only issue on adultery confined to one date—Evidence led indicated only preparation towards act of adultery—Other evidence consisted only of* (a) *evidence of behaviour of defendants prior to that date ;* (b) *letters written by* 2*nd defendant to the* 1*st defendant and found in her almirah .* (c) *later attempt by* 1*st defendant to reside at* 2*nd defendant's house—Is such evidence sufficient to establish issue on adultery or constructive malicious desertion—Can a respondent to an appeal canvass a finding of the trial judge although he has not appealed therefrom—Civil Procedure Code, section* 772.

Where an issue as to whether the 1st defendant (wife) committed adultery with the 2nd defendant on

or about the 19th December, 1957, was answered by the trial judge in the affirmative, basing his finding on the evidence (*a*) that the 1st and 2nd defendants were about to copulate when they were prevented by the unexpected intervention of the plaintiff (husband) who had been watching their movements ; (*b*) of a witness who spoke to their behaviour on previous occasions ; (*c*) contained in some letters written by the 2nd defendant to the 1st defendant and found in the latter's almirah.

Held : (i) That the finding of adultery was insupportable as the evidence led and accepted was insufficient to establish adultery on the date mentioned in the issue.

(ii) That it was open to the plaintiff-respondent to canvass in appeal the trial judge's finding that desertion was not established, notwithstanding the fact that he had not appealed therefrom.

(iii) That on the facts accepted by the trial judge, namely, the said incident of 19.12.57, the previous behaviour of the defendants as deposed to by the witness, the letters received from the 2nd defendant and found in the 1st defendant's almirah, and an attempt by the 1st defendant some time after she left her husband's house to take up residence at the 2nd defendant's house, it is safe to assume that the marriage had broken down completely, and even if it is not possible to impute to the 1st defendant an *animus deserendi* at the time she left the plaintiff's house on 19.12.57, such *animus* could have been imputed to her by the time the plaint came to be filed on 4.6.58.

PREMAWATHIE *vs.* H. G. WELIS,
SUGATHADASA *vs.* H. G. WELIS 67

Entail and Settlement Ordinance

Section 3.

See NONIS *vs.* NONIS AND OTHERS 17

Evidence Ordinance

Sections 5, 45, 47 *and* 49—*Action on mortgage bond —Debts due on promissory notes given after the execution of the bond for pre-existing liability—Expert evidence—Handwriting expert —Approach to such evidence by the Court—Oral evidence, reduction to writing of—Production of such writing at the end of oral testimony—Is this permissible.*

The defendants on 30th July, 1953, executed a mortgage bond by which they bound themselves to the plaintiff firm in a certain sum and hypothecated certain properties for securing to the firm (*a*) sums of money payable on supply of certain goods on credit for sale by the defendants on a commission basis ; (*b*) moneys lent and advanced to the defendant ; and (*c*) damages by accident and use other than those covered by insurance policies in respect of certain motor lorries and vans to be entrusted to the defendants by the plaintiffs for the sale of the said goods. On the 1st August, 1953, the defendants signed certain promissory notes in favour of the plaintiffs. The plaintiffs sued the defendants for the recovery of the amounts due on those promissory notes referring to the relevant provisions of the bond. The defendants pleaded that neither of them had signed the promissory notes and on that account denied liability. It transpired in the course of the 2nd plaintiff's evidence that the notes were executed in consideration not of a transaction contemplated in the bond but instead, of a pre-existing liability due to the 2nd plaintiff alone. The trial judge rejected this defence and holding that the 1st defendant had at any rate signed the notes, entered judgment in favour of the plaintiffs

Held : (1) That the cause of action relied on was liability under the bond and not liability on the promissory notes and that, inasmuch as the promissory notes were intended to secure an already existing liability and not one contemplated within the terms of the bond, the plaintiffs' action should have been dismissed.

(2) That in any event, the learned Judge's finding that the 1st defendant had executed the promissory notes could not be supported as *inter alia* his approach to the evidence of the handwriting expert on this point, viz., that the signature should be regarded as proved purely because of the opinion of the expert, was erroneous.

(3) That under section 45 Evidence Ordinance, the opinions of handwriting experts with regard to the identity or genuineness of handwriting are only relevant facts, which can be used by the Judge to form his own opinion. Appropriate weight should be given to the opinion, depending on the circumstances of the case, but a trial Judge should not treat the opinion of the expert as conclusive, without forming an opinion himself.

Per BASNAYAKE, C.J.—" Our Evidence Ordinance does not sanction a procedure by which a witness who gives oral evidence may reduce to writing his view on the matter on which he is called to give oral evidence and produce the writing at the end of his examination-in-chief. "

The subject of correct approach to the evidence of handwriting experts discussed.

PERERA AND ANOTHER *vs.* MOTHA AND ANOTHER .. 1

Section 138

See under—Criminal Procedure Code.

ATTORNEY GENERAL *vs.* SUPPIAH & ANOTHER .. 69

Sections 2 (1) *and* 60

See under—Criminal Procedure Code.

MARTIN APPUHAMY *vs.* S.I. POLICE JAFFNA .. 90

Section 145

See under—Criminal Procedure Code

THE QUEEN *vs.* SUMANATISSA THERA 79

Excise Ordinance

Excise Ordinance (*Cap.* 42), *section* 51 (2)—*Order of confiscation in respect of car used for offence—*

Application by absolute owner to have order set aside—Requirement that owner should be given an opportunity of being heard before order of confiscation made—No order to be made unless evidence implicates owner in offence.

After certain persons had been convicted of an offence under the Excise Ordinance, an order of confiscation was made in respect of a motor car used for the commission of the said offence. This order the learned Magistrate purported to make under section 51 (2) of the Excise Ordinance, after notice had been duly served on the registered owner to show cause why the car should not be confiscated. In the present application, the petitioner (a limited liability company) sought to have this order set aside on the ground that absolute ownership of the car had vested in it prior to the date of the offence and that it still was the absolute owner. The position of the petitioner was that over a year prior to the date of offence, it had hired the said car on a hire-purchase agreement to one *P.* who was the person who had been the registered owner at the time the offence was committed. It was on *P.* that the notice to show cause had been served, before the order of confiscation was made.

Held: (1) That it was clear that the petitioner had been the absolute owner of the car at the time when the order of confiscation was made.

(2) That confiscation of a motor car under section 51 (2) of the Excise Ordinance, should not be ordered without the owner being given an opportunity of being heard and that where the owner himself is not convicted of the offence, no order of confiscation should be made unless there is evidence that implicates him in the offence.

Expert evidence

Handwriting expert—Approach to such evidence by the Court.

Fideicommissum

"Fidei commissum"—Entail and Settlement Ordinance, (Cap. 54), section 3—Meaning of Sinhala word "කාරණාව"—Use of word "assigns" in deed of gift—Are beneficiaries sufficiently described or designated—Is prohibition against alienation contained in deed rendered null and void thereby.

Civil Procedure Code, section 118—Translations of documents—Must be signed by interpreter of a Court or sworn translator.

Held : (1) That the Sinhala word "කාරණාව" in the deed in question had been wrongly translated as "assigns".

(2) That in any event, the use of the word "assigns" in a deed does not make a prohibition against alienation null and void by reason of that fact alone, so long as the persons in whose favour the prohibition is imposed are designated with sufficient certainty as required by section 3 of the Entail and Settlement Ordinance.

(3) That section 118 of the Civil Procedure Code, forbids any Court from permitting to be read as a translation of a document tendered in evidence, a translation which is not signed by one of the persons referred to in that section.

"Fidei commissum"—Whether terms of a deed of gift were such as to create a valid "fidei commissum"—Effect of the use of the words "assigns" in relation to fiduciary—Is acceptance of gift by "fidei commissary" necessary—Donor's power of revocation—Acceptance of a gift taking effect after donor's death—Can bringing of action to gain possession amount to acceptance of such a gift.

By deed No. 7522, dated 20th September, 1853, one *J.P.* gifted certain property to her son and daughter, *J.* and *B.* The Deed purported to gift the property to *J.* and *B.*, "their heirs, executors, administors and assigns as a donation absolute and irrevocable . . ." and it also contained a prohibition against alienation and a clause that the property was to be held under the bond of *fidei commissum* for the heirs of *J.* and *B.* Finally it contained a clause that on the failure of extinction of such heirs the property should revert to the Roman Catholic Church of St. Lucia. The heirs of *J.* and *B.* became extinct, so that, the point of time when the property should go over to the Roman Catholic Church in terms of the Deed was reached. The heirs of *J.* had, however, conveyed the property to one *S.*, and *S.* had sold to the defendants. In the present action, the plaintiffs (on behalf of the Church) sought to gain possession of the property from the defendant and obtained a judgment in their favour in the District Court. The defendant appealed.

Held : (1) That the deed in question did create a valid *fidei commissum.*

(2) That under the Roman-Dutch law the vesting of absolute dominium in the fiduciary, in the first instance, is by no means repugnant to the creation of a valid *fidei commissum* so long as there is sufficient indication of a clear intention that this ownership should be burdened with a *fidei commissum.*

(3) That the use of the words "assigns" in the deed did not affect the creation of valid *fidei commissum* and had no more force than the words "executors" or "administrators"—all these words being used to vest, in the first instance, absolute dominium in the fiduciary.

(4) That acceptance of a gift by the *fidei commissary* is necessary only in order to render the gift to him irrevocable by the donor ; and where the donor had died before the time of the gift over to the *fidei commissary*, the power of revocation was at an end and could not be exercised by the donor's heirs. In any case the heirs had not exercised any power of revocation in the present case.

(5) That since a gift which really takes effect after the donor's death may be accepted after his death and in the present case when the gift over to the Church took effect, the plaintiffs were not permitted to take possession of the property, the present action to gain possession of the property was tantamount to a manifestation of the acceptance of the gift by the donee.

Firearms Ordinance

Section 44—Order of confiscation thereunder.

Income Tax

Income Tax Ordinance—Sections 65 and 80—Certificate issued by Commissioner under section 80 (1)—Effect thereof—Can it be challenged by alleged defaulter in proceedings before Magistrate.

Held : (1) That the certificate issued by the Commissioner in terms of section 80 (1) of the Income Tax Ordinance is merely *sufficient* and *not conclusive* evidence that the tax has been duly assessed and is in default.

(2) That once a certificate in terms of section 80 (1) has been issued, the proviso to section 80 (1) read with section 80 (2) does not have the effect of preventing an alleged defaulter from satisfying the Magistrate that he was not duly assessed.

Income Tax Ordinance (Cap. 188, Legislative Enactments 1938 Edition), Sections 5, 6 (1) (a), 9 (1)—Loss incurred by theft—Whether "out-going"—When is such loss incurred in the production of profits or income—Permissible deduction.

The assessee Company had in its safe a sum of money which it intended to use for the purpose of purchasing various commodities in the ordinary course of its business. The sum was stolen by burglars, but a part thereof was recovered by the Police. Insurers paid the assessee a further sum, but the total sum was not made good to them. In making its Income Tax return, the assessee claimed to deduct the shortfall under section 9 (1) of the Income Tax Ordinance, on the basis that it was an outgoing or expense incurred by it in the production of profits or income. The claim was disallowed by both the Authorized Adjudicator and the Board of Review, and the assessee caused a case to be stated to the Supreme Court on that question.

Held : (1) That the term "out-goings" in section 9 (1) of the Income Tax Ordinance covered a loss caused by a theft not committed by high officials in the assessee Company.

(2) That the loss in this case was one which could properly be deducted to ascertain the nett profit of the business. It was incidental to or inevitable in the conduct of the business which produced the income of the assessee Company. As such it was permissible to deduct it under section 9 (1).

Income Tax Ordinance (Cap. 188), sections 11 (6), 11 (6B), 74—Government employee seconded for service with University—Is there a cessation of employment within the meaning of section 11 (6) (a)—Meaning of term "employment."—Each employer regarded as a distinct source of income—Person employed by another—Ceasing to be such employee—Effect.

The appellant was a Visiting Surgeon of the General Hospital, Colombo, and a Visiting Lecturer, first at the Ceylon Medical College and later at the University of Ceylon. He was paid a salary by the Ceylon Government for his work as a Visiting Surgeon and by the University for his work as a Visiting Lecturer. From the 1st June, 1952, his services were released by the Public Services Commission and he was seconded for service with the University as Professor of Surgery. During the period of secondment the Government could have asked him to resume his service under the Government and he also had the right to go back of his own accord. The work which he did after the 1st June was substantially the same as the work he did before that date. The appellant claimed that from the date of his secondment, there was a cessation of employment in terms of section 11 (6) (a) of the Income Tax Ordinance. He also claimed that he could invoke the provisions of section 11 (6)B as being applicable to his case.

Held : (1) That inasmuch as he had only been seconded for service he did not cease to be an employee of the Government.

(2) That even if he had ceased to be employed by the Government and found a new employer as from the date of secondment, he had not ceased to carry on an employment within the meaning of section 11 (6) inasmuch as there was no material change in the nature of the work done by him. The word "employment" means that on which a person is employed and is synonymous with business or occupation and does not indicate a particular contract of service under a particular master.

(3) That section 11 (6B) had no application since that section only applied to a case where a person carried on a trade, business, profession or vocation as an employee of another, and not on his own account or in partnership with another, and then ceased to do so. In the present case the employee did not cease to be an employee of another during the years of assessment, but at most merely changed his employer.

Industrial Disputes Act

Industrial Disputes Act (Cap. 131 of the Legislative Enactments, 1956 Ed.) as amended by Act No. 62 of 1957, sections 31B, 33 (2), 47—Application for relief

by workman after death of employer—Widow made respondent to application—Of consent, order made against such widow—Sum ordered not paid within time set out in order—Further order by Magistrate under section 33 (2) of Act—Did the Labour Tribunal have jurisdiction to make the original order—Effect of widow's consenting to order—Jurisdiction of Magistrate.

Held : (1) That under the Industrial Disputes Act (as amended by Act No. 62 of 1957), the Labour Tribunal has no jurisdiction to give relief or redress to a workman who makes an application against the widow of his employer or ex-employer who is dead at the time of the application.

(2) That the mere fact that the widow of a deceased employer appears before the Labour Tribunal and consents to pay a sum of money to the applicant (workman) does not confer jurisdiction on the Tribunal when no such jurisdiction is conferred on it by statute law.

(3) That it would follow that a Magistrate, who, purporting to act under section 33 (2) of the Act, orders the payment of the said sum to the workman, also has no jurisdiction to make such an order.

ARNOLDA *vs.* GOPALAN 49

Insurance

Insurance policy—Claim on motor vehicle damaged in collision—Condition in policy requiring Insured to give written notice immediately he had knowledge of impending prosecution—Driver of vehicle prosecuted —Insured's evidence that he had no knowledge of this disbelieved—No other evidence on this point—Is the Insurance Company exempted from liability.

The plaintiff's car was damaged in a collision with a motor van. The defendant Company disclaimed the liability to pay the damages claimed by him on the ground that he had failed to comply with one of the conditions prescribed under the policy of insurance. The relevant provision imposed a duty on the insured to give the Company written notice " immediately the Insured shall have knowledge of any impending prosecution in respect of any occurrence which may give rise to a claim " under the policy. The person who had been driving the plaintiff's car at the time of the collision was prosecuted but the plaintiff gave evidence to the effect that he was unaware of this as he had subsequently fallen out with that person. The learned District Judge disbelieved the plaintiff's evidence and held that he was not entitled to be indemnified as he had not given the notice required by the policy.

Held : That as the mere fact that two vehicles collide on a public street does not necessarily mean that the driver of either vehicle will be prosecuted and the only evidence in this case on the point was that the plaintiff had no knowledge of an impending prosecution, disbelief of that evidence does not, in the absence of other circumstances from which the existence of knowledge may reasonably be inferred, prove that he had knowledge. The defence that the plaintiff failed to give notice of an impending prosecution cannot therefore be sustained.

THAMBIRAJAH *vs.* CEYLON INSURANCE CO., LTD. .. 28

Interpretation Ordinance

Sections 8(3) and 11—Computation of time—"Seven days."

NANAYAKKARA AND ANOTHER *vs.* PAIVA AND OTHERS 33

Jury

Disagreeing—Nature of trial judge's direction.

SHOUKATALLIE *vs.* THE QUEEN 36

Landlord and Tenant

Landlord and tenant—Reasonable requirement—Alternative accommodation—House bought by landlord with the intention of going into occupation—Relative hardships to the landlord and to the tenant.

Held : (1) That where the landlord sues a tenant for ejectment on the ground of reasonable requirement, the question of alternative accommodation is a relevant fact to be taken into account along with other facts.

(2) That the fact that the landlord bought the house with the intention of going into occupation thereof is not a measure of the reasonableness of his claim.

(3) That the Court must consider the relative hardships to the landlord and to the tenant.

PERERA *vs.* JAYASEKERA 16

Landlord and tenant—Premises used for purposes of business—Action by landlord—Reasonable requirement—Position when premises in question will only partially satisfy landlord's needs and he also has land available for building—Comparative needs of the parties —Is hardship to be presumed from mere fact of tenant's ejectment—What must tenant prove in the case of business premises.

Held : (i) That in considering the question whether it is reasonable for a landlord who is a businessman, to resume occupation of leased premises, on the ground that he needs storage space, it may be legitimate to consider whether he should utilize land available for that purpose instead of seeking to eject his tenant from premises the use of which will only partially satisfy his needs.

(ii) That in taking that question into consideration, the burden will be on the tenant to prove that the land is suitable for the erection of new buildings, that the landlord has sufficient funds available for the purpose, and that it would be a business-like step on the landlord's part to expend funds on new buildings.

(iii) That hardship is not to be presumed from the mere fact of ejectment and has to be established by

positive evidence . In the case of business premises, the tenant must show that he will suffer financial loss if he is unable to carry on his business.

WILLIAM SINGHO *vs.* MUDALIGE 14

Landlord and tenant—Agreement that rent payable by tenth of each month—Late payments accepted by landlord as a matter of regular practice—Effect thereof on landlord's right to sue for ejectment—In what circumstances will landlord be entitled to terminate tenancy on ground that rent in arrears.

Held : (1) That where there is a written agreement specifying the date on which the rent must be paid but the landlord has as a matter of regular practice accepted late payments of rent, he would not be entitled to terminate the tenancy for failure to pay rent on the agreed date if the rent was, in fact, tendered in accordance with the regular practice.

(2) That, however, in the present case the landlord was entitled to terminate the tenancy as the delay in payment had extended even beyond the period which he had allowed according to the regular practice.

WARAWITTA APPUHAMY *vs.* PERERA 73

Landlord and tenant—Late payments of rent by tenant—Acceptance and acquiescence by landlord—Arrears of rent—Landlord's right to eject tenant—Effect of such acquiescence thereon.

Held : That where for a considerable period a landlord has accepted and acquiesced in the late payments of rent by his tenant, he cannot without first informing the tenant explicitly that future delay will not be excused and that legal rights will be insisted on, suddenly take advantage of one late payment in order to sue for ejectment.

ADAMJEE LUKMANJEE & SONS, LTD. *vs.* ALEXANDER .. 77

Magistrate

Magistrates' Courts—Duty to carry out orders made by Supreme Court.

A. preferred a charge of theft of an elephant against *B.* The Magistrate ordered *B.* to deliver the elephant over to *A.* on the latter giving security in a sum of Rs. 5,000/-. On an application by *B.* to revise the said order the Supreme Court set it aside and directed that the elephant be delivered over to the custody of *B.* After the parties were informed of this order the Magistrate was transferred and his successor held that he had no jurisdiction to try the charge. Thereafter the petitioner obtained possession of the elephant from *A.* while the order of the Supreme Court was still unexecuted, and made application to the Supreme Court for a direction that the elephant be given to her custody as she was its owner.

Held : (1) That the Magistrate was bound to carry out the order of the Supreme Court, irrespective of his finding that he had no jurisdiction to try the charge.

(2) That *A.* still remained liable to obey the said order.

(3) That the application is unnecessary as the petitioner had already obtained the custody of the animal.

The petitioner was ordered to deliver the animal direct to the Court or to *A.*

KUMARIHAMY *vs.* ABEYGOONESEKERA AND ANOTHER .. 6

Maintenance

Maintenance—Corroboration of applicant's evidence—Statement of defendant recorded under section 122 of Criminal Procedure Code—Admission of paternity contained therein—Can such statement be used to corrobate applicant's evidence.

Held : That a statement recorded under section 122 of the Criminal Procedure Code, wherein a defendant in a maintenance case has made an admission of paternity, cannot be used to corroborate the evidence of the applicant.

JAYAWEERA *vs.* KARUNAWATHIE 72

Mortgage

Action on bond—Debts due on promissory notes given after the execution of the bond for pre-existing liability—Notes executed in consideration not of a transaction contemplated in the bond—Is action maintainable.

PERERA AND ANOTHER *vs.* MOTHA AND ANOTHER .. 1

Motor Traffic Act

Contract—" Rent-A-Dar " service—Hiring of cars registered as private cars—Prohibition and penalty contained in Motor Traffic Act—Illegality of such contract—Unenforceability thereof—Motor Traffic Act, No. 14 of 1951, sections 2 (1), 5 (1), 25 (1), 26, 29, 45, 177, 179, 197, 214 (2), 240.

The plaintiff sued the defendant to recover a specified sum of money on a contract according to which the plaintiff hired to the defendant a car on certain conditions. The car had been registered as a private car and the revenue licence was that of a private car. The defendant took up the position that the contract was illegal and therefore unenforceable.

Held : (1) That the contract was illegal inasmuch as it violated the provisions of section 45 of the Motor Traffic Act, No. 14 of 1951, such violation being also penalised by section 214 (2) of the said Act.

(2) That the contract is therefore also unenforceable.

Held further : (3) That in the present case no claim based on tort could have succeeded as the plaintiff had expressly pleaded that his claim was based on the contract between himself and the defendant.

SAMARAWICKREMA *vs.* SUBRAMANIAM 108

Ouster

Co-owners.

See under—Co-owners.

Partition

Partition action—Land which is not part of the land to which the action relates wrongly included in survey plan—Power of Court to exclude it.

Held : That in a partition action, where the Commissioner includes in his survey plan land which is not part of the land to which the action relates, the Court has power to exclude it.

THEGIS APPUHAMY AND OTHERS *vs.* HENDRICK SINGHO AND OTHERS 102

Partnership

Action for accounts—Partnership formed to become "Agents" of Shell Company for selling, storing and distributing petrol, kerosene oil, diesel oil, lubricating oils, etc., in return for a commission—Commission rate fixed for petrol, kerosene and diesoline, but lubricating oils to be paid for by difference between purchase price from Company and sale price to public—Contention by defendant that profits of partnership restricted to commission on petrol, etc., and that profits from lubricating oils were solely his—Construction of contract of partnership—Meaning of the terms "Agent", "Commission" used in agreement—Civil Procedure Code, section 508.

Trial of entire claim of plaintiff by Judge without calling upon defendant to file account.

Held : (1) That in this action for an account, the proper course for the Court to have adopted was first to have decided whether it should call upon the defendant to file an account and for what period. Section 508 of the Civil Procedure Code, expressly provides that in an action of account, the Court may decide piece-meal upon the matters in issue.

(2) That a statement sent by a managing partner to another partner, showing merely the amounts payable to each of the partners from the profits earned in a partnership business less the total working expenses, do not constitute a balance sheet. A balance sheet should contain several other items of account, for instance, a statement of stocks, a statement of drawings by the partners, a statement of balances due to or from each of them.

In regard to the contention of the defendant that the profits of the partnership were restricted to the commission paid on the sale of petrol, kerosene and diesel oil, but not in respect of lubricating oils, etc., he relied on the following facts :

(*a*) that it was his separate business for which he was remunerated by the Company at a rate which represented the difference in price between the rate at which it was purchased from the Company and the price at which it was sold to the public ;

(*b*) that unlike in the case of petrol, the arrangement regarding the oils was a sale to the agent and a resale by the agent.

Held further : (3) That when the partnership was referred to as the "agent" of the Shell Company in the partnership agreement and in the agreement with the Shell Company, it was used in a commercial or complimentary sense and not in a legal sense.

(4) That in a contract of this kind, the Court has to consider not the mere name given to it but the substance of the transaction and to decide what it would in truth and, in fact, amount to, on a consideration of all the facts relating to it.

(5) That having regard to the documents and the evidence in the case, the word "commission" in the agreement with the Shell Company must be equated to remuneration which in one case, namely, lubricating oils was capable of being fixed on re-sale. It was a convenient term to use, in referring to payments made to the firm for its services. The method of remuneration did not alter the nature of the transaction.

RATNAM *vs.* PERERA 42

Partnership—Dissolution—Action for accounts—Procedure to be adopted—Civil Procedure Code, sections 508, 511, 513 *and* 518*—Accounts submitted by Managing partner unsupported by books—Effect.*

One partner securing advantages to carry on separate business in his own name at the same premises with partnership assets unknown to the other—Is such partner liable to share profits until the date of payment of capital and costs—Partnership Act, sections 39 *and* 42.

Under a partnership agreement, dated 30.12.1942, P 1, the plaintiff and the defendant carried on business as agents of the Caltex Company for the sale of petrol. The defendant was the managing partner. Consequent on differences between them, the plaintiff instituted an action in March, 1948, claiming profits for three years ended 31.3.48 and obtained decree for Rs. 10,550/- in 1954. In the meantime in September, 1948, the defendant gave plaintiff three months notice of terminating the partnership in terms of P 1.

The plaintiff instituted the present action in 1949, averring dissolution of the partnership, failure to enter a true and correct account from 1st April, 1945, and asking (1) that the accounts of the partnership be taken ; (2) for distribution of assets and division of profits. The plaintiff also averred that prior to the notice of termination the defendant fraudulently obtained from the Caltex Company an agreement for the sale of their products in the same premises in his own name and claimed profits made by the defendant in conducting that business in his own name up to the date on which assets are distributed.

Partnership (*Contd.*)

The defendant in his answer denied that he failed to render accounts from 1.4.45 and stated that only a sum of Rs. 200/- was due to the plaintiff as his share of the profits.

At the trial the defendant submitted some accounts unsupported by books which the learned District Judge rejected and entered judgment for the plaintiff (*a*) for profits at the rate of Rs. 2,000/- per year from 31.3.48 up to the date of payment of his capital and costs ; (*b*) Rs. 2,300/- being his share of the assets and goodwill.

The defendant appealed.

Held : (1) That the learned District Judge was justified in assessing the profits on the basis of the earlier decree, viz., Rs. 10,550/- as profits for three years.

(2) That the failure of the defendant to produce the account books entitled the Court to draw every adverse inference against him, although such inferences were unnecessary in this case.

(3) That the defendant was liable to share with the plaintiff the profits he made by obtaining a renewal in his own name of the several agreements the partnership had made with the Caltex Company and utilising the partnership assets therefor before the termination of the partnership.

(4) That on the facts in this case the plaintiff is entitled to recover profits on the basis of the Court's order up to the date of the decree, for by its decree the Court has in effect, distributed the assets, and not up to the date of payment of capital and costs as ordered by the Court.

(5) That after the decree, the plaintiff would only be entitled to legal interest on the aggregate sum found due to him.

(6) That where a partner continues a business after dissolution utilising partnership assets, the other partner is entitled to recover profits until the final distribution of profits or in the alternative, interest on the capital, whichever is higher.

PATHIRANE *vs.* PATHIRANE 51

Partnership—Prevention of Frauds Ordinance, section 18*—Absence of written agreement—Whether business carried on in partnership or co-ownership—Proof of partnership—Trusts Ordinance, section* 96.

The plaintiff sued the defendant for a declaration that he was the owner of two-thirds share of the assets and goodwill of a business namde S. V. & Sons, and for an order for an accounting of assets taken charge of by the defendant and of profits of the business from 31st December, 1950. The claim was made on the basis of co-ownership. The defendant, having denied co-ownership, stated that the business was carried on in partnership between the plaintiff and the defendant, and that in the absence of an agreement in writing as required by section 18 of the Prevention of Frauds Ordinance, the action was not maintainable. The District Judge held that the facts of the case taken together did not shut out the existence of a co-ownership and decided in favour of the plaintiff. On appeal, the Supreme Court held that no conclusion other than that the business was a partnership was reasonably possible, and set aside the order of the District Judge. The plaintiff appealed. On appeal before the Board it was also argued that the plaintiff was entitled to relief on the basis of a constructive trust arising by virtue of section 96 of the Trusts Ordinance.

Held : (i) That on the evidence the business had been carried on as a *de facto* partnership and had never assumed character of a co-ownership.

(ii) That the interests of the plaintiff and the defendant in the business arose at the moment they were taken into the business and constituted partners. Therefore, the parties were never co-owners, and no argument based on the fact that they had once been co-owners could succeed.

(iii) That before the plaintiff could take advantage of section 96 of the Trusts Ordinance, he must be in a position to establish the partnership. Since he could not do this, the argument failed.

RAJARATNAM SIVAKUMARAN *v.* VEERAGATHIPILLAI RAJASEGARAM 61

Prevention of Frauds Ordinance

Section 18*—Partnership—Absence of written agreement—Effect.*

R. SIVAKUMARAN *vs.* V. RAJASEGARAM 61

Prescription

Among co-owners. See under—Co-owners.

To Servitudes. See under—Servitudes.

Privy Council

See under—Appeals (Privy Council) Ordinance.

Privy Council Decisions

SHOUKATALLIE *vs.* THE QUEEN 36

SIVAKUMARAN *vs.* RAJASEGARAM 61

Promissory Note

Action on mortgage bond—Debts due on promissory notes given after the execution of the bond for pre-existing liability—Notes executed in consideration not of a transaction contemplated in the bond—Is action maintainable.

PERERA AND ANOTHER *vs.* MOTHA AND ANOTHER .. 1

Rent Restriction Act

Rent Restriction Act, No. 29 *of* 1948 (*Cap.* 274 *of the Legislative Enactments,* 1956 *Ed.*), *section* 13 (1)—

Requirement that authorisation of the Rent Control Board be obtained before action for ejectment instituted—"Excepted premises"—Action filed without authorisation as this unnecessary—Premises ceasing to be excepted premises before trial began—Does this preclude Court from entertaining the proceedings.

The plaintiff instituted action against his tenant, the defendant, on 8.4.59, for ejectment from certain residential premises situated within the Municipality of Colombo. The trial began on 22.11.60 and continued on subsequent dates. Thereafter judgment was entered against the tenant and his ejectment ordered. The premises in question were at the time of institution of the action "excepted premises" within the meaning of the Rent Restriction Act, their annual value being over Rs. 2,000/-. The provisions of the Act did not, therefore, apply to them. However with effect from 1.1.60 (*i.e.*, after the action was instituted but before the trial began) the premisse ceased to be "excepted premises" as their annual value was reduced to Rs. 1,845/-. The provisions of the Rent Restriction Act thereupon became applicable to them. It was submitted on behalf of the defendant-appellant that once the provisions of the Act became applicable to the premises, the subsequent trial and also any steps that may be taken in Court in the execution of the decree would constitute "proceedings for the ejectment of the tenant" as contemplated in section 13 (1) of the Act and in the absence of any authorisation by the Rent Control Board, as required by that section, the Court would be precluded from entertaining the proceedings except in a case falling within the proviso to that section.

Held : That section 13 (1) of the Rent Restriction Act only requires that the authorisation of the Board should be obtained for the *institution* of the action or proceedings referred to in the earlier part of the section. Neither the proceedings at the trial nor those at the stage when the decree is sought to be executed are proceedings of the kind contemplated in section 13 (1) as requiring the authorisation of the Board.

SENEVIRATNE *vs.* PERERA 22

See also under—Landlord and Tenant.

Rural Courts Ordinance

Section 11—Charge of insult—Jurisdiction to try such charge.

EDWIN *vs.* CHELVARAJAH, S.I. POLICE, WELIGAMA .. 29

Servitude

Servitude—Right of using threshing floor—Acquisition thereof by prescription—User commencing with leave and licence—Evidence of adverse user for over prescriptive period thereafter—Effect.

Held : That even though the exercise of a servitude over another's land commenced with the permission of the owner of the servient tenement, a right of servitude by prescription could be acquired, if, subsequently there is user as of right for over the prescriptive period. On the facts of the present case, any presumption that the subsequent user too was by continued permission has been rebutted and it was established that the servitude had been acquired.

DONA PAVISTINA HAMINE *vs.* PIYADASA AND ANOTHER 57

Supreme Court

Order by—Duty of magistrate to carry it out.

KUMARIHAMY *vs.* ABEYGOONESEKERA AND ANOTHER.. 6

Trusts

Trusts Ordinance—Action instituted under section 102—Terms of certificate required under section 102(3) —Action entertained without jurisdiction—Decree entere a dnullity.

The defendants-respondents had instituted an action as plaintiffs under section 102 of the Trusts Ordinance (Cap. 72). Although a petition had been presented to the Government Agent in terms of section 102 (3), a copy of the plaint in the proposed action had not been submitted to him. As a result, the certificate given by the Government Agent did not state that the Commissioners appointed by him had reported that the subject-matter of the plaint was one that called for the consideration of the Court.

Held : (1) That the certificate was not in terms of section 102 (3).

(2) That, therefore, the Court had no power to entertain the action.

(3) That the decree granted in the action was, therefore, a nullity.

SITHIRAVELU *vs.* RAMALINGAM AND OTHERS .. 31

Trusts Ordinance, section 96

SIVAKUMARAN *vs.* RAJASEGERAM.. 61

Witness

Right to be represented by Counsel—Power of judge to order forfeiture of batta.

THE QUEEN *vs.* L. D. PRINS 26

Words and Phrases

"agent" in agreement.

RATNAM *vs.* PERERA 42

"assigns" in deed of gift.

NONIS *vs.* NONIS AND OTHERS 17

ELIAS APPUHAMY *vs.* ARCHBISHOP OF COLOMBO AND ANOTHER 19

"commission" in agreement.

RATNAM *vs.* PEREA 42

"excepted premises" in Rent Restriction Act.

SENEVIRATNE *vs.* PERERA 22

"final order"—Privy Council Appeal.

DAVID *vs.* ABDUL CADER 87

"judicial power."

DON ANTHONY *vs.* THE BRIBERY COMMISSIONER .. 100

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

PERERA & ANOTHER *vs.* MOTHA & ANOTHER

S.C. No. 268(F)/159—*D.C. Colombo No.* 5293/MB.

Argued on : November 29th and 30th, 1960
Decided on : 24th March, 1961

Evidence Ordinance, sections 5, 45, 47 *and* 49—*Action on mortgage bond—Debts due on promissory notes given after the execution of the bond for pre-existing liability—Expert evidence—Handwriting expert —Approach to such evidence by the Court—Oral evidence, reduction to writing of—Production of such writing at the end of oral testimony—Is this permissible.*

The defendants on 30th July, 1953 executed a mortgage bond by which they bound themselves to the plaintiff firm in a certain sum and hypothecated certain properties for securing to the firm (*a*) sums of money payable on supply of certain goods on credit for sale by the defendants on a commission basis ; (*b*) moneys lent and advanced to the defendant ; and (*c*) damages by accident and use other than those covered by insurance policies in respect of certain motor lorries and vans to be entrusted to the defendants by the plaintiffs for the sale of the said goods. On the 1st August, 1953 the defendants signed certain promissory notes in favour of the plaintiffs. The plaintiffs sued the defendants for the recovery of the amounts due on those promissory notes referring to the relevant provisions of the bond. The defendants pleaded that neither of them had signed the promissory notes and on that account denied liability. It transpired in the course of the 2nd plaintiff's evidence that the notes were executed in consideration not of a transaction contemplated in the bond but instead, of a pre-existing liability due to the 2nd plaintiff alone. The trial Judge rejected this defence and holding that the 1st defendant had at any rate signed the notes, entered judgment in favour of the plaintiffs.

Held : (1) That the cause of action relied on was liability under the bond and not liability on the promissory notes and that, inasmuch as the promissory notes were intended to secure an already existing liability and not one contemplated within the terms of the bond, the plaintiffs' action should have been dismissed.

(2) That in any event, the learned Judge's finding that the 1st defendant had executed the promissory notes could not be supported as *inter alia* his approach to the evidence of the handwriting expert on this point, viz., that the signature should be regarded as proved purely because of the opinion of the expert, was erroneous.

(3) That under section 45 Evidence Ordinance, the opinions of handwriting experts with regard to the identity or genuineness of handwriting are only relevant facts, which can be used by the Judge to form his own opinion. Appropriate weight should be given to the opinion, depending on the circumstances of the case, but a trial Judge should not treat the opinion of the expert as conclusive, without forming an opinion himself.

Per BASNAYAKE, C.J.—"Our Evidence Ordinance does not sanction a procedure by which a witness who gives oral evidence may reduce to writing his view on the matter on which he is called to give oral evidence and produce the writing at the end of his examination-in-chief."

The subject of correct approach to the evidence of handwriting experts discussed.

Cases referred to : *Wakeford vs. Lincoln (Bishop)*, (1921) 90 L.J. P.C. 174.
Gratiaen Perera vs. The Queen, 61 N.L.R. 522.

H. V. Perera, Q.C. with *W. D. Gunasekera* and *H. E. P. Cooray*, for the defendants-appellants.

S. Nadesan, Q.C. with *C. Ranganathan* and *M. Shanmugalingam* for the plaintiffs-respondents.

BASNAYAKE, C.J.—

I have the advantage of reading the judgment prepared by my brother. I am in entire agreement with him. But I wish to add one word to what he has said on the subject of the correct approach to the evidence of experts.

Under our law (Evidence Ordinance, section 5), "Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue, and of such other facts as are hereinafter declared to be relevant and of no others."

Opinions of persons as to the identity or genuineness of handwriting are declared to be relevant facts by sections 45 and 47 of the Evidence Ordinance. The former section declares that the opinions as to identity or genuineness of hand-

writing of persons specially skilled in such questions are relevant facts, while the latter section declares that the opinion of any person acquainted with the handwriting of another that it was written or signed by that other is a relevant fact. In practice the class of persons whose opinions are declared to be relevant under section 45 are described "experts." As we are here concerned with the opinion of an "expert" on handwriting I shall confine what I have to say to the opinions of "experts" on handwriting. In the first place for the opinion of an "expert" on handwriting on the question of the identity or genuineness of handwriting to be a relevant fact in a given case, it should be one in which the Court is called upon to form an opinion as to the identity or genuineness of handwriting. Secondly the person who gives oral evidence as to the identity or genuineness of handwriting must be one who is specially skilled in questions as to the identity or genuineness of handwriting. Whether he is a person specially skilled in such questions is a question of fact to be decided by the Court. If he is not such a person his opinion would not be a relevant fact in the case.

The fact which is declared to be relevant by section 45 stands in the same position as any other relevant fact which the Court has to take into consideration in forming its opinion as to the identity or genuineness of the handwriting in question. It is important to remember that it is the Court that is called upon to decide the question of identity or genuineness of handwriting and not the "expert". The expert's opinion is only a relevant fact to be taken into account in forming the opinion of the Court. Cases which have come up before us in appeal indicate a tendency on the part of Judges to regard the opinion of persons who describe themselves as handwriting experts as conclusive on the question of identity or genuineness of handwriting and not merely as a relevant fact, like any other such fact, to be taken into account in arriving at the Court's opinion as to the identity or genuineness of the handwriting in question. A Court should guard against that tendency. The duty of forming the opinion as to the identity of genuineness of the handwriting is on the Court and the Court alone. The expert's opinion on the points of identity or genuineness of the writing is a relevant fact in forming its opinion. The weight to be attached to such a fact would depend on the circumstances of each case. The standing of the expert, his skill and experience, the amount and nature of the materials available for comparison, the care and discrimination with which he has approached the question on which he is expressing his opinion, the extent to which he has called in aid the advances of modern science to demonstrate to the Court the soundness of his opinion, are all matters which will assist the Court in assessing the weight to be attached to the fact of his opinion. The cross-examination of the "expert" by the opposing side, where it is properly directed, would also assist the Court in determining what weight it should attach to the fact declared relevant by section 45. In the instant case the Court was called upon to form an opinion as to the genuineness of the signatures on documents X 5 and X6. The Assistant Government Examiner of Questioned Documents, who was called by the plaintiff, stated that he had before him 14 documents signed by the 1st defendant alone and 4 documents signed by both defendants. He expressed the opinion that the documents X5 and X6 had been signed by the 1st defendant. He did not explain how he reached his conclusion although he had made photographic enlargements of the signatures. The Court was therefore not afforded any assistance in performing its function of determining the genuineness of the signatures in question. An "expert" should endeavour to assist the Court by explaining the processes by which he reached his conclusion and by giving the reasons for it ; he should not be content with merely expressing his opinion. Both defendants on oath impugned the signatures in question. Now the learned District Judge, instead of treating the opinion of the Assistant Government Examiner of Questioned Documents merely as a relevant fact which fell to be considered along with the other relevant facts in forming his opinion as to the genuineness or otherwise of the signatures in question, treated it as conclusive of the dispute without forming an opinion himself as to the genuineness or otherwise of the signature, as he should have. He says :

> "The 1st defendant denies his signature on the promissory note marked X5. The evidence of the handwriting expert called by the plaintiff proves beyond any doubt that the signature on this promissory note is that of the 1st defendant. The two defendants have also denied their signatures on the two promissory notes X 5 and X6 on which the plaintiffs base their claim in this action. Again the evidence of the handwriting expert leaves no room for doubt whatsoever that at least the signature of the 1st defendant appears on these two notes."

It would appear from the words I have quoted that the learned Judge's approach to the opinion of the Assistant Government Examiner of Ques-

tioned Documents was wrong. He treated it not as a relevant fact but as conclusive of the fact of genuineness of handwriting.

I wish also to advert to an incidental matter. The Assistant Government Examiner of Questioned Documents in the course of giving evidence produced a report marked X20. He said :

> "I produce my report marked X 20 and the enlarged photographs of these signatures marked X 21. I photographed and developed these photographs. This is a report sent by me on a commission issued by Court. This report is signed by two examiners which is a practice customary in our Department. The other examiner also examined and signed the report after having agreed with me."

All facts except the contents of documents must be proved by oral evidence (section 59). The report which the witness produced is neither oral nor documentary evidence. It is a record of the testimony he proposed to give in Court. Our Evidence Ordinance does not sanction a procedure by which a witness who gives oral evidence may reduce to writing his views on the matter on which he is called to give oral evidence and produce the writing at the end of his examination-in-chief. What is worse in that is the instant case the witness claimed that the writing he tendered to the Court contained not his views alone but also those of another, who was not called by either side as a witness.

H. N. G. Fernando, J.—

By a mortgage bond dated 30th July, 1953 the two defendants, husband and wife, bound themselves to the plaintiff firm, consisting of two partners, in the sum of Rs. 100,000/-, and hypothecated certain properties for securing the payment to the firm of "all sums of moneys payable as specified in the Recitals hereto, or under or by virtue or in respect of these presents."

The first of the Recitals is that "the Obligors", (the defendants), "have requested the said Obligees to supply us on credit with the products manufactured by the said Obligees to lend and advance moneys to us the said Obligors upon cheques, I.O.U. chits, promissory notes made or endorsed by us the said Obligors or any of them ..... in the aggregate to the extent of a sum at the discretion of the said Obligees and the said Obligees agreed to do so upon our entering into and granting this security unto the said Obligees." The next Recital was that the Obligors had requested the Obligees to "allow us the use of their motor lorries and vans fully described in the second schedule for the sale and distribution of the products manufactured by the Obligees and they the said Obligees have agreed to give us the said Obligors the use of their lorries and vans fully described in the second schedule hereto upon our entering into and executing these presents and agreeing to be responsible for all damages by accidents and use other than those covered by the Insurance Policies in respect of such vehicles entrusted to our care by the said Obligees such damages to be incurred hereafter being also part of this security bond and shall be covered by this bond and security." Thereafter in the bond the parties agreed that the total extent of the security and liability in their aggregate upon the bond shall be Rs. 100,000.

The plaint in this action refers firstly to the relevant provisions of the bond and thereafter contains in paragraph 6 the following averment :

> "In pursuance of the said bond the defendants became indebted to the plaintiffs in a sum of Rs. 39,261.71 on promissory note dated 1st August, 1953 and in a sum of Rs. 47,987/- on promissory note dated 1st August, 1953 respectively marked P 2 and P 3."

Alleging that the sum of Rs. 87,000/- odd has not been paid, the plaint prays for judgment in the said sum with interest and a hypothecary decree for the sale of the properties mortgaged by the bond.

The defendants pleaded and alleged in their answer that neither of them had signed the promissory notes and on that account denied liability. The learned District Judge rejected this defence, and, holding that the 1st defendant had at any rate signed the promissory notes, has entered judgment in favour of the plaintiffs.

The first issue framed on behalf of the plaintiffs was : "What amount is due to the plaintiffs on the security bond No. 1871 dated 30-7-53 attested by K. Ramanathan and the two promissory notes both dated 1-8-53 ?" Having regard to the terms of the mortgage bond which have been set out above, the hypothecation was for the purpose of securing the payment *of all sums of money payable as specified in the Recitals hereto*. There are only two Recitals, the first being that the Obligors have requested the *Obligees to supply them on credit with products*, and *to lend and advance moneys to them*, and *that the Obligees had agreed to do so*. The second Recital relates to the motor vehicles and concludes by stating that *damages to be incurred hereafter* (to the vehicles) shall be covered by the bond. In these circumstances counsel for the

plaintiffs in appeal could not attempt to argue that the bond was anything but a security for the payments of debts which may be incurred by the defendants after its execution and damages to the vehicles which may occur thereafter. In so far as promissory notes are contemplated, the bond covered liability only on notes which may be given for credits or loans or advances made after 30th July, 1953.

The evidence given by the 2nd plaintiff at the trial constitutes a perfectly clear version of the circumstances in which the two promissory notes were alleged to have been executed. In brief, that version was that the 1st defendant had borrowed money from the 2nd plaintiff and also had for a considerable period been obtaining goods on credit, that the debt owing by the 1st defendant on this account was represented by a number of I.O.U. chits and promissory notes which he had signed from time to time, and that at the time of the execution of the bond the total liability on this score represented the aggregate of the two amounts specified in the promissory notes. Very shortly after the execution of the bond (in fact only a day or two later) the amount of the outstanding debt was ascertained by reference to the various documents and in respect of the full debt then due the defendants on 1st August, 1953 signed the two promissory notes referred to in the plaint. The 2nd plaintiff said that these debts were due to him personally because the firm was not able to give the credit but that circumstance is not relevant for present purposes. What is important and indeed decisive is that the two promissory notes, if they were in fact executed by the defendants, were in reality substitutes for a number of I.O.U. chits and promissory notes upon which the 1st defendant had previously become liable, but were not given by the defendants in circumstances contemplated in the mortgage bond, namely, in consideration of credits, loans or advances made to the defendants or either of them after the execution of the bond. Apart from the 2nd plaintiff's evidence as to the actual circumstances in which the notes came to be executed there was also at the trial his express opinion that the bond was a floating bond, which ordinarily at any rate, is intended to secure future debts. If in fact this was not so, and the object of taking the bond was to obtain covering security for an alleged existing debt of so large an amount as Rs. 87,000/- it was most unfortunate for the 2nd plaintiff that the bond is in a form quite irreconcilable with such an object.

The first issue framed at the trial placed upon the plaintiffs the burden of proving that the sums specified in the promissory notes were due on the bond of 30th July, 1953. Since according to the 2nd plaintiff the notes were executed in consideration not of a transaction contemplated in the bond but instead of a pre-existing liability due to the 2nd plaintiff alone the amounts so specified cannot be said to be due on the bond.

The legal position I have just been considering passed unnoticed by the learned trial Judge and perhaps also by counsel who appeared for the defendants, but as Mr. H. V. Perera argued it is perfectly in order to consider this question at the stage of appeal. Plaintiffs had to satisfy the Court that the promissory notes were executed in consideration of transactions contemplated in the bond. This the plaintiffs could do by giving evidence of the circumstances in which the notes came to be executed. The plaintiffs cannot now complain that they would have testified to an entirely different set of facts if they had realised the precise point which issue No. 1 required them to establish. In such a situation the learned trial Judge should have dismissed the action without calling for a defence because the cause of action relied on was a liability on the bond and not the liability on the notes. That which he should have done at that stage it is the duty of this Court now to do. Counsel for the plaintiffs did not invite us to hold that if the plaintiffs are not entitled to a hypothecary decree they are at least entitled to a money decree in respect of the notes. Nevertheless it seems desirable to consider the correctness of the learned District Judge's finding of fact that the 1st defendant executed the two promissory notes dated 1st August, 1953. His reasons for that finding are based partly upon an examination of the terms of the mortgage bond itself, partly on the evidence of the handwriting expert and partly on his belief of the evidence given by the 2nd plaintiff.

He says that it is absurd for the defendants to contend that they gave this mortgage bond solely for the purpose of securing the motor vehicles that were entrusted to them. This statement of the learned Judge is factually incorrect because the 1st defendant's evidence was that after executing the bond he did obtain goods on credit ; that in fact he had been sued upon a promissory note dated 17th August, 1954 for a sum of Rs. 19,000/- odd plus interest and had consented to judgment. His position was that the bond was intended to

cover and did in fact cover future credits and constituted in addition a security in respect of the entrustment to him of the motor vehicles belonging to the plaintiffs. There is little doubt that the value of the vehicles must have been about Rs. 50,000/- or more, so that in respect of half at least of the penal sum of Rs. 100,000/- specified in the bond, it was in my opinion quite reasonable for the defendants to maintain that the bond was executed partly in consideration of the defendants' liability at some stage to restore possession of the vehicles and to repair any damage mentioned in the bond.

The learned Judge than states that it is absurd to contend that the defendants owed no moneys to the plaintiffs at the time of the execution of the bond. His only reason for this opinion is that the document X 22 dated 11th December, 1951 shows that a sum of Rs. 43,000/- odd less commissions amounting to Rs. 16,000/-, i.e. a sum of Rs. 27,000/-, was due to the plaintiffs at that date. I am unable to see how the fact that Rs. 27,000/- was due at the end of 1951 serves to prove that a debt of Rs. 87,000/- must have been due in August, 1953. X 22 itself demonstrates that in five months the 1st defendant earned a commission of over Rs. 16,000/-. The chance that the debt would become reduced and not increased was at least even. Moreover the learned Judge failed to give any weight to the significant circumstance that the bond made no mention of any pre-existing debt. If indeed it were true that the principal purpose of the bond of 30th July, 1953 for a sum of Rs. 100,000/- was in order to secure cover for a pre-existing debt of Rs. 87,000/-, it is in my opinion most surprising that this most important object was not referred to in the bond. Surely if that was the object, the normal and reasonable course would have been to ascertain the total liability prior to 30th July, 1953 and to cause it to be covered by the terms of the bond or at least to state in the bond that such ascertainment would take place after execution.

In regard to the evidence of the handwriting expert, I do not think it was approached in the correct manner by the learned Judge. He states that that evidence "leaves no room for doubt whatsoever that at least the signature of the 1st defendant appears on these two notes." In other words he regards the signature as being proved purely because of the opinion of the expert. This approach does not accord with section 45 of the Evidence Ordinance whereby the expert's opinion is relevant but only in order to enable the Judge himself to form his own opinion. The correct approach is referred to in the Privy Council decision in *Wakeford vs. Lincoln* (*Bishop*), 1921 L.J. P.C. 174 *at page* 179 *ad. finem*.

> "The expert called for the prosecution gave his evidence with great candour. 'It is not possible,' he says 'to say definitely that anybody wrote a particular thing. All you can do is to point out the similarities and draw conclusions from them.' This is the manner in which expert evidence on matters of this kind ought to be presented to the Court, who have to make up their minds, with such assistance as can be furnished to them by those who have made a study of these matters, whether a particular writing is to be assigned to a particular person. Questions depending upon handwriting are in many cases doubtful, and in the past have given, and in the future will give, cause for great anxiety in Courts of justice."

Reference to the proper approach was made recently by Sinnetamby, J. in *Gratiaen Perera vs. The Queen*, 61 N.L.R. 522 *at* 524.

> "I think the modern view is to accept the expert's testimony if there is some other evidence, direct or circumstantial, which tends to show that the conclusion reached by the expert is correct; provided of course, the Court, independently of the expert's opinion, but with his assistance, is able to conclude that the writing is a forgery.
>
> The Judges of our Courts as well as of the Indian Courts, have made it clear that it is the function of the Court, with the assistance of an expert, to decide on the similarity of handwriting, and that it is not proper to act solely on the opinion of the expert."

In considering whether the 1st defendant signed the notes, the question whether the signature alleged to be that of the 2nd defendant was itself genuine was highly relevant. As to this the learned District Judge thought it was "unfortunate that sample signatures of the 2nd defendant were not available to the handwriting expert to express an opinion." Here again he lost sight of the fact that sample signatures were in fact available to the plaintiffs ; there were the admittedly genuine signatures of the 2nd defendant on the mortgage bond and on the proxy filed in the action. What was unfortunate to my mind was that the plaintiffs did not think it fit to make these sample signatures available to the expert. Their omission so to do gives rise to an inference that they did not have the confidence that the expert's opinion as to the 2nd defendant's signatures in the notes would be in their favour. Equally unfortunate was the failure of the trial Judge to refer to the 2nd defendant's testimony denying her signature on the notes. If there was, as I think there was, some doubt as to the genuineness of the 2nd defendant's signature on the two notes that circumstance itself would cast doubt on the genuineness of the 1st defendant's signatures on the same notes.

With regard to the oral testimony the learned District Judge merely stated that he had no reason to doubt the evidence of the 2nd plaintiff that the two defendants did come to the house and there signed the two promissory notes. No doubt the Judge may have been impressed with the manner in which the 2nd plaintiff gave his evidence ; but it does seem to me that his acceptance of that evidence was based largely upon the considerations to which I have just referred and which in my opinion were of little weight for reasons I have attempted to state. On the other hand the evidence as it reads is of so unsatisfactory a nature particularly having regard to the fact that it came from a business man who spoke to transaction involving considerable sums of money. For instance, while he alleged that he had for a considerable period allowed the 1st defendant to take goods on credit, he did not produce any book of accounts in which was reflected any of the alleged transactions. Indeed he admitted that his books did not contain any indication that the transactions were on credit. His explanation was that although the 1st defendant did not pay for the goods as taken the transactions were entered in the books as being cash transactions. This he said was because the Firm (which consisted of himself and one other partner) could not allow the credit and that credit was allowed by him personally. He made no reference however to the source from which he was able to provide cash in large amounts with which to pay into the Firm the price of the goods supplied to the 1st defendant. If a businessman maintains his books in such a way that what is alleged to have been a credit transaction is reflected in the books as being one for cash, he can scarcely expect a Court to give credence to his allegations.

If the books had been produced, the plaintiffs could at least have pointed to the relevant cash entries in order to establish that there had been in fact large transactions, the total value of which by August, 1953 had amounted to over Rs. 80,000. The failure to produce them even to establish this *prima facie* neutral fact justifies the opinion that even such a fact could not have been thus established.

Nor again was the 2nd plaintiff able to give any satisfactory reasons for allowing the 1st defendant to incur unsecured debts in so large a sum as Rs. 87,000/-. If as he maintained his own business was a profitable one there was no reason why the principal and perhaps sole agency for the distribution of those products was entrusted to a person who according to the plaintiff did not merely keep for himself a margin of profits realised upon disposal of the goods but appropriated for himself a large part of the value of the goods themselves. The explanation for this quite extraordinary state of affairs is entirely unsatisfactory.

For these reasons I would hold that the learned District Judge was wrong in his conclusion that the plaintiffs had satisfactorily proved the signature by the 1st defendant of the two promissory notes referred to in the plaint. That being so the plaintiffs are not entitled to judgment for the amounts of the notes on the basis of a simple money claim The judgment and decree appealed from are set aside and decree will be entered dismissing the plaintiff's action with costs in both Courts.

Appeal allowed.

Present : T. S. Fernando, J.

L. B. A. KUMARIHAMY *vs.* WILFRED ABEYGOONESEKERA* AND ANOTHER

S.C. Application No. 166 *of* 1961—*Application in Revision in M.C. Kandy Case No.* 12525

Argued on : 22*nd August*, 1961.
Decided on : 4*th October*, 1961.

Magistrate Courts—Duly to carry out orders made by Supreme Court.

A preferred a charge of theft of an elephant against B. The Magistrate ordered B to deliver the elephant over to A on the latter giving security in a sum of Rs. 5000/-. On an application by B to revise the said order the Supreme Court set it aside and directed the elephant be delivered over to the custody of B. After the parties were informed of this order the Magistrate was transferred and his successor held that he had no jurisdiction to try the charge. Thereafter the petitioner obtained possession of the elephant, from A while the order of the Supreme Court was still unexecuted, and made appli-

*For Sinhala translation see Sinhala section vol. 3 part 1, page 2.

cation to the Supreme Court for a direction that the elephant be given to her custody as she was its owner.

Held : (1) That the Magistrate was bound to carry out the order of the Supreme Court, irrespective of his finding that he had no jurisdiction to try the charge.

(2) That A still remained liable to obey the said order.

(3) That the application is unnecessary as the petitioner has already obtained the custody of the animal.

The petitioner was ordered to deliver the animal direct to the Court or to A.

E. R. S. R. Coomaraswamy with *Siva Rajaratnam* for the petitioner.

M. M. Kumarakulasingham for the 1st respondent.

T. S. FERNANDO, J.—

In Magistrate's Court, Kandy, Case No. 12525 the present 2nd respondent preferred a complaint of theft of an elephant against the present 1st respondent and two others. Before the charge came to be tried, the learned Magistrate made an order on 9th June, 1959 ordering the 1st respondent to deliver the elephant over to the complainant, the 2nd respondent, on the latter giving security to a sum of Rs. 5,000/- for the production of the elephant in court as and when required. The 1st respondent applied to this court for a revision of this order of the learned Magistrate made on 9th June, 1959. That application came on for hearing before me on 2nd November, 1960, and, after hearing counsel for both respondents, I made order on the very date of hearing setting aside the Magistrate's order of 9th June, 1959 and directing that the elephant be delivered over to the custody of the 1st respondent. My order appears to have been communicated to the parties by the Magistrate's Court on 19th November, 1960, but I regret to find that the order still remains to be executed.

While the order made by me remained unexecuted, the successor of the Magistrate who made the order of 9th June, 1959 had held that he has no jurisdiction to try the charge laid against the accused in the case. This finding is, however, immaterial to the issue whether the Magistrate's Court of Kandy was bound to carry out the order made by this Court on 2nd November, 1960. The order made by me contains a clear direction to the Magistrate's Court of Kandy which direction had to be carried out by the Court in question in its ministerial capacity.

It appears that, after the Magistrate's Court of Kandy had reached the finding that it had no jurisdiction to try the charges, the present petitioner had obtained possession of the elephant in question from the 2nd respondent. Having so obtained possession of the animal, she now applies to this Court directing that the custody of the animal be granted to her. The application appears to me to be unnecessary as custody is with her at present. She claims that the animal in fact belongs to her. It is undeniable that with full knowlege of the existence of the order made by this Court on 2nd November, 1960, the present petitioner has obtained custody of the animal from the 2nd respondent who had been ordered to deliver the animal to the 1st respondent. Having so obtained custody, and perhaps feeling that she had done something she was not lawfully entitled to do, she appears to have made the present application to this Court.

The question of jurisdiction of the Magistrate's Court of Kandy has not been argued before me, and I therefore refrain from making any observations thereon.

I direct that the record of this case be now transmitted to the Magistrate's Court of Kandy so that the order made by this Court on 2nd November, 1960 be now carried out. The present petitioner who claims to have custody of the animal may, however, deliver the animal direct to the Court or to the 2nd respondent who still remains liable to obey this Court's order.

This application No. 166 is dismissed.

Application dismissed.

Present: **Gunasekera, J.**

NILAWEERA *vs.* COMMISSIONER OF INLAND REVENUE*

Application No. 188—*Magistrate's Court Badulla* 25321

Argued on: *June* 28, 1961
Decided on: *January* 8, 1961

Income Tax Ordinance (*Cap.* 188) *Sections* 65, 80—*Certificate issued by Commissioner under Section* 80 (1)—*Effect thereof—Can it be challenged by allleged defaulter in proceedings before Magistrate.*

Held : (1) That the certificate issued by the Commissioner in terms of section 80 (1) of the Income Tax Ordinance is merely *sufficient* and *not conclusive* evidence that the tax has been duly assessed and is in default.

(2) That once a certificate in terms of section 80 (1) has been issued, the proviso to section 80 (1) read with section 80 (2) does not have the effect of preventing an alleged defaulter from satisfying the Magistrate that he was not duly assessed.

Case referred to : *De Silva vs. The Commissioner of Income Tax*, 53 N.L.R. 280.

G. E. Chitty Q.C with *E. A. G. de Silva* for the petitioner.

Kanagasunderam, Crown Counsel, for the respondent.

GUNASEKERA, J.—

This is an application for the revision of an order made by the Magistrate of Badulla under the Income Tax Ordinance, directing that a sum of Rs. 1,015/-, alleged to be tax in default, be recovered as a fine imposed on the petitioner and sentencing him to simple mprisonment for 3 months in default of payment of this sum as a fine.

The order was made in proceedings that were taken upon a certificate dated the 11th April, 1960, which was issued by an assistant Commissioner of Inland Revenue in terms of section 80 (1) of the Income Tax Ordinance, Cap. 188 of the 1938 edition of the Legislative Enactments.† (In order to avoid confusion I shall refer to the Ordinance as it appears in this edition of the Enactments.) The certificate stated that the petitioner had made default in the payment of Rs. 1,015/-, being income tax due from him, and gave particulars of this amount. It consisted of the amount of an additional assessment of the tax for the year 1952/1953 and a penalty for non-payment. The petitioner maintained that the assessment was time-barred, inasmuch as it was not made within the time prescribed by section 65, and was therefore invalid, and that consequently there was no tax in default. The learned Magistate held that it was not open to him to investigate this defence and that in any event the assessment was not time-barred. He said :

> I do not think that it is open to me to initiate an inquiry as to whether the claim in question is time-barred or not as this will involve me in a reconsideration of matter which should have been considered by the Commissioner of Inland revenue. The assessment in the instant case appears to me in any event to have been made within 3 years and it is not time-barred. I therefore hold that the defaulter has not showed sufficient cause why further proceedings for the recovery of tax should not be taken against him.

The learned Magistrate's view that it was not open to him to consider whether the assessment was time-barred is based on the proviso to section 80 (1), where it is enacted that nothing in that section shall authorise or require the Magistrate in any proceeding thereunder to consider, examine or decide the correctness of any statement in the certificate. The matters that are required to be stated in the certificate are the particulars of the tax in default that is sought to be recovered and the name and last known place of business or residence of the defaulter. These statements would assume that the alleged defaulter has been duly assessed to income tax, but there is nothing in the proviso to prevent him from proving that the assumption is incorrect. The real purpose of the proviso, as was pointed out by Gratiaen, J. in

*For Sinhala Tanslation see Sinhala section vol. 3, part 1, p. 1.

† Section 85 (1) cap. 242 of the 1956 Edition.

de Silva vs. The Commissioner of Income Tax, (1951) 53 N.L.R. 280 at 282, is to prevent a defaulter who has been duly assessed to income tax for which he is properly chargeable from re-agitating, in the course of proceedings taken under section 80 (1) for the recovery of such tax, the correctness of the assessments served on him. Sub-section (2) of the section provides that in any proceeding under sub-section (1) the Commissioner's certificate shall be sufficient evidence that the tax has been duly assessed and is in default. It most be noted that the certificate is to be merely sufficient, and not conclusive, evidence of these facts. Moreover, the provision that it shall be evidence connotes that an issue as to whether the tax has been duly assessed can arise for decision in such a proceeding. With respect, I agree with the view taken in *de Silva's case* (*supra*) that the provisions of these sub-sections do not have the effect of preventing an alleged defaulter from satisfying the Magistrate that he was not duly assessed.

The learned Magistrate's finding that in any event the assessment was not time-barred is not based on any evidence but on a statement made by the Commissioner's counsel that the assessment in question was made on the 26th March, 1955.

In my opinion the petitioner is entitled to be given an opportunity of satisfying the Magistrate that he was not duly assessed. I set aside the order made by the Magistrate and direct that the case be remitted to the Magistrate's Court so that the petitioner may be given such an opportunity.

Application allowed.

Present : **Basnayake, C.J. and Sinnetamby, J.**

CHAS. P. HAYLEY & Co., LTD. *vs.* COMMISSIONER OF INLAND REVENUE.

S.C. 8/60—*B.R.A.* 287 *Income Tax*

Case stated for the opinion of the Honourable the Supreme Court under the Provisions of Section 74 *of the Income Tax Ordinance* (*Chapter* 188) *upon the Application of Messrs. Chas. P. Hayley & Co., Limited.*

Argued on : 19th and 20th January 1961.
Decided on : 10th July, 1961.

Income Tax Ordinance (*Cap.* 188, *Legislative Enactments* 1938 *Edition*) *Sections* 5, 6(1) (*a*), 9(1)—*Loss incurred by theft—Whether 'out-going'—When is such loss incurred in the production of profits or income—Permissible deduction.*

The Assessee Company had in its safe a sum of money which it intended to use for the purpose of purchasing various commodities in the ordinary course of its business. The sum was stolen by burglars, but a part thereof was recovered by the Police. Insurers paid the assessee a further sum, but the total sum was not made good to them. In making its Income Tax return, the assessee claimed to deduct the shortfall under section 9 (1) of the Income Tax Ordinance, on the basis that it was an outgoing or expense incurred by it in the production of profits or income. The claim was disallowed by both the Authorized Adjudicator and the Board of Review, and the assessee caused a case to be stated to the Supreme Court on that question.

Held : (1) That the term 'outgoings' in section 9 (1) of the Income Tax Ordinance covered a loss caused by a theft not committed by high officials in the assessee Company.

(2) That the loss in this case was one which could properly be deducted to ascertain the nett profits of the business. It was incidental to or inevitable in the conduct of the business which produced the income of the assessee Company. As such it was permissible to deduct it under section 9 (1).

Cases referred to : *Charles Moore & Co. v. Federal Commissioner of Taxation*, Australian and New Zealand Reports p. 739.

Green v. Commissioner of Inland Revenue, Income Tax Reports (1928/1929) 14 Tax cases 377.
Bansidhar Onkarmai v. Commissioner of Income Tax, (1949) Income Tax Reports 247.
Ramaswami Chettiar v. Commissioner of Income Tax (*Madras*), A.I.R. (1930) Madras 808.
Curtis v. Oldfield Ltd., (1925) 9 Tax Cases 319
Commissioner of Income Tax v. Ash (1938/39) 61 Commonwealth Law Reports 263.

Mulchand Harilal, A.I.R. (1938) Patna 159.
Moripur Sugar Factory Ltd. v. Income Tax Commissioner, (1955) 28 Income Tax Reports 128.
Usher's Wiltshire Brewery Ltd. v. Bruce, 1915 A.C. 433.
Alliance Assurance Co., Ltd. v. Federal Commissioner of Taxation, 29 Commonwealth Law Reports 424.

H. W. Jayawardene, Q.C. with *S. Ambalavanar* and *N. R. M. Daluwatte*, for the assessee-appellant.

B. C. F. Jayaratne, S.C.C. with *M. Kanagasunderam*, C.C. and *H. L. de Silva*, C.C. for the assessor-respondent.

BASNAYAKE, C.J.—

I have had the advantage of reading the judgment prepared by my brother Sinnetamby. I am in agreement with the opinion he has expressed and the order he has made as to costs but I wish to add a short note of my own.

The only question for decision is whether the nett amount of the loss sustained by the assessee by the burglary of his office safe may be deducted under section 9(1) of the Income Tax Ordinance for the purpose of ascertaining the profits or income of the assessee from the source described in section 6(1) (*a*) as "profits from any trade, business".

Briefly the material facts are as follows : The assessee is a limited liability company carrying on business in Galle. One of the Company's business activities is the purchase of rubber for export. For the purpose of paying for the Company's purchases of rubber it withdrew from its Bank every day on which it was open sufficient money to pay for its purchases on each business day. On 17th April, 1952, the Company drew Rs. 6,075/- for the purpose of paying for the purchases. On the night of 19th April the Company's office was burgled and its safe was removed with its contents. A sum of Rs. 23,775/- was recovered by the police thereby reducing the amount of the loss to Rs. 72,300/-. Although the assessee had insured against loss by theft, the Insurance Company for some reason which is not disclosed, refused to meet the loss of Rs· 73,300/- but made an ex-gratia payment of half of it. The assessee's loss was thereby reduced to Rs. 36,150/- which sum it is claimed it was entitled to deduct for the purpose of ascertaining its profits from its trade or business. The Assessor disallowed the claim and the Company appealed. The Authorised Adjudicator also disallowed its claim. The Company thereupon appealed to the Board of Review, which also disallowed the claim. The Company expressed its dissatisfaction with that decision and asked that a case be stated to this Court.

Section 9(1) deals with three classes of deductions. One is "outgoings", the second is "expenses incurred by the assessee in the production of the profits or income" and the third is the specific deductions allowed by paragraphs (*a*)-(*i*) thereof.

The word "outgoings" means what goes out and is a word of wide import. It is the opposite of the equally wide expression "income", which means what comes in. In the context the word "expenses" is limited by the words "incurred by such person in the production thereof" while the word "outgoings" is not so limited. The two words are designed to express two different concepts, one of wider import than the other. All outgoings are not expenses incurred in the production of the profits or income ; but all expenses incurred in the production of the profits or income are outgoings. Apart from expenses incurred in the production of the profits or income the section specifically mentions other outgoings. The word outgoings in this context must be construed as outgoings other than those specifically mentioned. Whether a particular "outgoing" is deductible for the purpose of ascertaining the profits or income of a business would depend on the circumstances of each case subject to the provisions of section 10(*c*) which forbids the deduction of any expenditure of a capital nature or any loss of capital. Where an outgoing is not of a capital nature or a loss of capital or where it deduction is not expressly forbidden by the statutes

it is deductible under section 9(1) and it is not for the taxing authorities to say that the payment should not have been made.

The appellant's loss in the instant case is not a loss of capital and does not therefore come within the prohibition in section 10(*c*). Little assistance can be gained by examining the decisions on the taxing laws of other countries as they are rarely the same ; but in this instance the Australian case of *Alliance Assurance Co. Ltd. vs. Federal Commissioner of Taxation* 29 Commonwealth Law Reports p. 424 at 430 affords some assistance. In that case the Court was called upon to construe sub-clause (*a*) of section 18(1) of the Income Tax Assessment Acts 1915 (34 and 47 of 1915) which reads : "in calculating the taxable income of a taxpayer the total income derived by the taxpayer from all sources in Australia shall be taken as a basis, and from it there shall be deducted (*a*) all losses and outgoings, not being in the nature of losses and outgoings of capital, including commission, discount, travelling expenses, interest, and expenses actually incurred in Australia in gaining or producing the gross income". Knox, C.J Gavan Duffy, Rich and Starke, J.J., with whose judgment Higgins, J. expressed his agreement in a separate judgment, stated :

> "In our opinion the words 'all lossess and outgoings' which occur at the beginning of sub-clause (*a*), extend to all losses and outgoings of the business not being in the nature of losses and outgoings of capital and are not qualified by the words 'incurred in Australia in gaining or producting the gross income'. We think these latter words refer either to the word 'expenses' only, or at most to the words 'commission, discount, travelling expenses, interest, and expenses'. In our opinion this is the natural grammatical construction of the words used. Moreover, the construction contended for by the Commissioner would lead to the result that the cost of goods purchased and paid for in England and afterwards sold in the carrying on of a business in Australia could not be allowed as a deduction from the proceeds of sale in arriving at the taxable income of the taxpayer."

In the instant case the sum of Rs. 36,150/- cannot be described as expenses incurred in producing the profits of the business but it is an outgoing deductible under section 9(1) in ascertaining the profits or income.

SINNETAMBY, J.—

The assessee, Messrs. Chas. P. Hayley & Co., Ltd. is a firm carrying on a business in the export of rubber and other produce which it purchases in the open market. The facts stated by the Board of Review show that the firm's business involves work outside the normal working hours of the banks, that it was necessary for it to keep large sums of money in the office safe for the purpose of making purchases of rubber and other commodities in which it deals, and that money sufficient for its needs is withdrawn from the bank each day and kept in the office safe till it is utilised on the following day for the purpose of making purchases. In this way, on 17th April, 1952, the company withdrew from the bank a sum of Rs. 95,075/- in order to make the purchases it intended to make on the 21st, the 18th and 19th of April being bank holidays and the 20th being a Sunday.

It would appear that on the night of the 19th of April, the place of business of the assessee was burgled, and the safe removed with all its contents. The police recovered a sum of Rs. 23,775/- from some of the burglars, one of whom happened to be an employee of the assessee; presumably, he was not a high official in the company. The company apparently, had insured itself against losses of this kind ; but, for some reason not disclosed, the Insurance Company denied liability to indemnify them for the loss ; nevertheless, the Insurance Company made an *ex gratia* payment of Rs. 36,150/-. The balance of Rs. 36,150/- was a complete loss which the assessee had to bear.

The assessee, in making its income tax return for the year of assessment in question, claimed originally a deduction of Rs. 72,300/-, which is the amount of the loss unrecovered by the police ; but, subsequently, limited the claim to the nett loss sustained, namely, Rs. 36,150/-. Both the Authorised Adjudicator and the Board of Review held against the assessee, on the basis that this loss was a loss of capital and not a loss which, in terms of section 9 (1) of the Income Tax Ordinance, was an outgoing or expense "incurred by such person in

the production of profits or income." The question referred to this court for its opinion is whether, in the circumstances of this case, the loss of Rs. 36,150/- is a loss of capital or an outgoing incurred in the production of profits.

On the facts, the Board of Review held that the money was brought from the bank to the business premises of the assessee for the purpose of the business in which the assessee was dealing. Nevertheless, they took the view that, in as much as our Ordinance limits the amount deductable to "outgoings or expenses" incurred in the production of profits, a "loss" would not come within the term and was, therefore, not a sum which could properly be deducted to ascertain the nett profits of the business. In this way, they chose not to follow the decision in the case of *Charles Moore & Co. vs. Federal Commissioner of Taxation* (Australian & New Zealand Reports, p. 739). to which they referred. The wording of the Tax Act which was interpreted in that case provided for "losses and outgoings and expenses" to be legitimate deductions. In as much as our section does not include the word "losses," the Board of Review seemed to think that the loss in question could not be deducted. It is, therefore, necessary to consider the meaning to be attached to the term "outgoings and expenses."

The imposition of income tax by section 5 of our Ordinance is based upon the profits or income as calculated in accordance with the provisions of the Ordinance. In, therefore, interpreting the expression "outgoings and expenses," one must permit such deductions as may reasonably and in a commercial sense be made, in order to ascertain nett profits. The word "outgoings" must not be limited to voluntary payments. It would also include involuntary outgoings such as petty thefts by subordinate officers in the employ of the assessee as well as by outsiders. It was conceded that losses incurred in this way are permissible deductions ; for instance, thefts in a grocery store or in a shop by customers as well as minor employees are well recognized as being deductable in ascertaining the nett profits. They are losses in much the same way as the Rs. 36,150/- involved in this case, was a loss. If the Board of Review is correct in the construction they have placed on the words "outgoings and expenses," even such losses would not be deductable in view of the distinction they seem to have drawn. It seems to me, that the word "outgoings" is wide enough to cover losses for a loss, after all, is an involuntary outgoing. I may add that learned Crown Counsel did not seek to support the decision of the Board of Review on this ground. The "outgoings" however, must be outgoings of such a nature as would come within the meaning of the expression "incurred in the production of profits".

The question that must be decided is whether a loss of the kind in question is a loss which is incidental to or inevitable in the conduct of the business which produces the income. If so, it is deductible. Crown Counsel contended that it is only where stock in trade is lost that a deduction is permissible, and once goods are sold in a business which involves the sale and purchase of goods, the money which is brought "into the till" if lost, would be a loss of capital, and therefore, not deductible. It seems to me that the fallacy in that argument lies in the fact that the money "in the till" represents and replaces the stock in trade and, so long as it is in the till in that capacity, the loss of a portion of it would be equivalent to a loss of stock in trade. In *Green vs. Commissioner of Inland Revenue* (Income Tax Reports, 14 Tax Cases 1928/29, p. 377, the question that arose was whether the money paid by an insurance company as replacement or market value of timber which had been destroyed by fire, or the book value of the timber in the company's books, should be the permissible deduction ; and Lord Hanworth, in dealing with the question, made the following observations :—

> "They had a certain amount of fixed capital in their business, and they had a certain amount of circulating capital employed in the purchase of stock, which is enhanced again when the stock is sold. A part of that circulating capital was invested in timber. That timber might have been sold in the ordinary course of market—as a matter of fact, instead of being actually sold it was burnt. Under a contract of indemnity, properly entered

into for the purpose of safeguarding the possibilities of business in relation to it, a sum has been received in in respect of the timber. That is once more a restoration to the actual circulating capital of a sum which had previously been invested in specie in timber. We have got to take the actual sum received, which has been received in the ordinary course of business, plus the ordinary safeguards of business in the events which have happened. As Mr. Justice Rowlatt says : 'It seems to me that the Respondents must account for this timber that has been destroyed by fire ; they have received the money from the Insurance Company in place of it . . . the fact is that the Repondent's business is to buy, hold and sell timber, and it is part of their business to insure timber while they have it, in order that if the timber is destroyed they may have the insurance money instead of timber and, in my judgment, they must treat that money in the same way as they would have treated the timber, namely, as an item in their trading account.' These are the words of Mr. Justice Rowlatt. It appears to me that they are right."

In the present case, on the facts stated, the money that was brought from the bank by the assessee was, to use the words of Lord Hanworth, "circulating capital" and probably represented the proceeds of previous sales of the company's stock in trade. Although "in the till", the money represented stock in trade and was definitely intended to be utilized to replenish stocks. The Board of Review, quite rightly, rejected the Authorised Adjudicator's opinion that "what the cash lost represents and why it was brought and kept in the safe are not matters germane to the issue", and found that the "money was brought for the purpose of the purchase of rubber and other commodities that they were dealing in". It clearly was "circulating capital" and not "fixed capital", and if its loss was occasioned in the exercise of some step that had to be taken for the conduct of the company's business, it must surely be regarded as a casualty or a misfortune incidental to that business. It was an involuntary outgoing over which the assessee had no control, and involved a risk which had to be taken in the ordinary course of business in order to produce profits.

The two cases of *Bansidhar Onkarmai vs. Commissioner of Income Tax*, (1949) I.T.R. p. 247 and *Ramswami Chettiar vs. Commissioner of Income Tax (Madras)*, A.I.R. (1930) (Madras) p. 808, on which the Board of Review relied are distinguishable on the following grounds :—

In the former case, the court took the view on the facts that the theft did not occur in the course of business while the business was being conducted and, therefore, the loss was not a loss incidental to the conduct of the business. Narasingham, J. observed that the loss cannot be regarded as one that was likely to occur having regard to the peculiar risks attendant upon the conduct of the business of the assessee ; furthermore, the learned Judge stated that on the facts found by the tribunal from which the the appeal was taken, there was no evidence that the money stolen was the stock in trade of the money lending business which the assessee in that case was carrying on. As a matter of fact, the theft in that case was committed by the accountant of the firm ; and it is now a well established principle that where theft or embezzelment is committed by a high officer of a business, such as a Director or a Manager, the loss cannot be regarded as a trading loss, the principle being that the person in such a position having control of the company's money, when he takes it, is in the same position as the owner of the business. This principle appears to have been first laid down in in the case of *Curtis vs. Oldfield Ltd.*, (1925) 9 Tax Cases, p. 319. As was observed by Chief Justice Letham, in *Commissioner of Income Tax vs. Ash* Commonwealth Law Reports. 1938/39. Vol. 61, p. 263 referring to thefts by employees :—

"the case is different when income is actually received and then misapplied by the proprietor of a business or a person in the position of a proprietor as for example the Manager of the company."

In that case, monies misappropriated by a partner was not regarded as a permissible deduction. Ordinarily, an expenditure which is closely associated with the requirements of a business is a permissible deduction but as Chief Justice Letham states, such a statement cannot be regarded as exhaustive. Each case must be decided on the facts and circumstances in which the loss occurred.

In the case of *Ramaswami Chettiar vs. Commissioner of Income Tax (Madras)*, (*supra*), the appellant was doing business in money lending, and one night certain persons broke into the premises and

removed cash and jewellery to the value of Rs. 9,335/-. The court held that there was no evidence that the money which was stolen was stock in trade and that the loss was not incidental to the business of money lending. This was the view of the majority constituting the bench, but Justice Anantakrishna Ayyar wrote a strong dissenting judgment. The learned Chief Justice took the view that the loss was not incidental to the business and gave as an illustration the case of a man who having collected the profits was subsequently robbed of them by a stranger to the business. Such a loss was not incidental to his business. With all respect, I believe the learned Chief Justice took too narrow a view of the meaning that should be attached to the word "incidental to the business". As Chief Justice Ash, in the case I have already referred to observed :

> "an expenditure which is directly associated with the daily requirements or exigencies of the business will be an allowable deduction but such a statement as this cannot be regarded an exhaustive. The line is sometimes difficult to draw."

The Board of Review also referred to the case of *Mulchand Harilal*, A. I. R. (1938) (Patna) p. 159. In that case, money had been stolen while it was being taken to the bank. The court took the view that this was not a permissible deduction under section 10(9) of the Indian Income Tax Act of 1922 which permitted the deduction of "any expenditure..... incurred solely for the purpose of gaining such profits or gain". That opinion, however, has subsequently been declared to be obiter, as in that case the appeal was dismissed on the ground that the loss in question was sustained not in the year of assessment which was under review, but in respect of another year of assessment, vide *Bansidar Onkarmai vs. Commissioner of Income Tax* (*supra*). In *Motipur Sugar Factory Ltd. vs. Income Tax Commissioner*, 28 Income Tax Reports (1955) p. 128, the High Court expressed the opinion that the provisions of section 10(2) of the Indian Income Tax Act which permits the deduction of expenditure incurred solely for the purpose of producing profits or gain did not cover a case of theft while money was being taken for the purchase of goods ; but, nevertheless, having regard to the provisions of section 10(1) which imposes a tax on profits and gain, the words "profits and gains", it held, must be understood in a commercial sense, and a deduction was therefore permitted. The learned Judges quoted with approval the observations of Lord Parker, in *Usher's Wiltshire Brewery Ltd. vs. Bruce*, (1915) Appeal Cases p. 433, to the following effect :—

> "where a deduction is proper and necessary to be made in order to ascertain the balance of profits and gains, it ought to be allowed, notwithstanding anything in the first rule or in section 159, provided there is no prohibition against such an allowance."

The Judges expressed the view that section 10(1) of the Indian Income Tax Act must be considered in the light of this general principle.

In my opinion, the loss incurred by the assessee in this case is something which must be regarded as incidental to the assessee's business, and which any commercial undertaking would deduct from its income in order to ascertain its nett profits. In other words, I would hold that it must be deducted from the gross income to ascertain the nett profits. The question referred to us is, accordingly, answered in favour of the assessee and against the taxing department. The Commissioner of Inland Revenue will pay costs of this reference to the assessee.

Appeal allowed.

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

WILLIAM SINGHO *vs.* MUDALIGE.*

S.C. No. 210/*RE* 1957—*C.R. Colombo No.* 66214

Argued on : 22/10/58.

Decided on : 28/10/58

*For Sinhala Translation, see Sinhala section Vol. 3, part 1 p. 3.

Landlord and Tenant—Premises used for purposes of business—Action by landlord—Reasonable requirement—Position when premises in question will only partially satisfy landlord's needs and he also has land available for building—Comparative needs of the parties—Is hardship to be presumed from mere fact of tenant's ejectment—What must tenant prove in the case of business premises.

Held : (i) That in considering the question whether it is reasonable for a landlord who is a businessman, to resume occupation of leased premises, on the ground that he needs storage space, it may be legitimate to consider whether he should utilize land available for that purpose instead of seeking to eject his tenant from premises the use of which will only partially satisfy his needs.

(ii) That in taking that question into consideration, the burden will be on the tenant to prove that the land is suitable for the erection of new buildings, that the landlord has sufficient funds available for the purpose, and that it would be a business-like step on the landlord's part to expend funds on new buildings.

(iii) That hardship is not to be presumed from the mere fact of ejectment and has to be established by positive evidence In the case of business premises, the tenant must show that he will suffer financial loss if he is unable to carry on his business.

Sir Lalita Rajapakse, Q.C. with *O. M. da Silva* and *D. C. W. Wickramesekera* for the defendant-appellant.

H. W. Jayawardene, Q.C. with *Neville Samarakoon* and *C. P. Fernando* for the plaintiff-respondent.

H. N. G. Fernando, J.

The plaintiff has obtained a decree for the ejectment of his tenant from No. 250, Union Place, Colombo, on the ground that the premises were required for use as a store for goods imported by him in the course of an extensive import business. No. 250 will not by any means suffice to give him the storage space which he actually needs, and the suggestion made by the defence during the course of the trial was that it would be more reasonable for him to erect a sufficiently large store on a strip of bare land behind the premises in suit which also belongs to him. It has already been held that it is not " reasonable " for a landlord to resume occupation of premises let to a tenant if his need can be satisfied by using other premises available for his occupation. In the same way, I think it may be legitimate to consider whether, in the circumstances of a particular case, a business man, who needs storage for his business and has land available, should utilize the land for that purpose instead of seeking to eject his tenant from premises the use of which will only partially fulfill the landlord's needs. But if such a question can properly be taken into consideration, the burden will clearly be on the tenant to prove that the land is suitable for the erection of new buildings, that the landlord has sufficient funds available for the purpose, and that it would be a business like step on his part to expend funds on the new buildings. In the present case this burden has not been discharged, although it would seem that had the relevant matters been fully probed by the defence, the tenant may have succeeded in establishing his contention. I cannot therefore disagree with the learned Commissioner in his conclusion that the premises are " reasonably required " by the landlord.

As for the question of comparative needs, I must agree with Mr. Jayawardane that the failure of the tenant to produce his books of account justfied the Commissioner's disbelief of the tenant's evidence as to the profits made from the tailoring business carried on in the premises. Hardship is not to be presumed from the mere fact of ejectment and has to be established by positive evidence ; in the case of business premises, the tenant must show that he will suffer financial loss if he is unable to carry on his business. This the defendant has failed to do. The appeal is dismissed with costs.

Appeal dismissed.

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

MARTHELIS PERERA *vs.* MARGARET JAYASEKERA

S.C. No. 121 *of* 1960—*C.R. Colombo*, 7145

Argued on : 10*th October*, 1961.
Decided on : 18*th October*, 1961

Landlord and Tenant—Reasonable requirement—Alternative accommodation—House bought by landlord with the intention of going into occupation—Relative hardships to the landlord and to the tenant.

Held : (1) That where the landlord sues a tenant for ejectment on the ground of reasoable requirement, the question of alternative accommodation is a relevant fact to be taken intoaccount along with other facts.

(2) That the fact that the landlord bought the house with the intention of going into occupation thereof is not a measure of the reasonableness of his claim.

(3) That the Court must consider the relative hardships to the landlord and to the tenant.

Cases referred to : *Abeywardene v. Nicolle* (1944) XXVII C.L.W. 103
Suppiah Chettiar v. Samarakoon, (1954) 56 N.L.R. 163
Gunasena v. Sangaralingam Piliai Co., (1948) 49 N.L.R 476

G. P. S. de Silva, for the defendant-appellant.

S. D. Jayawardena, for the plaintiff-respondent.

T. S. FERNANDO, J.

This appeal has been ably presented at the argument by learned counsel for the defendant who has contended that not merely has the learned Commissoner of Requests overlooked the existence of certain evidence but that he has misdirected himself on the question of the reasonable requirement of the premises in question by the landlord.

When adverting to the question of alternative accommodation, the learned Commissioner observes that there is no evidence to show that the tenant had made any inquiries regarding such accommodation. It has, however, been pointed out to me that the defendant did say he had been searching unsuccessfully for a house for his occupation and this statement went unchallenged in cross-examination. As Soertsz, J. observed in *Abeywardene v. Nicolle*, (1944) 27 C.L.W. at 102, the question of alternative accommodation is a relevant fact to be taken into account along with other facts in considering the question of reasonableness of requirement.

The plaintiff lives in the adjoining premises which belong to her father, but her case is that the father wishes to donate those premises to her sister who is to be married shortly. There is no reasen advanced or suggested why the sister cannot live with her husband-to-be or continue to live where she is at present. The principal reason indicated in the judgment for deciding the only issue in the case in favour of the plaintiff is that there is no good reason why she should be deprived of occupation of the house which she bought with the intention of going into occupation thereof. As Sansoni, J. said in *Suppiah Chettiar v. Samarakoon*, (1954) 56 N.L.R. at 163, " while one sympathises with a man who invests a large sum of money in property in the expectation of getting vacant possession, that factor only indicates his anxiety to obtain the premises but is not a measure of the reasonableness of his claim." In considering whether premises are reasonably required for the occupation of a landlord, it has been held that a court must take into account not only the position of the landlord but also that of the tenant together with any other factor that may be directly relevant to the acquisition of the premises by the landlord—*Gunasena v. Sangaralingam Pillai Co.*, (1948) 49 N.L.R. at 476. The defendant is a carter by occupation and he has a wife and two children living with him in these premises. He has been in occupation of these premises as a tenant for some eighteen years. There does not appear to have been a consideration of the relative hardships to the landlord and to the tenant by the learned Commissioner ; and in these circumstances it is open to me now to consider that question on the evidence led at the trial. I am satisfied that on the evidence disclosed in this case the plaintiff has failed to establish that the premises are reasonably required for occupation by her and her family. It follows, therefore, that the plaintiff's action must fail.

I would set aside the order made in the Court of Requests and direct that the plaintiff's action be dismissed with costs in both Courts.

Appeal allowed.

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

WILLIAM NONIS *vs.* SIMON NONIS AND OTHERS

S.C. No. 120/59—*D.C. Negombo No.* 18444.

Argued on: September 1 *and* 2, 1960.
Decided on: September 2, 1960.

Fidei commissum—Entail and Settlement Ordinance, (*Cap.* 54), *section* 3—*Meaning of Sinhala word* "භාරකාර"—*Use of word "assigns" in deed of gift—Are beneficiaries sufficiently described or designated—Is prohibition against alienation contained in deed rendered null and void thereby.*

Civil Procedure Code, section 118—*Translations of documents—Must be signed by interpreter of a Court or sworn translator.*

Held : (1) That the Sinhala word "භාරකාර" in the deed in question had been wrongly translated as "assigns".

(2) That in any event the use of the word "assigns" in a deed does not make a prohibition against alienation null and void by reason of that fact alone, so long as the persons in whose favour the prohibition is imposed are designated with sufficient certainty as required by section 3 of the Entail and Settlement Ordinance.

(3) That section 118 of the Civil Procedure Code, forbids any Court from permitting to be read as a translation of a document tendered in evidence, a translation which is not signed by one of the persons referred to in that section.

Cases referred to : *Silva v. Silva,* 18 N.L.R. 174.
Elias Appuhamy vs. The Archbishop of Colombo and Another LXI C.L.W. 19

H. W. Jayawardene, Q.C., with *W. D. Gunasekera* and *C. P. Fernando*, for the plaintiff-appellant.

E. B. Wikramanayake, Q.C. with *Rajasinghe*, for the 15th to 22nd defendants-respondents.

BASNAYAKE, C.J.

The only question for decision in this appeal is whether the deed of gift No. 3778 of 1st December 1870, executed by Girigoris Fernando, and his wife Francina Fernando, creates a *fidei commissum.*

The learned District Judge has held that the deed does not create a *fidei commissum.* It would appear that he bases his conclusion on the existence of the word "assigns" which occurs in the English translation of the deed in the context "the said Peace Officer and the children, heirs, executors, administrators and assigns." He holds that the use of that expression has rendered the prohibition against alienation null and void as it has resulted in the person or persons in whose favour or for whose benefit the prohibition has been imposed not being described or designated.

The relevant portion of the original Sinhala deed reads as follows :-

දැනට ලංකාවේ වලංගුවෙන මුදලෙන් පවුන් 150 පමණ වටිනාකම් පෙනෙන එකී ඉඩම් සහ කුඹුරු කොටසත් අයිතිකාර පෙර කී ග්‍රීගෝරිස් ප්‍රනාන්දු ද ඉසුනි ප්‍රැන්සිනා ප්‍රනාන්දු යන අපි දෙදෙනාගේ මරණයෙන් පසු අයිතිවීමට අපේ දරුවරුන් අතරෙන් දුවණියෙක් වන අලවතුපිටියේ පදිංචි පත්නාගේ බස්තියානා ප්‍රනාන්දුට මෙවකට ලැබිය යුතු උරුම කොටස සේන්දුවීමට සහ වැඩිමනත් නැගි පිණිසත් ඇගේ පුරුෂයා අලවතුපිටියේ පදිංචි උන්ගාමන්ඩාඩිගේ ජෝසෙප් ප්‍රනාන්දු රණසිංහ පිස් ඔපිසර් මුලාදැනියාට මෙයින් දීමනා කළාය. ඉන්නියා මේ දීමනා කළ වන්න සහ කුඹුරු පංගුවත් මතු කී ගිරිගෝරිස් ප්‍රනාන්දු සහ ඉසුනි ප්‍රැන්සිනා ප්‍රනාන්දු යන අපි දෙනොගේ ජීවත්වීම තිබෙන තුරු බුත්නි විඳ අපි දෙදෙනාගේ මරණයෙන් පසු එකී පිස් ඔපිසර් මුලාදැනියාට සහ ඔහුගේ දරු උරුමක්කාර පොල්මෑ අද්මිනිස්ත්‍රාසි භාරකාර යනාදි බලේලත් අයවලටත් අයිතිව ගොවැනිමේන්තුවෙන් වත්තාවූ හැම නියමවලට යටහත්ව සදහාකාලේටම නිරවුල් හැටියේ හැමකල ප්‍රමෙනි සැලැස්වීමට බුත්නි විඳිනවා වීනා අන්සත් කරණ දන්දමේ යම් විකිණීමක් උකසක් කරන්ඩ බැරි හැටියට සහ දැවුරුද්දකට වැඩි නොවන ගණනකට බද්දකට දෙන්ඩ බැරි හැටියට ද මෙකී අන්දමට ඔවුන්ගේ දරු මුණුබුරු පරම්පරා අද දක්වා බුත්නි විඳින්ට පුළුවන් වෙනවා පමණකුත් නොව මේම දීමනාව ගැන මෙයින් පසු කිසි වියදුලක් නොකරනා නොකියනවා යන මීට විරුද්ධව කරනා හැම සහ සියලුම ආරාවුල් ගැන උත්තර දෙමින් මේම දීමනාව සවිකර දෙන හැටියටත් මතුකී දීමනාකාර අපි දෙදෙනා අපට සහ අපේ උරුමක්කාර පොල්මෑ අද්මිනිස්ත්‍රාසි භාරකාර අය වෙනුවටත් එකී දීමනාව අයිති පිස් ඔපිසර් මුලාදැනියා සමඟ ගිවිස පොරොන්දුව මතු කී ප්‍රකාර අයිතිකර දෙන්ඩ යෙදුනා පමණකුත් නොව මේම දීමනාව අයිකාර ජෝශෙප් ප්‍රනාන්දු

පිස් ඔපිසර වන මා විසින් මතුකී මගේ ස්ත්‍රීගේ පියා වන ග්‍රිගෝරිස් ප්‍රනාන්දුට ද, මව් ප්‍රැන්සිනා ප්‍රනාන්දුවන් අපේමුළු භෘදයෙන් ඉස්තුති දෙමින් මෙහි සඳහන් කර තිබෙන අන්දමට එහි ඉඩම සහ කුඹුරු කොටසක් පිළිගනිමි. ප්‍රසන්නයෙන් භාරගන්ඩන් යෙදුනා ඇත.

The following is the translation (P1A) of the material portion of the deed as translated by a Government sworn translator :-

"Therefore, we the said Girigoris Fernando and wife Francina Fernando, shall possess the said land and portion of field hereby gifted during our life time and after our death the said Peace Officer and his children, heirs, executors, administrators and assigns and those holding such powers may subject to Government regulations uninterruptedly possess for ever as a hereditary property but they shall not sell, mortage or alienate the same or lease the same for a period exceeding two years and their children and grand children shall possess the same in this manner until the end of posterity."

Learned counsel for the appellant submitted that the words "භාරකාර අය" have been wrongly translated as "assigns." Even the interpreter mudaliyar of the Court, who appears to have prepared at the instance of the Judge, a translation of the words "පිස් ඔපිසර යහ ඔහුගේ දරු උරුමක්කාර පොල්මෑක්නා අද්මිනිස්ත්‍රායි භාරකාර යනාදි බලයලත් අයවලටත් අයිනිව", translates them as "Peace Officer and his children, heirs, executors, administrators, assigns such as those who have received powers own." There is no support for the translation of the word "භාරකාර" as "assigns" in any of the dictionaries we have consulted. The meaning given in Sorata's dictionary is "ආරක්ෂාකාරයා" and in Carter's Sinhalese-English Dictionary is "trustee, bailee, consignee, custodian, warden." The word "assign" when used as a noun is in Carter's English-Sinhalese Dictionary given the following meanings "(ලියාදීමෙන්) යමක් හිමිවෙන අය, අයිතිවාසිකම් ලබන්නා", and in Clough's English-Sinhalese Dictionary the following meanings "අයිතිවාසිකම් හෝ බලය ලබන්නා"

But apart from the fact that the translation of the word "භාරකාර" as "assigns" is not supported by the only standard Sinhala dictionaries available, even if the Sinhala equivalent of the English word "assigns" had been used in the deed, the use of the word "assigns" does not make the prohibition or restriction against alienation null and void by reason of that fact alone so long as the deed names, describes, or designates the person or persons in whose favour or for whose benefit the prohibition, or restriction is declared or imposed. In the very case of *Silva v. Silva*, 18 N.L.R. 174, cited by learned counsel for the respondent, de Sampayo, A.J., observes referring to an unreported case cited by him from which I shall quote later :

> "There the Court, if I may be allowed to say so, rightly pointed out that the use of the word 'assigns' was not inappropriate for the purpose of conveying the *dominium* in the property to the fiduciary. I should say myself that it would not necessarily make invalid a *fidei commissum* which is otherwise well created."

In the unreported case (S.C. No. 446/D.C. Colombo No. 36298—S.C. Minutes of February 26, 1914),* this matter is discussed at length by Pereira, J., whose observations I shall set out *in extenso :*

> "While, if the facts of the cases cited were such as to make them applicable to the present case, I should unhesitatingly follow the decisions, I should like to observe that I cannot help thinking that too much importance has been attached to the use of the word 'assigns' in those cases. It has really no more force than 'executors' or 'administrators'. Property subject to a *fidei commissum* does not go to 'executors' or 'administrators' any more than it vests in 'assigns', and why the word 'assigns' should be singled out for condemnation I cannot quite understand. It is said that the word 'assigns' means any person to whom the donee may be pleased to assign the property, but similarly it may be said with reference to the word 'executors' that it implies that the donee might will away the property to any person he liked, and, with reference to the word 'administrator', that the property vested in the legal representatives of the deceased donee as property that belonged to him absolutely."

We are of the opinion that the deed P1 the material portion of which is set out above does not offend against section 3 of the Entail and Settlement Ordinance, as it describes or designates the person or persons in whose favour or for whose benefit the prohibition against alienation has been imposed.

Learned counsel for the respondent, submitted that the words "after that" in the context "after that his children, heirs, administrators, assigns, etc." in the following translation of the relevant clause made by the witness called by the plaintiff supported his contention :-

"Until the death of two of us we will enjoy this property and after our death that property will go to the said Peace Officer, and after that his children, heirs, administrators, assigns, etc. and according to the Government regulations and they will have hereditary possession of this property for ever. But they cannot sell or mortgage or they are not allowed to lease it out for more than two

*See 61 C.L.W. p. 19

years and the property will go to their children, grand-children and to the end of the line of descendants."

Apart from the fact that the Sinhala text which we have examined does not contain words equivalent to "and after that", section 118 of the Civil Procedure Code, forbids any Court from permitting to be read as a translation of a document tendered in evidence, a translation which is not signed by an interpreter of the Supreme Court, or by a Government sworn translator, or by a sworn translator or interpreter of some District Court or Court of Requests. The witness in question is neither an interpreter of a Court nor a Government sworn translator.

We, therefore, allow the appeal and set aside the order of the learned District Judge. The case will go back to the lower Court for trial in due course of the remaining issues.

The appellant is entitled to costs of the appeal.

SANSONI, J.
I agree.

Appeal allowed.

Present : **Pereira, J. and Ennis, J.**

ELIAS APPUHAMY *vs.* THE ARCHBISHOP OF COLOMBO & ANOTHER

S.C. 446/ *D.C. Colombo* 36298

DELIVERED ON 26TH FEBRUARY, 1914

Fidei commissum—Whether terms of a deed of gift were such as to create a valid fidei commissum —Effect of the use of the words "assigns" in relation to fiduciary—Is acceptance of gift by fidei commissary necessary—Donor's power of revocation—Acceptance of a gift taking effect after donor's death—Can bringing of action to gain possession amount to acceptance of such a gift.

By deed No. 7522 dated 20th September, 1853 one *J.P.* gifted certain property to her son and daughter, *J.* and *B.* The Deed purported to gift the property to *J.* and *B.*, "their heirs, executors, administrators and assigns as a donation absolute and irrevocable . . . " and it also contained a prohibition against alienation and a clause that the property was to be held under the bond of *fidei commissum* for the heirs of *J.* and *B.* Finally it contained a clause that on the failure or extinction of such heirs the property should revert to the Roman Catholic Church of St. Lucia. The heirs of *J.* and *B.* became extinct, so that, the point of time when the property should go over to the Roman Catholic Church in terms of the Deed was reached. The heirs of *J.* had, however, conveyed the property to one *S.*, and *S.* had sold to the defendants. In the present action, the plaintiffs (on behalf of the Church) sought to gain possession of the property from the defendant and obtained a judgment in their favour in the District Court. The defendant appealed.

Held : (1) That the deed in question did create a valid *fidei commissum.*

(2) That under the Roman-Dutch law the vesting of absolute dominium in the fiduciary, in the first instance, is by no means repugnant to the creation of a valid *fidei commissum* so long as there is sufficient indication of a clear intention that this ownership should be burdened with a *fidei commisum.*

(3) That the use of the words "assigns" in the deed did not affect the creation of valid *fidei commissum* and had no more force than the words "executors" or "administrators"—all these words being used to vest, in the first instance, absolute dominium in the fiduciary.

(4) That acceptance of a gift by the *fidei commissary* is necessary only in orde to render the gift to him irrevocable by the donor; and where the donor had died before the time of the gift over to the *fidei commissary*, the power of revocation was at an end and could not be exercised by the donor's heirs. In any case the heirs had not exercised any power of revocation in the present case.

(5) That since a gift which really takes effect after the donor's death may be accepted after his death and in the present case when the gift over to the Church took effect, the plaintiffs were not permitted to take possession of the property, the present action to gain possession of the property was tantamount to a manifestation of the acceptance of the gift by the donee.

Authorities referred to : *Hormusjee vs. Cassim*, 2 N.L.R. 190
Aysa Umma vs. Noordeen, 6 N.L.R. 173
Dassanaike vs. Dassanaike, 8 N.L.R. 361
Selembram vs. Perumal, 16 N.L.R. 6
Wijetunga vs. Wijetunga, 15 N.L.R. 493
De Silva vs. Thomis Appu, 7 N.L.R. 123
Asiathumma vs. Alimanchy, 1 A.C.R. 53
Voet 7.1.13
Censura Forensis 14.12.16

A. St. V. Jayawardene, for the defendant-appellant.

Bawa, K.C., with *H. J. C. Pereira* and *Samarawickreme* for the plaintiff-respondent.

PEREIRA, J.—

The first question argued in appeal was whether deed No. 7522 dated the 20th September, 1853, created a valid *fidei commissum* in respect of the property now in claim. The grantor of the deed was one Johana Perera and the immediate grantees were her son and daughter Johannes and Brezina. The material portion of the deed is as follows :—

"I have given, granted, assigned, transferred, and set over unto Johannes and Brezina, their heirs, executors, administrators and assigns as a donation absolute and irrevocable but subject to the provisions and conditions hereinafter stated and mentioned all that (description of the property donated) x x x to have and to hold the said premises unto them the said Johannes and Brezina, their heirs, executors, administrators and assigns for ever, provided always that the said garden and buildings shall not at any time be sold, mortgaged or in any other manner alienated but shall be only held possessed and enjoyed by them and their heirs and descendants in perpetuity under the bond of *fidei commissum*, and that the rents issues and profits thereof shall not be liable to be attached seized or sold by others for the debts of the said Johannes and Brezina or of their heirs and descendants, and provided also that on failure or extinction of heirs the said garden and buildings shall revert to and become the property of the Roman Catholic Church of St. Lucia x x x and I, the said Johanna, for myself, my executors and administrators do covenant promise and agree to and with the said Johanna and Brezina, their heirs, executors and administrators that I the said Johanna have not at any time made, done or committed any act whereby the hereby granted premises may be impeached in title &c."

In support of the contention that no *fidei commissum* is created by this deed certain judgments of the Court were cited, but, in my opinion, they have no application whatever to the present case. In *Hormusjee vs. Cassim* (2 N.L.R. 190) the gift was "a gift absolute and irrevocable to M, his heirs, executors, administrators and assigns" subject to the condition that M should not be at liberty "to sell, mortgage or otherwise alienate the property gifted but possess the same during his life", and out of these words it was sought to evolve a *fidei commissum*, but it is clear that the parties to benefit were not clearly designated in the deed. Similarly in the case of *Aysa Umma vs. Noordeen* (6 N.L.R. 173) the words used in the deed were—

"I have given, granted, assigned, transferred, and set over unto A. & B., their heirs, executors, administrators and assigns as a gift absolute and irrevocable all that portion of a house etc., to have and to hold the said premises unto the said A. & B. their heirs, executors, administrators and assigns and their children and grandchildren ; and the children and great grand-children of their heirs and assigns shall not sell, mortgage or encumber the said premises at any time but hold and possess the same ; and the rents, produce and income thereof shall not be held liable to be attached seized or sold for any of their debts, but they shall be able to give and grant the said premises or any part thereof in dowry for their female children also subject to the aforesaid conditions and restrictions."

Here too the words used import no more than a prohibition against alienation by the parties to whom the property is granted, namely, "A & B their heirs, executors, administrators and assigns", and there is no clear indication of any party to benefit by the prohibition, nor are there other words to indicate that the creation of a *fidei commissum* was intended. In the case of *Dassanaike vs. Dassanaike* (8 N.L.R. 361) the material words of the deed in question were—

"We have given, granted, assigned and set over as we do hereby give, grant, assign, transfer and set over as a gift absolute and irrevocable unto L, his heirs, executors administrators and assigns the following x x x to have and to hold the said premises unto the said L, his heirs, executors, administrators and assigns for ever, subject nevertheless to the following condition, that he the said L, and his generation shall possess the said lands for ever but he or his heirs shall not sell, mortgage or alienate the same in any manner whatsoever".

The same remarks as those made in the case last cited apply. In the case with which we are now concerned, however, it is manifest that the word "them" in the provision that the garden and buildings "shall be only held, possessed and enjoyed by them and their heirs and descendants in perpetuity under the bond of *fidei commissum*" refers only to the original institutes, namely, Johannes and Brezina, and that the words, "in perpetuity under the bond of *fidei commissum*" and also the provision that "in case of failure or "extinction of heirs the property shall revert to and become the property of the Roman Catholic Church of St. Lucia" indicate an intention to create a *fidei commissum*. In the case of *Selembram vs. Perumal* (16 N.L.R. 6) where similar words were used my brother Wood Renton observed—

"The words, 'in perpetuity', and 'under the bond of *fidei commissum*', leave no doubt in my mind that the testator intended to create a *fidei commissum*" ;

and it is noteworthy that in the present case there is an omission of the word "assigns" in the warranty clause, while Wendt, J. makes a point of the presence of that word in the corresponding clause in the deed in question in the case of *Dassanaike vs. Dassanaike.* While, if the facts of the cases cited were such as to make them applicable to the present case, I should unhesitatingly follow the decisions, I should like to observe that I cannot help thinking that too much importance has been attached to the use of the word "assigns" in those cases. It has really no more force than "executors" or "administrators". Property subject to a *fidei commissum* does not go to "executors" or "administrators" any more than it vests in "assigns", and why the word "assigns" should be singled out for condemnation I cannot quite understand. It is said that the word "assigns" means any person to whom the donee may be pleased to assign the property, but similarly it may be said with reference to the word "executors" that it implies that the donee might will away the property to any per on he liked, and, with reference to the word "adm nistrators", that the property vested in the legal representatives of the deceased donee as property that belonged to him absolutely. A grant to *A. B.* without qualification is exactly the same as a grant to "*A. B.* his heirs, executors, administrators and assigns" ; and the fact that words are used to vest, in the first instance, absolute *dominium* in the fiduciary is by no means repugnant to the creation of a *fidei commissum.* Unlike a mere usufructuary a fiduciary has title and *dominium*—So much so that an alienation by him of the property which is the subject of the *fidei commissum* by will or deed would be operative if there be a failure of the fidei commissary. Voet puts the position thus—(Voet 7.1.13) :

"Where a bare usufruct appears given, the ownership immediately on the death of the testator is considered as acquired by those who at the time were the next of kin of the deceased, or whom he in his last will declared his universal successors at law, so that even if they die during the existence of the usufruct, nevertheless they transmit their ownership and their hope of becoming full owners to their heirs. Which is not the case when full ownership with the burden of *fidei commissum* (*plena proprietas cum onere fidei commissi*) or of making restitution after the death of the fiduciary is understood to have been left ; for the *fidei commissarius* who dies during the lifetime of the *fiduciarius* does not transmit his chance of obtaining the *fidei commissum* to his heirs, but restitution is made to those who are alive at the death of the fiduciary, and if none such survive to whom restitution should be made, the fiduciary is taken to be released from the burden of *fidei commissum*, not finding any one to whom to restore it, and he can then alienate the property as if unburdened, or transmit the full right of ownership to his next heirs."

So that, it will be seen that under the Roman Dutch Law there is such a thing as "*plena proprietas cum onere fidei commissi*". The *plena proprietas* may be first conferred by some such words as "I grant to A" or "I grant to A, his heirs, executors, administrators and assigns", and then the burden engrafted on it. The only question is whether the words used sufficiently indicate a clear intention to burden the *plena proprietas.* In the present case it is inconceivable that the words "in perpetuity under the bond of *fidei commissum*" were used for any purpose other than that of creating a *fidei commissum.* The application to this case of the test that I have laid down in *Wijetunga vs. Wijetunga* (15 N.L.R. 493) would give only one result and that is that the deed in question created a valid *fidei commissum.*

The next question argued was whether it has been shewn that the heirs of Johannes and Brezina are extinct. On this point I am not prepared to question the verdict of the District Judge on the evidence.

The third question is whether the gift has been duly accepted by the plaintiffs. In *De Silva vs. Thomis Appu* (7 N.L.R. 123) it was held that a gift should be accepted by a fidei commissary, but in the case of *Asiathumma vs. Alimanchy* (1 A.C.R.) Wend, J. who was one of the two Judges who so held stated that the conclusion that he had arrived at in the case of *De Silva vs. Thomis* was erroneous and that after reconsideration of the points, his opinion was that the acceptance of a gift by the fidei commissary was necessary only in order to render the gift to him irrevocable by the donor. Now, it is, I think, clear law that if the donor himself died before the period had arrived when the property was to be delivered to the fidei commissary the power of revocation was at an end and could not be exercised by the heirs of the donor (see 2 Burge 149). Anyway, in the present case it is clear that the donor's heirs did not exercise or purport to exercise any power of revocation. The property vested in them (Johannes and Brezina) and the conveyance in favour of Seneviratne, the defendant's vendor, was not executed by them but by the heirs of Johannes. The conveyance itself is not tantamount to a revocation by Johanna and Rosa Maria *qua* heirs of Johanna even if they were such. The respondent's counsel argued that there was, in any case, an acceptance of the gift by

the plaintiffs in that they had brought the present action to recover the subject of the donation, and that that act of theirs was by itself an acceptance of the gift. Now, where a gift really takes effect after the death of the donor it may be accepted even after that (Cens. For. 14.12.16). In the present case when the gift to the Roman Catholic Church of St. Lucia took effect, the property gifted was already in the possession of the defendant who would not allow the plaintiffs to take possession of it. How were the plaintiffs to accept the gift except by means of an attempt to take possession of the property ? This action is such an attempt, and I am inclined to agree with the respondent's counsel that in the circumstances of a case like this an action to gain possession of the property donated would be tantamount to a manifestation of the acceptance by the donee of the gift.

For the reasons given above I would affirm the judgment appealed from with costs.

ENNIS, J.—
I agree.

Appeal dismissed.

Present: **Weerasooriya, J.**

SENEVIRATNE *vs.* PERERA

S.C. No. 166/60 (*R.E.*)—*C.R. Colombo, No.* 72808

Argued on : 11*th and* 12*th December*, 1961
Decided on : 17*th January*, 1962

Rent Restriction Act No. 29 *of* 1948 (*Cap.* 274 *of the Legislative Enactments*, 1956 *Ed.*) *section* 13 (1)—*Requirement that authorisation of the Rent Control Board be obtained before action for ejectment instituted—"Excepted premises"—Action filed without authorisation as this unnecessary—Premises ceasing to be excepted premises before trial began—Does this preclude Court from entertaining the proceedings.*

The plaintiff instituted action against his tenant, the defendant, on 8-4-59, for ejectment from certain residential premises situated within the Municipality of Colombo. The trial began on 22-11-60 and continued on subsequent dates. Thereafter judgment was entered against the tenant and his ejectment ordered. The premises in question were at the time of institution of the action "excepted premises" within the meaning of the Rent Restriction Act, their annual value being over Rs. 2,000. The provisions of the Act did not, therefore, apply to them. However, with effect from 1-1-60 (i.e. after the action was instituted but before the trial began) the premises ceased to be "excepted premises" as their annual value was reduced to Rs. 1845. The provisions of the Rent Restriction Act thereupon became applicable to them. It was submitted on behalf of the defendant-appellant that once the provisions of the Act became applicable to the premises, the subsequent trial and also any steps that may be taken in Court in the execution of the decree would constitute "proceedings for the ejectment of the tenant" as contemplated in section 13 (1) of the Act and in the absence of any authorisation by the Rent Control Board, as required by that section, the Court would be precluded from entertaining the proceedings except in a case falling within the proviso to that section.

Held : That section 13 (1) of the Rent Restriction Act only requires that the authorisation of the Board should be obtained for the *institution* of the action or proceedings referred to in the earlier part of the section. Neither the proceedings at the trial nor those at the stage when the decree is sought to be executed are proceedings of the kind contemplated in section 13 (1) as requiring the authorisation of the Board.

Cases referred to : *Ismail vs. Herft*, 50 N.L.R. 112; XL C. L. W. 50
S. P. Kader Mohideen & Co., Ltd. vs. S. N. Nagoor Gany, 60 N.L.R. 16
S. L. Arnolis Appuhamy vs. L. D. de Alwis, 60 N.L.R. 141
Swamy vs. Gunawardane, 61 N.L.R. 85

H.V. Perera, Q. C. with *H.E.P. Cooray*, for the defendant-appellant.

H. W. Jayawardene, Q.C. with *R. Manikkavasagar and S.S. Basnayake*, for the plaintiff-respondent.

WEERASOORIYA, J.—

This is an appeal by the defendant against the judgment and decree of the Court of Requests, Colombo, dated the 14th December, 1960, ordering his ejectment from certain residential premises situated within the Municipality of Colombo of which he was the tenant under the plaintiff. In entering the judgment the Court also ordered that writ of ejectment should not issue until the 30th November, 1961. At the time of the institution of the action (on the 8th April, 1959) the provisions of the Rent Restriction Act, No. 29 of

1948 (Cap. 274) did not apply to the premises as they were "excepted premises" in that the annual value thereof was Rs. 2240/-.

The trial took place on the 22nd November, 1960, and subsequent dates. Prior to that, and with effect from the 1st January, 1960, the annual value of the premises was reduced to Rs. 1845/-. In the result, the premises were taken out of the category of "excepted premises" and the provisions of the Act became applicable to them. Section 13 (1) of the Act is as follows :—"Notwithstanding anything in any other law, no action or proceedings for the ejectment of the tenant of any premises to which this Act applies shall be instituted in or entertained by any Court, unless the Board, on the application of the land-lord, has in writing authorised the institution of such action or proceedings." Then comes a proviso under which the authorisation of the Board is declared not to be necessary in any of the cases mentioned in paragraph (*a*), (*b*), (*c*) and (*d*) of the proviso. Paragraph (*c*) enables judgment in ejectment of the tenant to be given if, *inter alia*, the premises are, in the opinion of the Court, reasonably required for occupation as a residence for the land-lord or any member of his family. It may be stated that the operation of paragraph (*c*) has been temporarily suspended by section 13 (1) of the Rent Restriction (Amendment) Act, No. 10 of 1961.

The present action for the ejectment of the defendant was instituted without obtaining the authorisation of the Board under section 13 (1). It is common ground that such authorisation was not required as the provisions of the Act were not then applicable to the premises. But Mr. H. V. Perera, who appeared for the defendant-appellant, submitted that once the provisions of the Act became applicable to the premises (that is, from the 1st January, 1960) the subsequent trial, and also any steps that may be taken in Court in the execution of the decree, constitute "proceedings for the ejectment of the tenant" as contemplated in section 13 (1), and that in the absence of any authorisation by the Board under that section the Court is precluded from entertaining the proceedings except in a case falling within the proviso. It was on this ground alone that Mr. Perera asked that the judgment and decree appealed from should be reversed and the plaintiff's action dismissed.

The main plank of learned Counsel's argument was that Rent Control legislation is in a class of itself, the object of it being to protect tenants from eviction by their land-lords, and that such legislation shall be construed in a manner which will suppress the mischief and advance the remedy. While I see no objection to the rule of beneficial construction being invoked in construing the Rent Restriction Act, I think that, having regard to the inroads made by the Act on the common law rights of landlords, a Court should at the same time guard itself against giving tenants any greater protection than is accorded by the language of the relevant provisions of the Act.

There does not appear to be any previous case where the precise point raised by Mr. Perera was decided in this Court. In the absence of direct authority, he relied on certain cases dealing with paragraph (*c*) of the proviso to section 13 (1) where the question was whether the conditions postulated in that paragraph should be shown to exist as at the time of institution of the action or at the time when the Court is called upon to make the order of ejectment. On that question there seems to be a sharp conflict of judicial opinion—see *Ismail vs. Herft* 50 N.L.R. 112; *S. P. Kader Mohideen & Co. Ltd. vs. S. N. Nagoor Gany* 60 N.L.R. 16; *E. L. Arnolis Appuhamy vs. L. D. De Alwis* 60 N.L.R. 141; and *Swamy vs. Gunawardene* 61 N.L.R. 85. But those cases dealt with an enirely different question and, in my opinion, they are of little assistance in the decision of the point raised in the present appeal.

The word "proceedings" in section 13 (1) is, no doubt, a general word which, in its ordinary sense, would be applicable to the trial stage of an action or the stage when the decree is sought to be executed. But assuming (without deciding) that the proceedings at the trial of the present action or the stage of execution of the decree that has been entered would come within the expression "proceedings for the ejectment of the tenant" in section 13 (1), the question yet remains whether such proceedings require the authorition of the Board. It seems to me that section 13 (1) itself furnishes the answer to the question, since the concluding part of the section expressly provides for the authorisation of the Board being necessary for the *institution* of the action or proceedings referred to in the earlier part. I think that it would be a misuse of language to speak of proceedings which are a step in, or incidental to, a pending action as proceedings which are "instituted."

Under section 3 of the Small Tenements Ordinance (Cap. 102) it is open to a land-lord to take proceedings for the recovery of possession of a "tenement" as defined in section 2 of that Ordinance, by the filing of an application supported by

an affidavit, instead of by a regular action. The filing of such an application would be an instance of proceedings being instituted for the ejectment of the tenant within the meaning of section 13 (1) of the Rent Restriction Act.

In my opinion, neither the proceedings at the trial nor at the stage when the decree is sought to be executed are proceedings of the kind contemplated in section 13 (1) as requiring the authorisation of the Board.

The appeal is dismissed with costs.

Appeal dismissed.

Present : **Sansoni, J. and Sinnetamby, J.**

PIYADASA *vs.* THE QUEEN

S.C. 109/1961—*D.C. Hambantota No.* 40/28342

Argued on : 1st February, 1962.
Decided on : 2nd March, 1962.

Criminal Procedure Code, sections 163, 165F (1A), 391, 425—*Non-summary proceedings before Magistrate—Sufficient evidence to commit accused for trial—Has the Attorney-General power to consolidate commitments and join together in one indictment counts relating to offences inquired into in separate non-summary proceedings—Does the District Court have jurisdiction to try accused on such commitment—Is this a defect curable under section* 425.

Held : (1) That every non-summary proceeding before a Magistrate must, if there be sufficient evidence to put the accused on trial, be followed by *a separate commitment* and *a separate indictment.*

(2) That where the Attorney-General has purported to consolidate commitments and join together in one indictment counts relating to offences inquired into in separate non-summary proceedings, he would be acting *ultra vires* and the District Court would have no jurisdiction to try the accused on that particular indictment.

(3) That section 425 of the Criminal Procedure Code cannot be used to cure a defect of this nature, as an error which strikes at the root of jurisdiction can never be cured under section 425.

Followed : *Vythialingam vs. The Queen*, 52 N.L.R. 345
The Queen vs. Thiagarajah, 57 N.L.R. 58; LII C. L. W. 56
Morarka vs. The King. A.I.R. (1948) P.C. 82;

Referred to : *The King vs. Michael Fernando*, 52 N.L.R. 571; XLIII C. L. W. 97

Colvin R. de Silva with *M. L. de Silva* and *D. S. Wijesingha*, for the accused-appellant.

E. H. C. Jayatilaka, C.C., for the Attorney General.

SANSONI, J.—

The accused has appealed against his conviction on all six counts of the indictment framed against him. Counts (1) and (2) charge him with cheating in respect of a document, and abetting the uttering of that document which he knew to be forged. Counts (3) and (4), (5) and (6) contain two other sets of similar charges in respect of two other documents.

The point pressed on his behalf at the hearing before us was that the Attorney-General had no power to draw up one indictment containing the six counts, because one non-summary inquiry in Magistrate's Court case No. 28342 was held in respect of only counts (1) and (2), while counts (3) and (4) relate to offences which were inquired into in case No. 28,343, and counts (5) and (6) relate to offences which were inquired into in case No. 28345. In each of the three cases the Magistrate committed the accused to stand his trial in the District Court, but the Attorney-General drew up one indictment containing six counts relating to six offences inquired into in the three cases.

The only question we have to decide is whether a trial held upon such an indictment is valid. Crown Counsel supported the procedure adopted by referring us to the decision of Gratiaen, J. in *The King vs. Michael Fernando*,(1951) 52 N.L.R.571, where the learned Judge held that it was not illegal for the Crown to join in one indictment charges which had formed the subject of two separate non-summary proceedings terminating in separate commitments, though he also held that such a procedure could not be permitted in that case, because the effect of it was to supplement at the trial the insufficient evidence relied on in one proceeding by the evidence recorded in the other proceeding. The learned Judge gave no reason for his view that the Crown could join charges in that way.

The matter has, however, been further considered in two later decisions to which the learned Judge was a party, and we ought to follow them. In *Vythialingam vs. The Queen*, (1953) 52 N.L.R. 345, Gunasekera, J. (Gratiaen, J. agreeing) held that an indictment can charge the accused only with offences alleged in the charges upon which they have been committed for trial, or offences of which they can be lawfully convicted upon a trial of those charges. That case was one where the offences inquired into were the offences for which the accused were indicted, but the particulars set out in the counts of the indictment were different from the particulars appearing in the charges into which the Magistrate inquired. Gunasekera, J. examined closely the provisions of the Criminal Procedure Code relating to inquiries and commitments, and he held that the Attorney-General had no power to draw up an indictment in that way.

The question came up again before Gratiaen, J. in *The Queen vs. Thiagarajah*, (1955) 57 N.L.R. 58. He held that the power of a Magistrate to commit under section 163, and the power of the Attorney-General to direct a committal under section 391, are both determined by the scope of the particular charges which formed the subject matter of the magisterial inquiry, and that the only exception recognised by the Code is in respect of offences of which a man may lawfully be convicted upon a trial of the charges actually inquired into.

These two decisions were given at a time when the Code did not contain the amendment made in 1956, and now to be found in section 165 F(1A). By that amendment the Attorney-General has been empowered, subject to the provisions of the Code relating to the joinder of charges, to include in the indictment any charge in respect of any offence which is disclosed by the evidence taken by the Magistrate, notwithstanding that such charge may not have been read to the accused by the Magistrate. But the ground upon which those two decisions proceeded is important, and it is this—that the Attorney-General had acted *ultra vires*, and the indictments were therefore bad and should be quashed.

Coming now to the case before us, a similar test to that applied in those two cases must be applied, namely : Is the indictment upon which the trial proceeded one which the Attorney-General had the power to present to the District Court ? If he had no such power, the indictment was bad and the District Judge had no jurisdiction to try the accused on such an indictment.

The Attorney-General's power with regard to the presentation of indictments is a purely statutory power derived from section 165 F. The principle is clear that each non-summary proceeding shall, if there is sufficient evidence to put the accused on his trial, be followed by a separate commitment and a separate indictment. There is no provision of the Code which authorises the Attorney-General to consolidate commitments and join together, in one indictment, counts relating to offences inquired into in separate non-summary proceedings. It follows that the Attorney-General in this case acted *ultra vires*, and the District Court was not a court of competent jurisdiction to try the accused on this particular indictment. It was not open to the Attorney-General to invent a new procedure or to give himself new powers, as he sought to do in this case. A valid indictment is a condition precedent to a valid trial.

Crown Counsel suggested that since the accused would not have been prejudiced by the course followed, we should not interfere with the conviction. This is not a case to which section 425 of the Code can apply, for that section presupposes that the court is a court of competent jurisdiction. An error which strikes at the root of jurisdiction can never be cured under section 425—see *Morarka v. The King*, A.I.R. (1948) P.C. 82, decided by the Privy Council.

We therefore quash the conviction and set aside the sentence passed on the appellant.

SINNETAMBY, J.—
I agree.

Appeal allowed.

IN THE COURT OF CRIMINAL APPEAL

Present : **Basnayake C.J. (*President*) Sansoni, J. and Sinnetamby, J.**

THE QUEEN *vs.* L. D. PRINS.

Appeal No. 141 *of* 1961 *with Application No.* 148 *of* 1961.
S.C. No. 13 A—*M.C. Colombo No.* 34492/B.

Argued and Decided on: February 2, 1962

Counsel—Right of an accused person to be represented by counsel or pleader—Conviction to be vitiated by denial of such right—Proceedings under section 439 *of the Criminal Procedure Code.*

Criminal Procedure Code, section 253A*—Regulation* 1 *of the regulations made thereunder—Is trial Judge empowered to order forfeiture of a witness's batta.*

Held : (1) That under our law an accused person has a right to be represented by counsel or pleader and the refusal to give him reasonable time to retain counsel is a denial of that right. The conviction of the accused in the present case should therefore be quashed.

(2) That the learned trial Judge had no power to order that a witness should not be paid his batta, as there is no provision in our law for the forfeiture of batta.

Colvin R. de Silva with *Prins Rajasooriya* for the accused-appellant.

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

BASNAYAKE, C.J.—

The accused-appellant was indicted under section 439 of the Criminal Procedure Code on the following charges :—

"That on or about the seventh day of April, 1961, at Mount Lavinia within the jurisdiction of this Court, while being examined as a witness in Supreme Court case No. 13, Magistrate's Court of Colombo case No. 34492/B and being bound by affirmation to state the truth, you on a material point, to wit, the identity of the person who placed the order with you for a key to be made from impressions on a piece of soap, did, when asked whether the witness A. M. James came to your shop and placed the order for the key asking you to make it according to the impressions on the soap, state 'No'.

Whereas while being examined as a witness previously on the 30th day of June, 1960 at the inquiry held by the Magistrate and being bound by affirmation you had stated when you were shown the witness A. M. James—

'I have seen this man before on the occasion he came to get a key made from me . . . . . I met the last witness for the first time after Wesak . . . . He brought a piece of soap . . . . James asked me whether it was possible to make key from those impressions.'

and that you have thereby committed the offence of intentionally giving false evidence in a stage of judicial proceeding punishable under section 190 of the Penal Code read with section 439 of the Criminal Procedure Code.

2. At the same time and place aforesaid while being examined as a witness in the said Supreme Court case No. 13, Magistrate's Court of Colombo case No. 34492/B and being bound by affirmation to state the truth you, on a material point, to wit, your association with the first accused Kompannage Albert Fonseka, before the 25th day of May, 1960, the date of the robbery at the Ceylon Transport Board, did, when asked whether the first accused Kompannage Albert Fonseka had ever come to your shop on his own, state 'No', and when further questioned as follows :—

'In this court you stated that the first accused never came into your shop except when he was brought by the Police.'

state—'Yes.'

meaning thereby that you had no dealing whatever with the 1st accused Kompannage Albert Fonseka prior to the 25th day of May, 1960. Whereas while being examined as a witness previously on the 30th day of June, 1960 at the inquiry held in the Magistrate's Court, Colombo, and being bound by affirmation to speak the truth you had stated—

'About three days after James came to see me with another, the other was the first accused. That was the first occasion I saw him. James told me that it may not be possible for him to come and remove the key. He said to hand over the key to the first accused should he be able to come . . . . Thereafter I did not meet James. But I met the first accused 4 or 5 days later. I gave the key to him. I wanted Rs. 25/- for the key but he gave Rs. 10/- and took the key away. Thereafter I met the first accused about 7 or 8 days later at my workshop. My workshop and the house are one and the same. That day I entered into a discussion with the first accused. First accused asked me not to tell anyone about the making of the key and he gave me Rs. 95/- in Rs. 5/- notes.'

and that you have thereby committed the offence of intentionally giving false evidence in a stage of judicial proceeding punishable under section 190 of the Penal Code read with section 439 of the Criminal Procedure Code."

He was found guilty and sentenced to undergo a term of seven years' rigorous imprisonment.

The trial in which the accused gave evidence was interrupted prematurely and the jury were discharged and a retrial ordered.

It has been assumed that the contradictions were on material points. Learned counsel for the appellant has urged before us that proceedings under section 439 of the Criminal Procedure Code cannot be taken in a case in which the trial has come to a premature end and has not been concluded by a verdict of the jury. Learned counsel, however, in the course of his submissions indicated to us that he did not wish to press that argument. We therefore do not rest our decision on that submission.

The ground which was pressed is that the accused, whose counsel was taken suddenly ill, was not afforded an opportunity of retaining other counsel to defend him. Counsel appearing for the accused at the trial indicated to the Court that he was suddenly taken ill and asked for a postponement which was granted without objection. On the following day the Proctor for the accused informed the Court that counsel was unable to attend owing to illness and asked for a postponement of the case for even 24 hours. The Court then asked the Proctor who made the application for the postponement to defend the accused. That Proctor declined and informed the Court that the accused wished to be defended by counsel. The Court thereupon, after stating the facts, made order granting two hours' time to retain counsel. The Proctor then informed the Court that he would not be able to retain counsel in two hours. The accused who was on remand too said that he would not be able to retain counsel.

Although at present accused persons who are undefended at Assize trials are assigned counsel to defend them, the learned Commissioner did not even assign counsel but proceeded with the trial without any legal aid. Under our law an accused person has a right to be represented by counsel or pleader. The refusal to give an accused person reasonable time to retain counsel is a denial of that right. We are of opinion that the learned Commissioner acted wrongly in not granting the accused reasonable time to retain another counsel. We therefore quash the conviction and direct that a verdict of acquittal be entered.

Learned counsel also drew our attention to the proceedings of 22nd May, 1961 which, according to the transcript, reads—

"Date of Trial : 22nd May, 1961.

Before : P. Sri Skanda Rajah, Esq., Commissioner of Assize.

Counsel : J. R. M. Perera, Crown Counsel, for the prosecution.

Charge : (1) Perjury—On or about the 7th day of April, 1961 at Supreme Court, Mount Lavinia,—Under section 190 of the Penal Code read with section 439 of the Criminal Procedure Code.

(2) Perjury—on or about the 7th day of April, 1961 at the Supreme Court, Mount Lavinia—Under section 190 of the Penal Code read with section 439 of the Criminal Procedure Code.

Plea : Accused pleads not guilty.

Court to accused : On the 19th June, 1961 your case will be taken up before the same jury.

Court to Jury : You are required to attend court on 19-6-61.

Foreman of the Jury : My Lord, one of my fellow-jurors states that he will not be able to attend court on the 19th June as he has an examination on that date.

Court to Jury : We'll have it on the 21st of June, 1961.

Court to Accused : Accused to be on remand. He will not be paid his batta. Witnesses to be noticed on the back of the indictment."

He submitted that the order forfeiting the batta to which the witness was entitled under the law was illegal and that that order was made without the witness being asked to show cause and before he was tried on the charges framed against him. Witnesses in criminal proceedings are under regulation 1 (Vol. I Subsidiary Legislation (1938 ed.) p. 97) of the regulations made under section 253A of the Criminal Procedure Code entitled to receive batta and travelling allowance. Neither those regulations nor any other law makes any provision for the forfeiture of batta. The learned Commissioner had therefore no power to make order that the witness should not be paid his batta, and that order is set aside.

Appeal allowed.

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

THAMBIRAJAH *vs.* CEYLON INSURANCE CO., LTD.

S.C. No. 298—*D.C. Colombo Case No.* 42113/M.

Argued on : July 26, 27 *and* 28, 1960.
Decided on : July 28, 1960.

Insurance policy—Claim on motor vehicle damaged in collision—Condition in policy requiring Insured to give written notice immediately he had knowledge of impending prosecution—Driver of vehicle prosecuted —Insured's evidence that he had no knowledge of this disbelieved—No other evidence on this point—Is the Insurance Company exempted from liability.

The plaintiff's car was damaged in a collision with a motor van. The defendant Company disclaimed the liability to pay the damages claimed by him on the ground that he had failed to comply with one of the conditions prescribed under the policy of insurance. The relevant provision imposed a duty on the insured to give the Company written notice " immediately the Insured shall have knowledge of any impending prosecution in respect of any occurrence which may give rise to a claim " under the policy. The person who had been driving the plaintiff's car at the time of the collision was prosecuted but the plaintiff gave evidence to the effect that he was unaware of this as he had subsequently fallen out with that person. The learned District Judge disbelieved the plaintiff's evidence and held that he was not entitled to be indemnified as he had not given the notice required by the policy.

Held : That as the mere fact that two vehicles collide on a public street does not necessarily mean that the driver of either vehicle will be prosecuted and the only evidence in this case on the point was that the plaintiff had no knowledge of an impending prosecution, disbelief of that evidence does not, in the absence of other circumstances from which the existence of knowledge may reasonably be inferred, prove that he had knowledge. The defence that the plaintiff failed to give notice of an impending prosecution cannot therefore be sustained.

C. Ranganathan, for the plaintiff-appellant.

L. W. de Silva with *Neville Wijeratne* for the defendant-respondent.

BASNAYAKE, C.J.—

The only question that arises for decision in this appeal is whether the plaintiff has failed to comply with one of the conditions prescribed, under the the policy of insurance issued by the defendant, as a condition precedent to the liability of the Company. Condition 1, the material portion of which is underlined, is the one that has to be construed.

It reads as follows :—

"Notice shall be given in writing to the Company immediately upon the occurrence of any accident or loss or damage and in the event of any claim. Every letter, claim, writ and or process shall be forwarded to the Company immediately on receipt by the insured. *Notice shall also be given in writing to the Company immediately the Insured shall have knowledge of any impending prosecution in respect of any occurrence which may give rise to a claim under this policy.* In the case of theft or other criminal act which may be the subject of a claim under this policy the Insured shall give immediately notice to the Police and co-operate with the Company in securing the conviction of the offender."

The defendant Company disclaimed liability to pay the damages claimed by the plaintiff, in respect of the damage suffered by his car in a collision with a motor van, on the ground that the plaintiff had failed to give the notice required by the clause underlined in condition 1. The plaintiff's case is that he travelled in his car on the day of the accident with two others. One of them by name Vincent, who was a friend of his and who was in possession of a driving licence, was driving his car when, at a bend of the road, it came into collision with a motor van and suffered damages. The plaintiff in the course of his evidence stated that he thought that at the time of the accident, Vincent, who was at the wheel, took an undue risk in seeking to overtake another vehicle at a bend. The accident occurred on the 19th November, 1954, and Vincent was prosecuted by the police on the 19th January, 1955. The plaintiff states that he was unaware of the prosecution as he and Vincent had fallen out and Vincent had not informed him of it. But the learned District Judge did not believe that he was not informed on 18th January, 1955, when Vincent came to Matale where the plaintiff resided. He states : "I am inclined to believe that the plaintiff had knowledge of the prosecution at least on the day that Vincent appeared in Court and pleaded guilty." His finding is "I hold that there has been

a failure on the part of the plaintiff to give information of the prosecution against Vincent. The plaintiff in that view of the matter must lose the indemnity guaranteed to him under the policy."

The obligation on the insured under the policy is to give notice in writing "immediately the insured shall have knowledge of any impending prosecution in respect of any occurrence which may give rise to a claim." Undoubtedly the occurrence was one which may give rise to a claim. Did the plaintiff have knowledge of any impending prosecution ? The mere fact that two vehicles collide on a public street does not necessarily mean that the driver of either vehicle will be prosecuted. The only evidence in the case on the point is that the plaintiff had no knowledge. Disbelief of that evidence does not, in the absence of other circumstances from which the existence of knowledge may reasonably be inferred, prove that he had knowledge as the learned Judge seems to think. The evidence in the case does not establish that the plaintiff had any knowledge of any impending prosecution in respect of the collision. In our opinion the defence set up by the defendant that the plaintiff failed to give notice of the impending prosecution cannot be sustained. We therefore allow the appeal, set aside the judgment of the learned District Judge and direct that judgment be entered for the plaintiff as prayed for in his plaint with costs both here and in the court below.

SANSONI, J.—
I agree.

Appeal allowed.

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

EDWIN *vs.* CHELVARAJAH, S. I. POLICE, WELIGAMA.

S.C. No. 979 *of* 1961—*M.C. Matara No.* 64925

Argued on: 9*th October*, 1961.
Decided on: 10th *October*, 1961.

Criminal Procedure Code, sections 172 *and* 413—*Fire-arms Ordinance, section* 44—*Rural Courts Ordinance, section* 11—*Penal Code, section* 484—*Charge of intimidation—Altered to insult charge after evidence led—Jurisdiction of Magistrate to try such charge—Order of confiscation of licensed gun—Legality of order.*

The appellant was charged with criminal intimidation. After receiving some evidence the learned Magistrate recorded that the complainant was "not speaking the truth when he refers to a gun" and purported to amend the charge of intimidation to one of insult. The accused pleaded guilty and he was sentenced. Thereafter the learned Magistrate recorded that "the accused does not need a gun" and ordered the confiscation of the gun. He also directed that it be sent to the Government Agent.

In his petition of appeal the appellant complained of two matters : (1) A charge of insult was triable exclusively by the Rural Court. (2) The order of confiscation of the gun was wrongly made.

Held: (1) That according to section 11 of the Rural Courts Ordinance, No. 12 of 1945, a Magistrate's Court has jurisdiction to try an offence punishable under section 484 of the Penal Code, when the prosecution is instituted by a Police Officer.

(2) That the order of confiscation could not be justified either on the facts of the case or on the law applicable viz., section 413 of the Criminal Procedure Code and section 44 of the Fire-arms Ordinance.

Per T. S. FERNANDO, J.—" . . . . . a judicial authority should always address his mind to the question of his competency to make an order of the nature here complained of, even though such an order may appear to him to be desirable".

No appearance for the accused-appellant.

T. D. Bandaranayake, Crown Counsel, for the Attorney-General.

T. S. FERNANDO, J.—

The appellant was charged with committing the offence of criminal intimidation by threatening to cause injury to the person of a man named Danoris. Danoris testified that the appellant came along with a gun in his hand and threatened to shoot him before three days elapsed. After Danoris and the Village Headman to whom Danoris had made a complaint had been examined the Magistrate, recording as his opinion that "at

this stage it is quite clear that the complainant is not speaking the truth when he refers to a gun", purported to amend the charge of intimidation to one of committing the offence of insult, an offence punishable under section 484 of the Penal Code. What really took place was not so much an amendment of the intimidation charge as an alteration of the charge within the meaning of section 172 of the Criminal Procedure Code. Be that as it may, the appellant pleaded guilty to the charge of insult, and he was fined Rs. 50/-, in default 2 weeks' simple imprisonment. A point of law has been certified by the appellant's proctor that the charge of committing an offence punishable under section 484 of the Penal Code was triable exclusively by the Rural Court. This contention overlooks the existence of section 11 of the Rural Courts Ordinance No. 12 of 1945, according to which the Magistrate's Court has jurisdiction to try offences punishable under section 484 of the Penal Code where the prosecution is instituted by a Police Officer. I therefore dismiss the appeal against the conviction and sentence.

There is, however, another matter which is the subject of complaint in the petition of appeal. After the appellant pleaded guilty and was sentenced, the learned Magistrate, recording that the "accused does not need any gun", ordered the confiscation of the gun and directed that it be sent to the Government Agent. How this order can be justified either on the facts of the case or on the law applicable is difficult to appreciate. The appellant was not represented at the argument, but learned Counsel appearing for the Attorney-General admitted he could not support the order in respect of the gun. Clearly that order was made in excess of jurisdiction. If, as the learned Magistrate himself observed, Danoris falsely stated that the appellant brought along his gun—a gun for which he holds a licence—where lay the justification for depriving the appellant of the gun which the proper and only licensing authority has thought fit he should have ? This order cannot be justified as one made under section 413 of the Criminal Procedure Code or under section 44 of the Firearms Ordinance (Cap. 139). Under the first named section, viz., section 413 of the Code, the gun was on the Magistrate's own finding not property regarding which any offence appeared to have been committed. In regard to the second-named section it is sufficient to observe that the appellant was not and, indeed, could not have been convicted of any offence under the Firearms Ordinance. In these circumstances I am compelled to set aside the order confiscating the gun and to direct that it be returned to the appellant. I consider it relevant to observe, having regard particularly to orders from this particular Magistrate's Court which have come to my notice recently that a judicial authority should always address his mind to the question of his competency to make an order of the nature here complained of, even though such an order may appear to him to be desirable. I consider it relevant also to add that, even in regard to the question of the appropriateness of leaving a gun in the hands of a citizen, the law has vested the power to decide that question ordinarily in an administrative officer, viz., the Government Agent of the district in which the gun is to be used. Courts could well leave the officer designated by the law for the purpose to perform his legal functions without appearing to usurp them.

Order confiscating gun set aside

Present : **Basnayake, C.J.**

K. D. PETER *vs.* INSPECTOR OF POLICE, MIRIGAMA

S.C. No. 1045/52—*M.C. Gampaha No.* 49055/*B*

Argued and decided on : April 11, 1960

Criminal Procedure Code, section 182—*Conviction for offence other than one mentioned in charge—When may this be permitted.*

Held : That except in a case to which section 182 of the Criminal Procedure Code applies, an accused person cannot be convicted of an offence with which he has not been charged.

No appearance for the accused-appellant.

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

BASNAYAKE, C.J.—

The accused-appellant together with four other accused was charged with having committed offences punishable under sections 443 and 369 of the Penal Code. The Magistrate who tried the case in his capacity as a District Judge came to the conclusion that there was no evidence against the 1st and 2nd accused of house-breaking or theft. He convicted them of dishonest retention of stolen property. In doing so he said :

> "There is no evidence against the first and second accused directly connecting them with the house-breaking. But, when one considers the circumstances under which they happened to be with these goods court is entitled to draw on the presumption that they were thieves or guilty-retainers. I find the first and the second accused guilty not of theft but of dishonest retention of stolen property knowing same to have been stolen."

The circumstances referred to by him are that the 1st, 2nd and 4th accused were in a car driven by the 5th accused when it was stopped by the Police at Warakapola at 8-45 P.M. Inside the car and in the luggage boot were rolls of new cloth. The rolls in the luggage boot were wrapped in pyjama cloth. When the car was stopped the 1st accused alighted from it and attempted to run away. The cloth was claimed by the owner of a shop at Madabawita. The 4th and 5th accused gave evidence to the effect that it was the 1st and 2nd accused that loaded the rolls of cloth into the car which the 4th accused had hired from the 5th. The learned Judge accepted their evidence and acquitted them. Although he did not convict the 1st and 2nd accused of theft there was evidence if believed to support a conviction on that charge. But the appellants have been convicted of "dishonest retention of stolen property knowing them to be stolen" an offence with which they were not charged. It is fundamental that, except in a case to which section 182 of the Criminal Procedure Code applies, an accused person cannot be convicted of an offence with which he has not been charged.

I accordingly quash the conviction of the 1st accused-appellant and direct that the case be sent back to the lower Court so that he may be tried on a proper charge.

Set aside and sent back.

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

SITHTHIRAVELU *vs.* RAMALINGAM AND OTHERS

S.C. No. 444/59—*D.C. Point Pedro No. TR* 44

Argued and Decided on : May 8, 1961.

Trusts Ordinance—Action instituted under section 102—*Terms of certificate required under section* 102 (3)—*Action entertained without jurisdiction—Decree entered a nullity.*

The defendants-respondents had instituted an action as plaintiffs under section 102, of the Trusts Ordinance (Cap. 72). Although a petition had been presented to the Government Agent in terms of section 102 (3), a copy of the plaint in the proposed action had not been submitted to him. As a result, the certificate given by the Government Agent did not state that the Commissioners appointed by him had reported that the subject-matter of the plaint was one that called for the consideration of the Court.

Held : (1) That the certificate was not in terms of section 102 (3).

(2) That therefore the Court had no power to entertain the action.

(3) That the decree granted in the action was, therefore, a nullity.

Case followed : *Velautham and Others vs. Velauther and Another*, (1957) 61 N.L.R. 230.

C. Ranganathan with *S. Sharvananda* and *Siva Rajaratnam* for the plaintiff-appellant.

C. Chellappah for the defendants-respondents.

BASNAYAKE, C.J.—

The only question for decision in this appeal is whether the decree entered in D.C. Jaffna Case No. 457 is a valid decree. That was an action instituted on 27th April, 1931 by six persons who claimed that they were worshippers at a Hindu temple called the Muttumariamman Kovil in Alvay North in Jaffna. They sought the following relief in that case :—

"(*a*) That deed No. 10001 dated September 7, 1930, and attested by K. Subramaniam, Notary Public, be declared null and void and set aside.

(*b*) That the defendants be removed from the office to which the said deed purports to appoint them and also be ejected from the said temple and its premises.

(*c*) That a scheme be framed by the Court for the management of the said temple in accordance with the custom referred to in the plaint.

(*d*) That the defendants be ordered jointly and severally to account for all monies received by them on behalf of the temple and to pay into Court all monies found on such accounting to be due from them to the temple."

It is submitted that, that action which the plaintiffs purported to bring under section 102 of the Trusts Ordinance was entertained by the Court in contravention of the prohibition in sub-section (3) thereof. That provision reads :

"No action shall be entertained under this section unless the plaintiffs shall have previously presented a petition to the Government Agent or Assistant Government Agent of the province or district in which such place or establishment is situate praying for the appointment of a commissioner or commissioners to inquire into the subject-matter of the plaint, and unless the Government Agent or the Assistant Government Agent shall have certified that an inquiry has been held in pursuance of the said petition, and that the commissioner or commissioners (or a majority of them) has reported—

(*a*) that the subject-matter of the plaint is one that calls for the consideration of the court ; and

(*b*) either that it has not proved possible to bring about an amicable settlement of the questions involved, or that the assistance of the court is required for the purpose of giving effect to any amicable settlement that has been arrived at."

It has been held by this Court in the case of *Velautham and Others vs. Velauther and Another*, (61 N.L.R. 230), that the certificate should be in terms of the sub-section (3) and that to enable the Government Agent to issue the prescribed certificate the petitioners should submit the plaint they propose to file in Court upon receiving the certificate. Unless that is done the Commissioner cannot report that the subject-matter of the plaint is one that calls for the consideration of the Court and the Government Agent cannot certify that they have so reported. In the instant case it would appear that the plaint which was filed was not submitted to the Government Agent, for, the certificate issued by him reads :

"I do hereby certify that in pursuance of the petition dated 22nd September, 1930, presented by you and others regarding the management of the Temple called Muttumari Amman Kovil situated on the land called 'Vevilanthai' in the village of Alvai North, in the Vadamaradchi Division, Messrs. S. Subramaniam, J.P., Proctor, Point Pedro, K. Muttukumaru, Proctor, Puloly West, N Thamotharampillai, Chairman, V. C. Uduppiddi and S. Shivapathasundaram, B.A., Principal, Victoria College, Chulipuram, were appointed by me Commissioners to inquire into the subject-matter of the petition, as provided for in sub-section 3 of section 102 of 'The Trusts Ordinance No. 9 of 1917' and that they having held and inquired accordingly reported to me (*a*) that the subject-matter of the petition is one that calls for the consideration of the court, and (*b*) that it has not been possible to bring about an amicable settlement of the questions involved."

Clearly the certificate is not in terms of the section and the action is not one the Court had power to entertain. A decree granted in an action which the Court had no power to entertain is a nullity and is not a valid decree. The learned District Judge is wrong in holding that it was.

We therefore set aside the judgment of the learned District Judge and direct that the case be sent back for trial on the remaining issues. The appellant is entitled to his costs both here and in the court below.

H. N. G. FERNANDO, J.

I agree.

Appeal allowed.

Present : **Basnayake, C.J., Gunasekara, J., and T. S. Fernando, J.**

NANAYAKKARA & ANOTHER *vs.* PAIVA & OTHERS

S.C. No. 48/60—*D.C. Colombo* 22734/*S.*

Argued on : June 22, 1961.
Decided on : December 22, 1961.

Civil Procedure Code, Chapter LIII—Summary Procedure on Liquid Claims—Summons required by section 703—*Application for leave to appear and defend under section* 706—*Computation of seven days mentioned in Form* 19—*Interpretation Ordinance, section* 8 (3), *section* 11.

The plaintiff instituted an action under Chapter LIII of the Civil Procedure Code, and summons issued to the defendants under section 703 in the Form 19 contained in the First Schedule to the Civil Procedure Code. The summons required the defendants to obtain leave from the Court within seven days from the service thereof, inclusive of the day of such service. Summons was served on the 1st December, 1959. On the 8th December, the Proctor for the defendants tendered to the Court office a proxy and affidavit signed by them together with a motion that the application of the defendants be fixed for inquiry. The District Judge treated the filing of these papers as an application by the defendants for leave to appear and defend within the meaning of section 704 of the Code, but made order that the application was made out of time. The defendant appealed.

Held : (BASNAYAKE, C.J. dissentiente)

(1) That by reason of section 11 of the Interpretation Ordinance (Cap. 2, Legislature Enactments, 1938 Ed.), in computing the period of time during which the defendant was required to apply for leave to appear and defend, the 1st day of December, 1959, had to be excluded. When the defendant applied on 8th December 1959, therefore, he was within the time allowed by law.

(2) That as a result of the application of section 11 of the Interpretation Ordinance and the consequent exclusion of the first day in the computation of time, the period allowed in the summons for an appearance by the defendant is a period not exceeding six days. Form 19 being a written law within section 2 of the Interpretation Ordinance, the result was that section 8(3) of the Interpretation Ordinance, also applied to the Form, and operated to exclude a Sunday which intervened in the relevant period from being included in the computation of time. For that reason also, the defendant appeared within the time allowed by law.

Cases referred to : *Nallan v. Ossen*, (1897) 2 N.L.R. 381
Hassen v. The Ceylon Wharfage Co., (1910) 13 N.L.R. 99 (F.B.)
Perera v. Karunanayake, (1960) 62 N.L.R. 423.

Nimal Senanayake, with *Desmond Fernando* and *Suriya Wickremasinghe*, for the 1st and 2nd defendants-appellants.

T. Arulanathan, for the plaintiff-respondent.

BASNAYAKE, C. J.

This appeal comes for hearing before a bench composed of three Judges because the bench composed of two Judges before which it came up for hearing in the ordinary course was unable to agree as to the decree that should be passed by the Court.

The question for decision is whether, in computing the time prescribed in a summons in Form No. 19 within which the defendant is required to obtain leave from the Court to appear and defend the action on a liquid claim under Chapter LIII of the Civil Procedure Code, Sundays and Public Holidays should be excluded.

The relevant portion of the summons in the instant case which, as required by section 703, is in Form 19 of the Forms in the Schedule to the Civil Procedure Code reads :

> "You are hereby summoned to obtain leave from the Court within seven days from the service hereof, inclusive of the day of such service to appear and defend the action, within such time to cause an appearance to be entered for you."

The summons was served on 1st December, 1959. On 8th December, the proctor of the

defendants appears to have tendered to the Court office a proxy and an affidavit signed by them together with a motion dated the same date to the following effect :—

> "I file appointment from the defendants together with their affidavit and for the reason stated therein move that the defendants' application be fixed for inquiry."

On the next day—9th December—when the matter came up in open Court, the learned District Judge made the following order:— " Mr. T. G. de Silva to support the application as it appears to me Defendants are out of time ". No application for leave to appear and defend was filed along with the affidavit or even later. Section 706 requires that there should be an application by the defendant for leave to appear and defend the action. It reads—

> "The court shall, upon application by the defendant, give leave to appear and to defend the action upon the defendant paying into court the sum mentioned in the summons, or upon affidavits satisfactory to the court, which disclose a defence or such facts as would make it incumbent on the holder to prove consideration, or such other facts as the court may deem sufficient to support the application and on such terms as to security, framing, and recording issues, or otherwise, as the court thinks fit."

The learned Judge appears to have treated the affidavit as an application. But even in the affidavit there is no prayer for leave to appear and defend. The last sentence of it which contains a request for relief reads—" We beg that the Court be pleased in view of the above facts to dismiss the plaintiff's action with costs ".

Learned counsel relies on section 8(3) of the Interpretation Ordinance for his submission that Sundays and Public Holidays are to be excluded in the computation of the time prescribed in a summons in Form 19 of the Schedule to the Civil Procedure Code issued under section 703. That provision reads :—

> "Where a limited time not exceeding six days from any date or from the happening of any event is appointed or allowed by any written law for the doing of any act or the taking of any proceeding in a court or office, every intervening Sunday or public holiday shall be excluded from the computation of such time."

Written law is defined in section 2 thus :

> "(v) "written law" shall mean and include all Ordinances, and all orders, proclamations, letters patent, rules, by-laws, regulations, warrants, and process of every kind made or issued by any body or person having authority under any statutory or other enactment to make or issue the same in and for the Island of Ceylon or any part thereof, but it shall not include any Imperial Statute extending expressly or by necessary implication to the Island of Ceylon, nor any Order of the King in Council, Royal Charter, or Royal Letters Patent;"

Learned counsel submits that summons is a process and falls within the ambit of the expression " written law ". Assuming that a summons is written law, the time appointed in the summons in the instant case is seven days and not six. Section 8(3) applies to a case where time appointed does not exceed six days. It does not therefore apply to the summons in the instant case.

There is no universal rule for the computation of time when an act is required to be done within a given number of days. In a case such as the one we have before us where the defendant is required to make application for leave to appear and defend within seven days from the date of service of the summons he would be within time if he appeared and made his application on the very day the summons was served. But in arriving at the last day for making such an application it is usual, and there are decisions which so hold, that the first day is excluded from the computation unless the context, as in the instant case, requires its inclusion. Where the expression " clear days " is used, both terminals are excluded. See *Nallan* v. *Ossen* (2 N.L.R. 381) and *Hassen* v. *The Ceylon Wharfage Co.* (13 N.L.R. 99 (F.B.). The former is a case on this very form of summons and it has been held that Sundays and Public Holidays are not excluded in the computation of the seven days.

As 1st December, the date on which the summons was served, must in accordance with the instruction as to computation given in the summons itself be reckoned for the purpose of computing the seven days the seventh day was 7th

December. The words "inclusive of the day of the service hereof" are inserted to leave no room for misunderstanding as to the method of computation and to enable the defendants, if they wish to do so, to appear on the very day the summons is served.

The learned District Judge was therefore right in holding that the application for leave to appear and defend, if application there was, and I am inclined to think there was not such an application as is contemplated by section 706, was out of time.

The appeal is dismissed with costs.

GUNASEKERA, J.

I regret I am unable to agree with the judgment of my Lord the Chief Justice.

The period specified as seven days from the service of the summons inclusive of the day of such service is identical with a period of six days from that event exclusive of the day of service. Section 11 of the Interpretation Ordinance provides that for the purpose of excluding the first in a series of days or any period of time it shall be deemed to have been and to be sufficient to use the word "from". The period in question is therefore identical with a period of six days from the service of the summons. That is to say, a period of six days from the service of the summons is allowed for the taking of the proceeding in Court which is indicated in the summons, and therefore, in terms of section 8(3) of the Interpretation Ordinance, the intervening Sunday must be excluded from the computation of the time allowed.

The case of *Nallan* v.*Ossen*, (1897) 2 N.L.R. 381, which is cited by the Chief Justice, was decided on the 5th August, 1897, before the Interpretation Ordinancecame into force.

The only matter that was argued before us was the question as to the computation of the time specified in the summons. It was assumed in the argument of the appeal and it has been assumed in the proceedings before the District Court and in the learned District Judge's order that there was before that court an application by the defendants for leave to appear and defend the action. The order under appeal must be set aside and the case must go back for an order to be made by the District Court upon the footing that the 8th December, 1959, was within the time specified in the summons. The appellants must have their costs of appeal.

T. S. FERNANDO, J.

In this action of summary procedure on a liquid claim instituted against the defendants on 19th October, 1959, the District Judge made order on 28th October, 1959, as follows :—

> "Defendant to appear within seven days from the date of service."

A summons was issued following on this order, and this summons, as required by section 703 of the Civil Procedure Code, was in the form No. 19 prescribed by the Code and contained in the First Schedule thereto. It required the defendants to obtain leave from the court within seven days from the service thereof, inclusive of the day of such service.

The day on which this summons was served on the defendants was 1st December, 1959. The proctor for the defendants filed in court on 8th December, 1959, proxy from the defendants together with affidavit and moved that the application of the defendants be fixed for inquiry. The filing of these papers was treated by the learned District Judge as an application by the defendants for leave to appear and defend within the meaning of section 704 of the Code, and no argument was raised either in the District Court or before us that it did not constitute such an application.

The plaintiffs contended in the District Court that the defendants' application could not be entertained by the Court as it was out of time. The learned District Judge held with the plaintiffs on this question. Hence this appeal.

Section 11 of the Interpretation Ordinance (Cap. 2) enacts that, in all Ordinances, for the purpose of excluding the first in a series of days or any period of time, it shall be deemed to have

been and to be sufficient to use the word "from". In accordance with that section, in computing the period of time during which the defendants in this case were required to apply for leave to appear and defend, the 1st day of December, 1959, had to be excluded. Therefore, when they applied on 8th December, 1959, they were, in my opinion, within the time allowed by law.

Apart from section 11, learned counsel for the defendants relies on section 8(3) of the same Ordinance. He contends that, the summons that issued from the court being "written law" within the meaning of section 2 of the Interpretation Ordinance, section 8 (3) operates to exclude the intervening Sunday (December 6th) from the computation of the time allowed. By section 8(3) where a limited time not exceeding six days from any date or from the happening of any event is appointed or allowed by any written law for the doing of any act or the taking of any proceeding in a court or office, every intervening Sunday or public holiday shall be excluded from the computation of such time, It will be seen that if the first day is excluded as required by section 11 then the time ("within seven days from the service hereof, inclusive of the day of such service") that has been allowed in the summons for an appearance by the defendants is a time not exceeding six days. If so, section 8(3) also operates to prevent the Sunday that intervened in this case being included in the computation of time allowed. I am, therefore, of opinion that the contention on behalf of the defendants is correct. I would allow the appeal with costs and remit the case back to the District Court for action to be now taken on the basis that the defendants applied within time for leave to appear and defend the action.

I should add that a similar point came up for consideration recently in *Perera* v. *Karunanayake* (62 N.L.R. 423), before a Bench of two Judges, but the question of the application of the Interpretation Ordinance does not there appear to have received consideration. Mr. Senanayake, however, relied on the decision embodied in the last paragraph of the judgment in that case where the Court refused to interfere with an order of the District Court in favour of the defendant because it held that while the District Judge, in accepting the plaint, ordered that the defendant should "appear within seven days of service of summons", the Secretary of the District Court had no authority to compute the period of seven days to include the day of service. We have precisely the same situation here. In view of the fact that on the question argued before us I have reached a conclusion in favour of the defendants it is hardly necessary to say anything further. I would like, however, to add that had I, on the question argued, reached a conclusion in favour of the plaintiffs, I would have been prepared to apply in favour of the defendants the decision embodied in the last paragraph of the judgment in *Perera* v. *Karunanayake* (supra).

Appeal allowed.

Privy Council Appeal No. 70 *of* 1960

Present : **Lord Denning, Lord Morris of Borth-Y-Gest, Mr. L. M. D. De Silva**

SHOUKATALLIE *vs.* THE QUEEN

FROM THE FEDERAL SUPREME COURT OF THE WEST INDIES

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, Delivered the 5th JULY, 1961.

Criminal Procedure—Jury—Nature of trial Judge's direction if jury disagree—Use of phrases importing coercion—Exhortation to reach a verdict.

Murder—Two persons charged with this offence—Disposal of body after shooting victim—One accused only assisting in such disposal—Victim found to have been yet alive when body thrown into river—Possibility of belief on part of person assisting in disposal that victim already dead—What should a trial Judge's directions to the jury on this point be—Non-direction—Effect.

Affidavits—Attempt to admit affidavit from jurors in Appeal Court—Permissibility.

The appellant *S* and his brother *M* were charged with the murder of one *P*. The prosecution story was that while *P* was travelling along the river in his corial, the appellant shot him. They further sought to prove that after *P* was shot, the appellant and *M* had tied him to a log of wood by a vine and thrown him into the water. The medical evidence revealed that *P* was yet alive at the time he was thrown into the river.

The trial lasted 15 days. On the final day of trial, after a summing-up lasting 5 1/2 hours, the jury retired at 4.50 p.m. At 8.40 p.m. they returned into Court and stated that they disagreed on their verdict. On the trial Judge inquiring whether they needed any further directions the Foreman replied in the negative. Thereupon, the learned trial Judge reminded them of the oath they had taken. He further pointed out that the evidence led by the Crown and by the accused persons was clear and that it would not be difficult to arrive at a verdict. He then went on to make *inter alia* the following observations :—"*When you get into that jury room you must put all extraneous matter away from your deliberations. . . . . It appears to me that this Colony is reaching a stage, or wants to reach a stage, when it can manage its own affairs. Well this kind of thing that is going on amongst the jury would not help. In my very humble submission I cannot see how it will help one way or the other. Now, you must return to the jury-room and consider the matter again and make up your minds one way or the other. If you feel one way and another member of the jury thinks another way, then you must examine the arguments of each and accept reason. You must not be pig-headed. . . . . .Gentlemen of the jury, I am now going to order you to return to that jury-room and consider the matter calmly and dispassionately, and give you an opportunity of arriving at an honest verdict in this case. Please see that you do not besmirch the fair name of your country. Please return to the jury-room.*" Thereafter, the jury retired again but returned at 10 p.m. to ask for further directions on the law. The learned trial Judge then directed them on the law concerning principals in the first and second degree, but he did not deal with accessories *after* the fact. The jury retired again at 10.15 p. m. and at 1.35 a.m. early the next day they came back and returned a verdict finding both accused guilty of murder. There was a strong recommendation for mercy in the case of *M*, the 2nd accused.

Both accused appealed to the Federal Supreme Court. There, the appeal of *M* was allowed and that of the present appellant *S*, dismissed. The ground on which the appeal of *M* was allowed was that the trial Judge had failed to direct the jury on the point that when *M* assisted *S* in disposing of *P*'s body, *P* may have been dead or to all appearances dead and *M* may have believed that *P* was dead before he took any part in the matter. On this view of the matter *M* may have been found guilty as an accessory *after* the fact. *S* then appealed to the Privy Council on the ground that the trial Judge had exerted undue pressure on the jury—the gist of the complaint being that the learned trial Judge told the jury that they *must* return a verdict one way or the other, and that they may have thought that they might not be discharged till they agreed on a verdict.

Held : (1) That there was nothing wrong in a trial Judge exhorting the jury to reach a verdict, so long as he does not use phrases which import a measure of coercion. In the present case although the trial Judge's directions were perhaps too strongly worded and might have been differently put, there was not such a measure of coercion as to invalidate the verdict.

(2) That the Federal Supreme Court had rightly allowed the appeal of *M* and set aside his conviction. In view of the trial Judge's non-direction on whether *M* might have been only an accessory after the fact, the jury had been prevented from considering the possibility that he was guilty not of murder but of manslaughter, as it would have been open to them to take the view that despite the medical evidence *P* was, in fact, dead before he was thrown into the water *or* that *M* may have thought *P* was dead when his body was thrown into the river.

(3) That the appeal of *S* had been rightly dismissed by the Federal Supreme Court.

Held further : (4) That when the appellants had, before the Federal Supreme Court, sought to adduce affidavits from two of the jurors as to what took place in the jury-room, that Court had rightly refused to admit the affidavits.

Authorities referred to : *Co. Litt.* 227*b*, *Co. 3rd Inst.*, 110
4 *Blackstone Commentaries*, 360
Penn & Mead's case, (1670) 6 *Howell's State Trials* 951
Winsor v. The Queen, 1866 L.R. 1 Q.B. 289
R. v. Neal, 1949 (2) K.B. 590; 1949 (2) A.E.R. 438
R. v. Klein, (Feb. 9th 1932, unreported)
R. v. Walheim, (1952) 36 Cr. App. Reps. 167
R. v. Creasy, (1953) 37 Cr. App. Reps. 174
R. v. Mills, 1939 (2) K.B. 90; 1939 (2) A.E.R. 299

Observations on the question of what directions a trial Judge should give when it is found that the jury cannot agree.

Phineas Quass, Q.C., with *Montague Solomon* and *Shakoor Manraj*, for the appellants.

J. T. Moloney, Q.C., with *J.G. Le Quesne*, for the Crown.

LORD DENNING :—

In British Guiana on 10th February, 1960, a man named Rampat (also called Peeka) was murdered. Their Lordships will call him Peeka. He had gone in the early morning to visit his cows at a creek on the Mahaica River. He was paddling a corial, which is a dug-out canoe. He never returned alive. Five days later his body was recovered from the river : and from its condition it appeared that someone had shot him with a shot-gun, then his body (whilst he was still alive) had been tied to a log of wood by means of vine branches, and it had then been thrown into the river.

Suspicion fastened on two brothers named Shoukatallie (No. 1 accused) and Mahomed Ali (No. 2 accused). They were arrested and charged with the murder. On 16th May, 1960, they were indicted in the Supreme Court of British Guiana and tried before Bollers, J., and a jury. The case was heard on 15 days between 16th May, 1960, and 3rd June, 1960 (including a visit to the *locus in quo*) and in the early morning of 3rd June, 1960, the jury found Shoukatallie (No. 1 accused) guilty of murder : and they also found Mahomed Ali (No. 2 accused) guilty of murder but in his case with a very strong recommendation to mercy. Bollers, J. sentenced both of them to death. Both appealed to the Federal Supreme Court (Hallinan, C.J., Rennie and Marnan, F.JJ.) who, on 14th September, 1960, dismissed the appeal of Shoukatallie : but they allowed the appeal of Mahomed Ali and set aside his conviction and sentence. Shoukatallie applied for special leave to appeal to Her Majesty in Council and was granted it. His appeal was heard on 4th and 5th July, 1961, when their Lordships said that they would humbly advise Her Majesty that his appeal should be dismissed They now give their reasons.

The appeal was based on the conduct of the Judge at the trial. It was said that he had exerted undue pressure on the jury to come to an agreement : and that for this reason the verdict could not stand. The point cannot properly be appreciated without some description of the nature of the case.

The case for the Crown was that Shoukatallie and Mahomed Ali were acting together in concert in a common design to kill Peeka. The evidence of the prosecution was to the following effect :—

Shortly before his death Peeka was paddling along the river in his corial. A shot rang out. It came from another corial in which were the two accused men Shoukatallie (No. 1 accused) and Mahomed Ali (No. 2 accused). Shoukatallie was the man who had fired the shot. He had a gun in his hand. Mahomed Ali was steering the corial. Shoukatallie shouted out : " Shut your rass, you no dead yet ". Shoukatallie then fired the gun again at Peeka. Peeka fell on his face in his corial. Mahomed Ali then paddled their corial close to Peeka's corial. Shoukatallie got hold of Peeka's corial and pulled it across the creek. A short time later, Shoukatallie and Mahomed were seen near two corials. Shoukatallie was chopping wood. Mohomed was twisting vine branches. Five days later a search was made in the river and a diver employed. The body of Peeka was found tied to a log of wood by a vine. A post-mortem examination indicated that Peeka was shot, then tied up and immersed in the water while still alive.

The accused men, Shoukatallie and Mahomed Ali, did not give evidence on oath. They both made statements from the dock denying they were in the vicinity or knew anything at all about the crime. The defence attacked the credibility of the witnesses for the prosecution saying that four of the principal witnesses were members of a family who had a feud with the family of the accused, and that the fifth had been bribed.

Before Their Lordships, Mr. Phineas Quass argued strongly that on the evidence either *both* Shoukatallie and Mahomed Ali were guilty of murder or that *neither* was guilty. " How strange, then ", he said, "'that as the matter stands, Shoukatallie has been found guilty and Mahomed Ali goes free ! "

Their Lordships think the case is not so simple as that : for, even if the jury rejected the alibi of the accused men (as they did), nevertheless they would have to consider whether the evidence of the prosecution was sufficient to bring home

the guilt of *both* accused. So far as Shoukatallie was concerned, there could be no doubt. On the evidence, if accepted, he was the man who fired both shots. But what about Mahomed Ali ? Even if the evidence of the prosecution was accepted, was it altogether clear that the shooting was prearranged ? Might it not, perhaps, be that Shoukatallie fired the shots on his own account, with Mahomed Ali merely a spectator ?

The learned Judge himself had that possibility in mind. He put it clearly to the jury that if Mahomed Ali took no part in the crime, and his presence there was merely accidental, they should acquit him. But he pointed out a difficulty in taking that view. If the medical evidence was accepted, it was not the shots which killed Peeka, but the immersion in the water. So he told the jury :

> "You may very well feel that the number 1 accused shot Peeka in cold blood, with malice aforethought, and that while he was still alive the number 2 accused then joined in concert with him in order to kill Peeka by drowning him and that it was in those circumstances that Peeka came to his death. If you feel that they were acting in concert then, they would be equally guilty of the offence of murder in the eye of the law."

Now clear and comprehensive as he was, the Judge in his summing-up seems to have missed one point which might operate in favour of Mahomed Ali : up to the moment that Peeka fell shot, Mahomed Ali may have been merely a spectator. Then Peeka fell so badly wounded that he was to all appearances dead, so that Mahomed Ali *thought* he was dead. Then Mahomed Ali, in order to save his brother, Shoukatallie from conviction, helped him to dispose of the body by throwing it into the water. In that event Mahomed Ali would not have been guilty of murder for he had no intent to kill. He would only have been guilty of manslaughter. Another view which the jury might conceivably have taken was that, despite the medical evidence, Peeka was actually shot dead, so that he was not alive but dead, before Mahomed Ali took any part in the matter. In that event Mahomed Ali would only have been guilty as an accessory after the fact.

Their Lordships must now recount the concluding stages of the trial. On 2nd June, 1960, the jury took their places at 8.40 a.m. The Judge sat at 9 a.m. Crown counsel continued his final address until 10 a.m. when he concluded it. The Court then adjourned for a few minutes until 10.14 a.m. when the Judge began his summing-up. It lasted from 10.14 a.m. to 4.50 p.m. but with a break of one hour and ten minutes for lunch from 11.20 a.m. to 12.30 p.m. So the summing-up took nearly 5 1/2 hours to deliver. The jury retired at 4.50 p.m. Looking back on it now, it would have been better if the Judge had not finished his summing-up that night but had left it over till the next morning ; but no doubt he thought that the jury would be able to reach their verdict in an hour or so. At 5.30 p.m. they were served with sandwiches, tea and ice-cream. At 8.40 p.m. they returned into Court. It is not known whether they returned at their own initiative or at the request of the Judge. Then this took place :

"*The Marshall* : Have the jury arrived at a verdict ?

The Foreman : No, My Lord, we are disagreed on our verdict."

The Judge clearly interpreted this as meaning : "We have not yet agreed on our verdict", for he went on to say :

"*The Judge* : I would like to know, Mr. Foreman, if the jury need any further directions.

The Foreman : No, My Lord."

The Judge evidently could not see why the case should cause the jury any difficulty. He seems to have thought that some one or more of them were not mindful of their duty, for he went on to address them in this way :

"Bollers, J. : Gentlemen of the jury, I want to remind you of the oath that each and every one of you took at the commencement of this case. It reads as follows :—

> 'You shall well and truly try and true deliverance make between Our Sovereign Lady the Queen and the prisoners at the Bar whom you shall have in charge, and a true verdict give according to the evidence. So help you God.'

I want to direct your attention to the last two sentences in that oath that you have taken— 'And a true verdict give according to the evidence. So help you God.'

Well, the evidence that has been led in this case by the Crown and by the accused persons is clear and I can see no difficulty at all why

you should not arrive at a final conclusion in this matter.

When you get into that jury-room you must put all extraneous matter away from your deliberations. If you take extraneous matter and improper matter into your deliberations in deciding whether the case has been proved or not proved against the accused persons, then you will not be acting in accordance with the oath which you have taken.

It appears to me that this Colony is reaching a stage, or wants to reach a stage, when it can manage its own affairs. Well, this kind of thing that is going on amongst the jury would not help. In my very humble submission I cannot see how it will help one way or the other.

Now, you must return to that jury-room and cousider the matter again and then make up your minds one way or the other. If you feel one way and another member of the jury thinks another way, then you must examine the arguments of each other and accept reason. You must not be pig-headed. Not because you may feel one way or the other does it mean that you must never give way, even though sound commonsense and good reason are placed before you.

The community is looking to you to return a verdict in accordance with the evidence and in accordance with your own conscience. If you fail to do that you will not only be bringing disgrace upon the community but you will be bringing disgrace upon yourselves, which is perhaps even worse.

Gentlemen of the jury, I am now going to order you to return to that jury-room and consider the matter calmly and dispassionately, and give you an opportunity of arriving at an honest verdict in this case. Please see that you do not besmirch the fair name of your country. Please return to the jury-room."

At 8.49 p.m. the jury retired to the jury-room but they returned again at 10 p.m. and asked for further directions :

" *The Foreman* : We would like further legal directions as to accomplices after the fact.

The Judge : I am not quite sure what that means. During the course of my summing-up I did not mention the word 'accomplices'. What I did mention was 'acting in concert in pursuance of a common design to commit the offence for which the accused persons stand charged'. Do the jury desire further directions on that aspect of the matter ?

"*The Foreman:* Yes."

The Judge then proceeded to direct the jury about principals in the first degree and in the second degree but he did not deal with accessories after the fact. Presumably he thought it did not arise. He again made his own view of the facts fairly clear when he said :

> "You may feel that in this case the number 1 accused shot Peeka and having shot Peeka, when he was in a helpless condition but still alive, he decided to drown Peeka, and it was at that stage that the number 2 accused proceeded to act in concert with the number 1 accused and assisted him, and was present at aiding and abetting the number 1 accused in the killing of Peeka. If you find that is so, then they would be equally guilty of murder."

Their Lordships notice that in these further directions the learned Judge missed the one point that he had missed in his summing-up, namely, that Peeka may have been dead or to all appearances dead and that Mahomed Ali (the No. 2 accused) believed he was dead before he took part in the matter.

At 10.15 p.m. the Judge concluded his further directions and the jury retired again.

At 1.35 a.m. on 3rd June, 1960, the jury returned and gave verdict as follows :—

> "*Unanimous verdict*: No. 1 accused guilty of murder. *Unanimous verdict*: No. 2 accused guilty of murder with a very strong recommendation to mercy."

On the 14th September, 1960, the Federal Supreme Court set aside the conviction of Mahomed Ali the second accused. They observed that the Judge had not directed the jury on the point that Their Lordships have already mentioned. The Federal Supreme Court put it in this way : "The jury may have thought the deceased (Peeka) was dead before the second appellant (Mahomed Ali) assisted in the disposal of his body or, even if he was not dead that the second appellant (Mahomed Ali) might have believed that he was, so that when he assisted in tying the deceased to a log and putting him in the river he had not the intention to kill" in which case "the second appellant was not

guilty of murder". Now if Peeka was already dead before Mahomed Ali gave any assistance, he could only be guilty as accessory after the fact : whereas if Peeka was still alive but Mahomed Ali believed he was dead, he would only be guilty of manslaughter, not of murder. It was the failure of the Judge to assist the jury on this point which led (amongst other reasons) to the Federal Supreme Court quashing the conviction. It is a point which was not available to Shoukatallie and is clearly enough to distinguish the two cases.

Now Shoukatallie appeals on the ground that the Judge exerted undue pressure on the jury when they returned at 8.40 p.m. Their Lordships have already set out the passage in full. The gist of the complaint is that the Judge told the jury that they *must* give a verdict one way or the other. He never told them that they were at liberty to disagree : and they may have been left under the impression that they would not be discharged until they did agree.

In England in olden times there would have been nothing wrong in a judge telling the jury that they must agree and that he could not discharge them until they did agree : for that was indeed the law of the land. Lord Coke said that "a jury sworn and charged in case of life or member cannot be discharged by the Court or any other, but they ought to give a verdict", see Co. Litt. 227b, Co. 3rd Inst. 110 ; and Sir William Blackstone said that "when the evidence on both sides is closed, the jury cannot be discharged till they have given in their verdict", see 4 Blackstone Commentaries 360. Strong measures of coercion were adopted to secure a verdict. The jury were not allowed to separate. They were kept in the jury-room without meat, drink or fire (candle-light excepted) until they did agree. You have only to read the report of *Penn* and *Mead's* case, (1670) 6 Howell's State Trials 951 at pp. 962-6, to see what compulsion was brought to bear upon jurors. "Our ancestors", said Cockburn, C.J., "insisted on unanimity as the very essence of the verdict, but they were unscrupulous as to the means by which they obtained it", see *Winsor* v. *The Queen* (1866) L.R. 1 Q.B. 289, at p. 305.

All that is, of course, ancient history now. We have outlived those inhumanities. No longer is any measure of coercion acceptable. Once the judge has finished his summing-up and the jury given in charge of the bailiff, they are still not allowed to separate but they are provided with refreshment and, if need be, accommodation for the night in an hotel, see *Rex* v. *Neal* (1949) 2 K.B. 590. If they should return and say they cannot agree, the judge usually explains to them that it is their duty to agree if they can honestly and conscientiously do so. He tells them that they must be unanimous but he explains what unanimity means on the lines of the direction of Finlay, J., in *Rex* v. *Klein* (February 9th, 1932, unreported) which was followed in substance in *Rex* v. *Walheim* (1952) 36 Cr. Ap. R. 167 and *Rex* v. *Creasy* (1953) 37 Cr. Ap. R. 179. He reminds them that it is most important that they should agree if it is possible to do so : that, with a view to agreeing they must inevitably take differing views into account ; that if any member should find himself in a small minority and disposed to differ from the rest, he should consider the matter carefully, weigh the reasons for and against his view, and remember that he may be wrong ; that if, on so doing, he can honestly bring himself to come to a different view and thus to concur in the view of the majority, he should do so ; but if he cannot do so consistently with the oath he has taken, and he cannot bring the others round to his point of view, then it is his duty to differ, and, for want of agreement, there will be no verdict.

It is everyday practice for a judge thus to exhort a jury to reach a verdict. There is nothing wrong in it, indeed it may be very proper he should do so, so long as he does not use phrases which import a measure of coercion such as was held to have been exerted in *Rex* v. *Mills*, (1939) 2 K.B. 90.

The question in this case is whether the Judge went beyond exhortation which is permissible, and exerted some measure of coercion which is not. The words spoken by the Judge show clearly enough what was in his mind. He thought it was a straightforward case which should not present an honest jury with any difficulty in reaching a verdict : and he could only account for their disagreement by supposing that some of them were taking extraneous and improper matter into their deliberations or were being pig-headed about it. So he reminded them of the oath which each and everyone of them had taken—an oath which makes it clear that it is their duty to give a verdict, a true verdict, according to the evidence. He directed them to put aside all extraneous matters, and told them to accept reason one from the other. And he asked them not to besmirch the fair name of their country. It was

perhaps, as the Federal Supreme Court said, too strongly worded and might have been differently put. But the Federal Supreme Court did not see in it such a measure of coercion as to invalidate the verdict. Nor do Their Lordships. The more especially as the conduct of the jury shows that they were not in the least coerced by it. They deliberated for more than an hour and then came back with a request for further directions on a pertinent point—about the case of Mahomed Ali—which they had seen for themselves. Then after further directions, they deliberated for another 3½ hours and then came back with a verdict from which, one can readily infer, reflected the course of their discussions. They unanimously found Shoukatallie (No. 1 accused) guilty. But they only found Mahomed Ali (No. 2 accused) guilty with a strong recommendation to mercy. It is apparent that they thought that Mahomed Ali did not participate in the shooting of Peeka, but only came in after the shooting and helped Shoukatallie dispose of the body. But they thought that when the body was put into the water, Peeka was still alive ; and for that reason Mahomed Ali was guilty of murder. The Judge had told them so. But as Mahomed Ali played so minor a part, they made a strong recommendation to mercy. If they had realised that, even though Peeka was still alive, there was still a possible point in favour of Mahomed Ali—in that he might have *thought* that Peeka was dead—the jury might well have found Mahomed Ali not guilty of murder, but at most of manslaughter. At any rate, in view of the non-direction, it was quite right for the Federal Supreme Court to allow the appeal of Mahomed Ali and set aside his conviction of murder ; and at the same time to dismiss the appeal of Shoukatallie.

Their Lordships notice, as did the Federal Supreme Court, the heavy strain on the jury in listening and deliberating over so many hours. It was unfortunate and unforeseen : but it is no ground for upsetting the verdict. And, as Their Lordships have said, despite the strain, the jury came to a verdict which can readily be understood.

Their Lordships notice that, before the Federal Supreme Court, the appellants sought to adduce affidavits from two of the jurors as to what took place in the jury-room. The Federal Supreme Court quite rightly refused to admit these affidavits and the point was not pressed before Their Lordships.

For these reasons Their Lordships have therefore humbly advised Her Majesty that the appeal should be dismissed.

Appeal dismissed.

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

RATNAM *vs.* PERERA*

S.C. 67/59(F)—*D.C., Kurunegala, No.* 11433

Argued on : 26*th*, 28*th*, 29*th*, 30*th June*, 1961
Decided on : 3*rd November*, 1961

Partnership—Action for accounts—Partnership formed to become " Agents " of Shell Company for selling, storing and distributing petrol, kerosene oil, diesel oil, lubricating oils, etc., in return for a commission—Commission rate fixed for petrol, kerosene and diesoline, but lubricating oils to be paid for by difference between purchase price from Company and sale price to public—Contention by defendant that profits of partnership restricted to commission on petrol, etc., and that profits from lubricating oils were solely his—Construction of contract of partnership—Meanings of the terms " Agent ", " Commission " used in agreement—Civil Procedure Code, section 508.

Trial of entire claim of plaintiff by Judge without calling upon defendant to file account.

Held : (1) That in this action for an account, the proper course for the Court to have adopted was first to have decided whether it should call upon the defendant to file an account and for what period. Section 508 of the Civil Procedure Code, expressly provides that in an action for account, the Court may decide piece-meal upon the matters in issue.

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

(2) That a statement sent by a managing partner to another partner, showing merely the amounts payable to each of the partners from the profits earned in a partnership business less the total working expenses, do not constitute a balance sheet. A balance sheet should contain several other items of account, for instance, a statement of stocks, a statement of drawings by the partners, a statement of balances due to or from each of them.

In regard to the contention of the defendant that the profits of the partnership was restricted to the commission paid on the sale of petrol, kerosene and diesel oil, but not in respect of lubricating oils etc., he relied on the following facts:

(*a*) that it was his separate business for which he was remunerated by the company at a rate which represented the difference in price between the rate at which it was purchased from the company and the price at which it was sold to the public;

(*b*) that unlike in the case of petrol, the arrangement regarding the oils was a sale to the agent and a resale by the agent.

Held further : (3) That when the partnership was referred to as the "agent" of the Shell Company in the partnership agreement and in the agreement with the Shell Compnay, it was used in a commercial or complimentary sense and not in a legal sense.

(4) That in a contract of this kind, the Court has to consider not the mere name given to it but the substance of the transaction and to decide what it would in truth and in fact amount to, on a consideration of all the facts relating to it.

(5) That having regard to the documents and the evidence in the case. the word "commission" in the agreement with the Shell Company must be equated to remuneration which in one case, namely, lubricating oils was capable of being fixed on re-sale. It was a convenient term to use, in referring to payments made to the firm for its services. The method of remuneration did not alter the nature of the transaction.

Per SINNETAMBY, J.—"Commission need not necessarily be restricted to a fixed rate. It can be variable, but it should be capable of determination."

Cases referred to: *Pathirane v. Pathirane*, 63 N.L.R. 370; LXI C.L.W. 51
Fernando v. Cooray, 59 N.L.R. 169; LV C.L.W. 291
Weiner v Harris, 101 Law Times 647; (1910) 1 K.B. 285
W.T. Lamb & Sons v. Goring Brick Co., 146 Law Times 318; (1932) 1 K. B. 710
Ex parte Bright; *Re Smith*, 39 Law Times 649; (1879) 10 Ch. D. 566

C. Ranganathan for the defendant-appellant.

C. Thiagalingam, Q.C., with *C. de Silva* for the plaintiff-respondent.

SINNETAMBY, J.

This is an action by one partner against another asking for an account of the partnership business which had been dissolved, and for a distribution of the profits and assets. It would appear that the plaintiff and the defendant were originally brought together by one Siebel, who was an employee of the Shell Company, for the purpose of conducting the business of the Shell Petrol Station at Kurunegala. The defendant had earlier, in conjunction with one Mendis, been doing this business and had considerable experience in managing such an installation. When the Shell Company terminated its contract with Mendis, Siebel looked out for some responsible person who could in partnership with the defendant carry on the business. The defendant did not have the requisite capital, and on Siebel's suggestion, it was agreed that the plaintiff, who was one of the biggest consumers of Shell products in the district, should be brought into the business as a partner of the defendant. They entered into a partnership agreement, and, in due course, registered the partnership business in terms of the Business Names Registration Ordinance on 29th November, 1943. The certificate of registration has been produced marked D 170. The business was to commence on 1st January, 1944. The partnership agreement P 1 was actually drawn up later ; viz., on 13th May, 1944, though the business, in point of fact, commenced on 1st January, 1944.

Under the terms of that agreement, the parties agreed to become the " Agents " of The Shell Co. of Ceylon, Ltd., at Kurunegala, and other places : the partnership business was to be conducted under the name of " Ratnam & Perera " : the minimum capital was fixed at Rs. 20,000/- of which Ratnam contributed Rs. 5,000/- and Perera Rs. 15,000/- : provision was made that proper books of accounts be kept and entries of all transactions made in those books; there was

a further provision that a trial balance should be struck at the end of every month and that an annual balance sheet should be struck on the 31st March of each year ; the defendant Ratnam was to be the managing partner. In regard to profits, article 14 provided that the "agency commission" which is paid at the end of each month by the Shell Company was to be divided in the proportion of 1/3rd to Ratnam and 2/3rds to Perera. It further provided that neither party should draw "by way of advance or otherwise any other sum from the partnership funds". Article 18 provided that in the event of the partnership being dissolved, the assets shall be divided between the parties in the proportion 1/4th to Ratnam and 3/4ths to Perera.

The partnership business was terminated by the Shell Company on 30th October, 1953, and the present action was instituted by the plaintiff Perera alleging that the defendant had failed to render true and proper accounts and to pay to the plaintiff his share of the capital assets, profits, and agency commission. Plaintiff estimated the amount due to him at Rs. 224,677/- of which Rs. 86,314/-, had been paid, and after giving credit to the defendant in Rs. 4,476/13, claimed the balance : the credit of Rs. 4,476/13 was the defendant's share in respect of a business of a like nature which the plaintiff carried on at Malpitiya from 1st November, 1951. In his prayer the plaintiff asked for an order on the defendant to render a true and proper account of the business from its inception till the dissolution of the partnership and for judgment in respect of the amount eventually found by Court to be due to the plaintiff.

The defendant in his answer denied that a cause of action had accrued to the plaintiff and pleaded that the accounts of the partnership were annually balanced and the plaintiff looked into accepted and acted upon the said accounts as correct and held out to the defendant that he was satisfied with them for the entire period ended 31st March, 1952. He further pleaded that the accounts from 3rd March, 1952, had been duly audited and show a sum of Rs. 7,182/22 as due from the plaintiff to the defendant which he claimed in reconvention. In respect of the Malpitiya Agency he claimed a sum of Rs. 10,000/-. The defendant pleaded prescription as well as estoppel and settled accounts. The plaintiff thereupon filed replication alleging that the conduct of the defendant in relation to the accounts had been fraudulent ; and the defendant, having concealed the fraud, was not entitled to plead prescription or estoppel.

The learned Judge, without making any order calling on the defendant to file accounts awarded the plaintiff a sum of Rs. 79,000/- on account of his share of capital profits and assets and allowed the defendant a sum of Rs. 5000/- on his claim in reconvention in respect of the Malpitiya business. Against this judgment the defendant filed the present appeal : the plaintiff filed cross-objections claiming a larger sum than the amount awarded to him.

It is apparent that the first question the learned trial Judge was called upon to determine was whether he should order the defendant to file accounts and if so, for what period, the defendant's contention being that he had rendered accounts for the period ended March, 1952. From the answer it is clear that for the period commencing 1st April, 1952, till the termination of the partnership no accounts had been rendered and the defendant would have been obliged in any event to file an account for at least that period. In regard to the earlier period the learned trial Judge had first to determine whether there were, as alleged, settled accounts and if so, to what extent the plaintiff was entitled to either re-open, or falsify and surcharge those rendered. I have in an earlier case (S.C. 351/58 (F), D.C. Kurunegala No. 5810/M—*Ariya Pathirane* vs. *Robert Watte Pathirane*, S.C. minutes of 25th July, 1961,)* set out the procedure that should be adopted in actions for accounts as between partners ; and, if the learned trial Judge had followed that procedure, he would have saved himself much time and trouble and it would have also enabled him to keep the proceedings within reasonably manageable proportions. As I pointed out in my judgment in that case, Section 508 of the Civil Procedure Code expressly provides that in actions of account the Court may decide piece-meal upon the matters in issue. In this case the proper course for the Court to have adopted was first to have decided whether it should call upon the defendant to file an account and for what period ; and only thereafter, after giving the plaintiff an opportunity to falsify and surcharge, proceeded to determine what amounts were due either to the plaintiff or to the defendant as the case may be. Instead of doing that, the learned trial Judge framed a whole series of issues which covered the question of not only whether

* See 61 C.L.W. 51; 63 N.L.R. 370

the defendant should be ordered to file accounts but also the entire claims of the plaintiff and defendant and included even matters which were admitted. In the result, when the time came for the learned Judge to answer the issues, while he held that the defendant was liable to render accounts, he nevertheless said no purpose would be served by ordering him to do so.

It is the plaintiff's contention that no proper accounts were rendered to him. He admits that monthly statements of commission were sent to him and that annually, for a certain period of time, a statement of the total commission received less total working expenses were sent to him from which the nett income was ascertained and allotted in the proportion of 2/3rds and 1/3rd. It was not suggested that all sums of money shown to be due were paid in accordance with those statements. The statements merely show the amounts payable to each of the parties from the commission received. It certainly was not a balance sheet of the nature contemplated by article 15 of the partnership agreement. Issue 12 is as follows :—

> " Has the defendant rendered to the plaintiff monthly and annually accounts of the partnership as required in the Agreement."

It should immediately have been answered in the negative. Indeed, at the hearing in appeal the learned counsel for the appellant did not contend that the monthly statements, which appear to have been sent, operated in any way as settled or stated accounts ; nor could he contend that the annual accounts were, as formulated in the issue, in terms of the partnership agreement, which required a balance sheet. A balance sheet should contain several items of account not shown in the statements rendered : there is, for instance, no statement of stocks, no statement of drawings by the partners and no statement of balances due to or from each of them. Issues 13 and 14 are as follows :—

13 " Did the plaintiff—
(*a*) Look into ;
(*b*) Accept ;
(*c*) Act upon

the accounts so submitted to him up to 31.10.51 ?

14. If so, is the plaintiff estopped from claiming an accounting up to that date ? "

They also should have been answered in the negative for the same reason. The plaintiff would have, therefore, been entitled to obtain an order on the defendant to file a statement of his accounts from the date of the commencement of the business.

The item which formed the main contest between the parties related to whether the profits derived from miscellaneous sales of Shell products, other than petrol, kerosene and diesoline, are accountable to the partnership. The defendant contended that it was his separate business and that he was not liable to bring it into the partnership accounts ; but there is an overwhelming body of evidence which shows that the Shell Company consigned these miscellaneous articles, consisting mainly of Shell oil and greases to the firm of Ratnam & Perera, that they credited the firm of Ratnam & Perera for payments made in respect thereof, and that they would never have consigned the articles to Ratnam alone : there is also evidence to suggest that payments were made out of partnership funds. At the commencement of the business, Shell kerosene, petrol and diesoline were consigned to the " agents " to be kept in the installation and issued to customers at prices fixed by the Company, the partnership being paid a commission or a rebate in respect of actual sales. No payment was made for the petrol, etc., to the Company by the " agent " at the time of delivery. In the case of lubricating oils and so on, the partnership had to pay in advance, when taking delivery, at certain specified rates, subject to the condition that they should sell it at the installation at rates not above a certain fixed ceiling price. It was contended on behalf of the defendant that the profits from lubricating oil, greases, etc., were solely his, earned by him independently of the partnership and were not included in the partnership agreement. It was argued that the partnership profits related only to the commission in respect of those products which remained the property of the Company and were entrusted to the firm for sale on behalf of the Company and not to profits realised by the resale of articles purchased outright from the Company which on delivery became the property of the agent.

The learned trial Judge has expressed himself strongly against the credibility of the plaintiff and defendant and was not prepared to act upon the uncorroborated testimony of either of them. The question, therefore, has to be decided on a

consideration mainly of the documents and the conduct of the parties. It becomes necessary therefore, first to examine the agreement between the Shell Company and the partnership. That agreement has been produced marked P 2. The firm of Ratnam & Perera in that agreement is referred to as the "agent" and the Shell Company as "The Company". Paragraph 1 of that agreement expressly states that the "agent" shall serve the Company for the purpose of among other things "selling, storing and distributing the company's products entrusted to its charge". The expression "company's products" is defined to include petrol, kerosene oil, diesel oil, lubricating oil and other goods from time to time entrusted by the Company to the agent under this agreement for "selling, distribution and storage". If, therefore, lubricating oil has been entrusted to the "agent" for storage, sale and distribution, it would clearly come within the ambit of the agreement. It is not denied that lubricating oils, etc., were consigned to the firm, had to be stored in the company's installation, and had to be sold at prices below a fixed ceiliug price. The agreement further provided that the agent shall not sell any petroleum products other than the company's products. It is true that paragraph 18 provides that in consideration of the services to be rendered by the agent the company shall pay to the agent "a commission at a rate to be fixed in writing and that such commission is to be paid monthly", that paragraph 6 provides that the property entrusted to the agent for sale shall remain the property of the Company until sold, and that paragraph 8 provides that the agent shall sell the products at prices fixed by the Company. It was contended on behalf of the defendant that this agreement applied only to Shell diesoline and kerosine oil, in respect of which a "commission" was paid at rates which had been fixed earlier in a letter addressed to the firm by the Shell Company dated 3rd December, 1943, marked D 95. The rate of commission on petroleum products like petrol and kerosine is mentioned, but no mention is made of lubricating oil nor is there any reference to diesoline. In the case of petrol, lubricating oil, and diesoline, no payment was made at the time of delivery by the Company to the agent ; the petrol, kerosine, and diesoline had to remain the property of the Company and the agent had to sell it at a fixed price. He had to make a return weekly showing the quantities sold and on those he was allowed a commission at a certain specified rate per gallon. In the case of lubricating oil the remuneration for the agent's services took, as stated earlier, a different form. According to the agreement, therefore, in the case of petrol, kerosine, and diesoline, commission at a fixed rate was paid but in the case of lubricating oil and other miscellaneous articles, the services were paid for by the difference in price between the rate at which it was purchased from the company and the price at which it was sold to the public. In actual practice, as would appear from the statements of accounts rendered to the firm, credit was allowed even in respect of greases and oils delivered to the firm. The avidence of the company's representative is that the greases and oils would never have been sold to Ratnam in his individual capacity. It was sold to the firm and it had to be kept in the company's premises at Kurunegala, where the oil pumps and tanks were installed and it had to be sold there. Clearly, although in the case of the oils, etc., the arrangement was described as a sale to the agent and a resale by the agent, in actual practice, it differed very little from the arrangement in regard to the petrol, kerosine, and diesoline, except that in the case of the latter the amount of profit was fixed whilst in the former it depended on the price at which the agent resold it, subject, however, to a restricted maximum price.

In a contract of this kind, what the Court has to consider is not the mere name given to it but the substance of the transaction and decide what it would in truth and in fact amount to on a consideration of all the facts relating to it, *vide Fernando* vs. *Cooray*, (59 N.L.R. 169 at 179). In *Weiner* vs. *Harris*, (101 Law Times 647), the transaction the Court was called upon to construe was described by the words "sale or return". Goods were entrusted to a mercantile agent for "sale or return" and the expression "sale or return" in the agreement, it was held did not make the agent a purchaser. He was remunerated by being given half the excess of his selling price over and above the price he paid for it to his principal. The Master of the Rolls Cozens-Hardy said—

> "So here the mere fact that goods are said to be taken on sale or return is not in any way conclusive of the real nature of the contract. The court must look at the contract as a whole and see whether that is the real meaning and effect of it."

and Moulton, L.J., observed:—

> "I fully agree with what the Master of the Rolls has said, that no phrase can enable a person to misdescribe the contract, but that yon must look at what the contract really is and not at what the parties say it is."

Now the use of the word "agent" in the contract P 2 does not make the defendant firm

" agent " in the legal sense of the Shell Company, for if it did, their acts, contracts with customers, etc., would bind the Shell Company. The agreement expressly excludes this. There are other terms, to some of which I have already referred, which offend against the principles governing the law of agency. The term " agent " is used in a commercial or complimentary sense and not in the legal sense. As Scrutton, L.J., observed in *W. T. Lamb & Sons* vs. *Goring Brick Co.*, (146 Law Times 318):

> "Anyone with experience of commercial matters knows that in certain trades the word 'agent' is used without any reference to its meaning at law."

Greer, L.J., said in the same case :—

> "It is a somewhat remarkable fact that, notwithstanding the numerous commercial and other cases in which the distinction between the position of a buyer and that of an agent for sale has been stated and interpreted, there are still innumerable people engaged in business who do not understand the simple and logical distinction between a buyer and an agent for sale, and they use the two terms as if they were equivalent, the one to the other."

In regard to the contention that the profits of the partnership was restricted to the commission paid under paragraph 18 of the contract with the Company and was confined to petrol, kerosene, and diesoline, it is difficult to understand why, if that were so, there was express provision in article 14 to the following effect :—

> " but neither party shall draw by way of advance or otherwise any sum from the partnership funds ".

The defendant tried to explain this by saying that this provision was included to prevent partners from drawing the capital they contributed, but it is clear law that no one partner is entitled without the consent of the other partners to withdraw any capital he brought into the partnership business. It was not necessary to include such a provision in a partnership deed nor would the withdrawal of capital be referred to in the way in which this particular provision is worded. Paragraph 14 suggests that apart from the commission payable in respect of kerosene etc., there was other profit accruing to the firm. If the agency commission on petrol, kerosene and diesoline was the sole source of income of the partnership, how could it have been paid at the end of the month to each of the partners who contemplated selling petroleum products on credit to customers as would appear from article 18 of the partnership deed ? The plaintiff tried to give an explanation for this which to my mind is not very convincing. He probably was aware that he was not being paid a share of the profits from the lubricating oils but apparently he did not know the extent of such profits till he started the Malpitiya agency in 1951. He raised the matter in writing for the first time in his letter P 49 of 13.2.53, complaining of the non-inclusion of the lubricating oil profits in the accounts, and, as the learned trial judge says, it is extremely likely that he would have complained about it orally earlier. The defendant did not reply to P 49. In fact, he says that the arrangement between the partners was that the defendant should appropriate the profits from the lubricating oils to himself. If that was so, he would have immediately so replied to P 49 and, he does not appear to have taken such a forthright attitude even when the representative of the Shell Company discussed matters with the partners with a view to bringing about a settlement. Although the agreement with the Shell Company did not expressly refer to the profits made by the partnership on lubricating oils, etc., as " commission " there is not the slightest doubt that that was the remuneration payable by the Company to the partners for handling these Shell products and the word " commission " used in the contract must be considered to include this profit. In this connection it would be relevant to consider the manner in which the agreement was regarded by the parties after D 100 was executed. D 100 is a new agreement which superseded P 2 in regard to motor spirits, and after D 100 was executed, the firm bought petrol in much the same way as it had earlier purchased the lubricating oils. It paid for it at the time of delivery and had to resell it within the company's premises from the company's containers and tanks at prices fixed by the company. The agreement is dated 6.2.1950 and in regard to motor spirits contains the same restrictions as in P 2. The agent who is therein referred to as the " buyer " is required to buy at a certain rate and resell it at a price fixed by the Company and notified to the buyer. That agreement also provided for the purchase and resale by the firm of motor lubricants and other petroleum products which the seller considered necessary for the purpose of maintaining a full service. In the case of petrol sales after D 100 was executed, the difference in price was regarded by both the company in their statements to the firm and by the firm as " commission " and were so included in the several commission statements submitted subsequently to the plaintiff by the defendant, such as P 17, P 18, etc. If the defendant's contention in regard to lubricating oil is correct, then, he would not be liable to

account for the difference in the purchase price and the resale price of petrol after document D 100 was executed; the firm was, thereafter, not paid a commission as such calculated at a certain rate per cent on the sale price of the petrol but was permitted to retain the profit derived by resale to the public at a higher fixed price.

The reason why the Shell Company adopted the form of agreement set out in D 100 is not clear ; perhaps, they intended that the risk should pass to their agents on delivery. If so, it has yet to be decided whether they have effectively done so. The " buyer " in D 100 did not exercise complete ownership of the property sold to him. He could not deal with it in the same way as he could with the other property in his ownership. He could not store it where he liked. He could not sell it at whatever price he liked. His powers were restricted and the new transaction in substance was no different to the old one.

Commission need not necessarily be restricted to a fixed rate. It can be variable but it should be capable of determination. As Jessel, M.R., observed in *Ex parte Bright; Re Smith,* 39 Law Times 649 at 650:-

> "There is nothing to prevent a principal remunerating his agent by a commission varying according to the profit obtained by the vendor. *A fortiori* there is nothing to prevent his paying a commission depending on the surplus the agent can obtain over and above the price which will satisfy the principal. The amount of commission does not turn the agent into a purchaser. The principal says to the agent 'Sell my goods and whatever you get for them over and above the price, I am willing to accept shall be yours as commission'."

In my opinion, therefore, the word " commission " in the agreement P. 2 must be equated to " remuneration " which in one case, namely petrol, was fixed and which in the other case, namely, lubricating oils, capable of being fixed on resale. It was a convenient term to use in referring to payments made to the firm for the services by the Shell Company.

Having regard to the principles enunciated in the cases I have referred to and on a consideration of all the terms of the contract between the Shell Company and the partnership and the course of conduct between them, I am of the opinion that the agents did not become purchasers of the lubricating oil, etc., but only, if I may borrow an expression, agents for sale. The mere circumstance that the agents either paid for or were given credit in the books of the Company for the cost of lubricating oils, etc., on delivery and had to sell it at the installation at prices below a certain ceiling price does not, in my view, alter the nature of the transaction.

If the plaintiff has based his claim on a secret profit which the defendant as a partner made by using the firm's name and property and using the agreement which the firm had entered into with the Shell Company, no defence whatever would have been available to the defendant and he would have been liable to account for that secret profit. The learned counsel for the appellant, however, contended that that was not the basis on which the plaintiff came into Court and this was conceded by the learned counsel for the respondent.

It is to be noted that the defendant produced no books of account. He is alleged to have given them to a person by the name of Chary who was living at the time action was instituted but died subsequently before he could be called as a witness. The books were alleged to have been given to Chary and are not available : the defendant's evidence was that the books have been lost. It is very difficult to accept this story and the learned judge has rightly rejected it. These accounts alone will show the amount of money derived by the defendant as profits from the sale of lubricants. The defendant deliberately chose to keep them away from the courts and in the circumstances the court is entitled to draw every inference adverse to the defendant from such refusal. Indeed, the Court would have been perfectly justified in accepting the amount assessed by the plaintiff as the profits derived from the sale of lubricants : fortunately, in this case, there is a statement supplied by the Shell Company and from that it is possible to ascertain the profits. This sum has been fixed by the learned trial judge at Rs. 60,000/- and the amount awarded has not been contested. The learned counsel for the respondent who had filed a cross appeal did not press his cross appeal which related to profits from miscellaneous products other than the lubricating oil. The learned trial judge has fixed the profits payable from the Malpitiya agency to the defendant at Rs. 5,000/- and I see no reason to interfere with that finding.

In the result, the appeal of the defendant-appellant is dismissed with costs and the cross appeal by the plaintiff-respondent is dismissed without costs.

T. S. FERNANDO, J.—

I agree.

Appeal and cross appeal dismissed.

Present : **Tambiah, J.**

S.C. 687/1961—M.C. Colombo No. 44223/A.

ARNOLDA *vs.* GOPALAN

S.C. Application No. 175

Argued on : 27th November, 1961
Decided on : 12th December, 1961

Industrial Disputes Act (Cap. 131 of the Legislative Enactments, 1956 Ed.) as amended by Act No. 62 of 1957, sections 31B, 33 (2), 47—Application for relief by workman after death of employer—Widow made respondent to application—Of consent, order made against such widow—Sum ordered not paid within time set out in order—Further order by Magistrate under section 33 (2) of Act—Did the Labour Tribunal have jurisdiction to make the original order—Effect of widow's consenting to order—Jurisdiction of Magistrate.

Held : (1) That under the Industrial Disputes Act (as amended by Act No. 62 of 1957), the Labour Tribunal has no jurisdiction to give relief or redress to a workman who makes an application against the widow of his employer or ex-employer who is dead at the time of the application.

(2) That the mere fact that the widow of a deceased employer appears before the Labour Tribunal and consents to pay a sum of money to the applicant (workman) does not confer jurisdiction on the Tribunal when no such jurisdiction is conferred on it by statute law.

(3) That it would follow that a Magistrate, who, purporting to act under section 33 (2) of the Act, orders the payment of the said sum to the workman, also has no jurisdiction to make such an order.

Case referred to : *De Silva vs. The Commissioner of Income Tax*, 53N.L.R. 280

H. V. Perera, Q.C., with *G. F. Sethukavaler*, for the appellant.

C. S. Barr Kumarakulasinghe with *Bala Nadaraja*, for the respondent.

TAMBIAH, J.—

The petitoner has made this application to revise the order of the learned Magistrate, dated 3rd April, 1961, in which the petitioner was ordered to pay a sum of Rs. 2,073.50 cts. to the respondent.

The respondent was employed by the late Mr. Bobby Arnolda, the husband of the petitioner, as an employee in a transport business which was run under the name and style of Bobby Arnolda Travel Service. On the 31st of August, 1958, Mr. Bobby Arnolda died and the petitioner, by letter dated 2nd September, 1959, informed the respondent that the latter's services had ceased in view of the death of her husband.

The respondent, through the Ceylon Motor Workers' Union, made an application to the Labour Tribunal in Colombo, making the petitioner, the widow of the late Mr. Bobby Arnolda, a respondent. In this application, the respondent claimed wages, compensation and gratuity from the petitioner for the period he was employed under Mr. Bobby Arnolda.

As a result of the settlement arrived at between the petitioner and the respondent, the petitioner agreed to pay the respondent the sum of Rs. 2,073.50 cts. on behalf of the estate of the late Mr. Bobby Arnolda. Thereupon, the President of the Labour Tribunal ordered the petitioner to pay the sum to the respondent on or before the 10th of November, 1960.

The learned Magistrate of Colombo, purporting to act under section 33 (2) of the Industrial Disputes Act (Chapter 131 of the Legislative Enactments, 1956 ed.), as amended by Act No. 62 of 1957, ordered the petitioner to pay the sum which the petitioner had agreed to pay the respondent. The petitioner prays that this order was made without jurisdiction and asks this Court to revise this order.

It was urged on behalf of the petitioner that the learned Magistrate did not have jurisdiction to make the order made on 3-4-1961 in which the petitioner was to pay the said sum to the respondent, since the Labour Tribunal itself had no jurisdiction to make an order compelling the peti-

tioner, who is the widow of the late Mr. Bobby Arnolda, to pay the claim of the respondent. The counsel for the appellant contended that the Industrial Disputes Act, as amended, empowered the Labour Tribunal to make an order against "*an employer or ex-employer who was living at the time the application was made*", and that there is no provision in the statute which enables an employee to make an application against the legal representative, executor *de son tort*, or the widow of the estate of an employer or an ex-employer who was dead at the time the application was made before the Tribunal.

An examination of the relevant provisions of the Industrial Dispute Act, as amended by Act No. 62 of 1957, bears out the contention of the counsel for the appellant. Section 31 B of the Industrial Disputes Act, as amended by Act No. 62 of 1957 enacts as follows :—

"(1) A workman or a trade union on behalf of a workman who is a member of that union, may make an application in writing to a Labour Tribunal for relief or redress in respect of any of the following matters :—

(*a*) the termination of his services by his employer;

(*b*) the question whether any gratuity or other benefits are due to him from his *employer* on termination of his services and the amount of such gratuity and the nature and extent of any such benefits ;

(*c*) such other matters pertaining to the relationship between an *employer* and a *workman* as may be prescribed.

(2) Where a Labour Tribunal is satisfied after such inquiries as it may deem necessary that the matter to which an application under sub-section (1) relates is under discussion with the *employer* of the workman to whom the application relates by a trade union of which that workman is a member, the Tribunal shall defer making an order on such application until such discussion is concluded or the Minister has made an order under section 4.

(3) Where an application under sub-section (1) relates—

(*a*) to any matter which, in the opinion of the Tribunal, is similar to or identical with a matter constituting or included in an industrial dispute to which the *employer* to whom that application relates is a party and into which an inquiry under this Act is held, or

(*b*) to any matter the facts affecting which are, in the opinion of the Tribunal, facts affecting any proceedings under any other law,

the Tribunal shall make order suspending its proceedings upon that application until the conclusion of the said inquiry or the said proceedings under any other law, and upon such conclusion the Tribunal shall resume the proceedings upon that application, and shall in making an order upon that application, have regard to the award or decision in the said inquiry or the said proceedings under any other law.

(4) Any relief or redress may be granted by a Labour Tribunal to a workman upon an application made under sub-section (1) notwithstanding anything to the contrary in any contract of service between him and his *employer*.

Section 31B (6) of the amended Industrial Disputes Act, enacts as follows :—

Notwithstanding that *any person has ceased to be an employer*—

(*a*) an application claiming relief or redress from such person may be made under sub-section (1) in respect of a period during which the workman to whom the application relates was employed by such person, and proceedings thereon may be taken by a Labour Tribunal,

(*b*) if any such application was made while such person was such *employer*, proceedings thereon may be commenced or continued and concluded by a Labour Tribunal, and

(*c*) a Labour Tribunal may on any such application order such person to pay that workman any sum as wages in respect of any period during which that workman was employed by such person, or as compensation as an alternative to the reinstatement of that workman or as any gratuity payable to that workman by such person, and such order may be enforced *against such person* in like manner *as if he were such employer*.

The expression 'such a person' must, in this context, necessarily mean an ex-employer, who is alive at the time the proceedings are commenced.

The term "employer" is defined by section 47 of the Industrial Disputes Act (as amended by Act No. 62 of 1957), as follows :—

'"employer" means any person who employs or on whose behalf any other person employs any workman and includes a body of employers (whether such a body is a firm, company, corporation or trade union) and any person who on behalf of any other person employs any workman ;'

The term "workman" is also defined in the same section as follows:

'"workman" means any person who has entered into or works under a contract with an employer in any capacity, whether the contract is expressed or implied, oral or in writing, and whether it is a contract of service or of apprenticeship, or a contract personally to execute any work or labour, and includes any person ordinarily employed under any such contract whether such person is or is not in employment at any particular time, and, for the purposes of any proceedings under this Act in relation to any industrial dispute, includes any person whose services have been terminated.'

The scope and ambit of the amended Industrial Disputes Act is to give relief or redress to a work-

man who is in a position to make an application before the Labour Tribunal *against* his employer or ex-employer who is alive at the time of the application. The Labour Tribunal derives its jurisdiction from the amended Industrial Disputes Act. Its powers, as well as its jurisdiction, has to be looked for within the four corners of this statute and liability under this statute, therefore, cannot be extended to a widow of a deceased employer, who is brought before the Labour Tribunal and against whom relief is sought for a liability incurred by her husband. The counsel for the respondent was unable to refer me to any provision in the amended Industrial Disputes Act which enables an employee to make an application of this nature against the widow of a deceased employer.

The counsel for the respondent urged that as the petitioner had appeared before the Labour Tribunal and had consented to pay the said sum, the Labour Tribunal had cognisance over this matter. The words of Maxwell, in this context, are apposite. He states (*vide* Maxwell on Interpretation of Statutes (9th edition), page 392): "Consent cannot give jurisdiction and therefore any statutory objection which goes to the jurisdiction does not admit of waiver." Therefore, the mere fact that the petitioner appeared before the Tribunal and had consented to pay the said sum, does not confer jurisdiction on the Labour Tribunal when it has, in fact no jurisdiction conferred on it by the statute law. The counsel for the respondent also argued that the petitioner had registered the same transport business in her name in September, 1959 and the sum which she had consented to pay, included the wages due to the respondent for a few days in September when he was employed under the petitioner. The Labour Tribunal, however, has only adjudicated on a claim of the respondent for wages, gratuity, etc., alleged to be due to him during the period he worked under the late Mr. Bobby Arnolda and this contention, therefore, is untenable.

Section 33 (2) of the Industrial Disputes Act, as amended by Act No. 62 of 1957, gives the Magistrate the power to enforce any lawful order made by the Labour Tribunal and recover the sum ordered to be paid. The Supreme Court is given wide revisionary powers over the orders made by Magistrates without jurisdiction. In *De Silva vs. Commissioner of Income Tax*, (1951) 53 N.L.R. p. 280, this Court revised an order made against the Managing Director of a Company, who was ordered to pay the tax due from a limited liability company, when the Income Tax Ordinance did not empower the Commissioner of Income Tax to impose such a tax against the Managing Director personally. When the Magistrate tried to enforce the order against the Managing Director, this Court interfered by way of revision and set aside the order.

There are other statutes which have imposed liability on the executor or the personal representative of a deceased person for debts or liabilities of the deceased (*vide* the Income Tax Ordinance (Cap. 242) and the Workmen's Compensation Ordinance (Cap. 139), but it is significent that the Industrial Disputes Act does not impose any liability on the executor, personal representative or the executor *de son tort* of a deceased person for his debts or liabilities.

For these reasons, I hold that the Magistrate had no jurisdiction or power to make an order calling upon the petitioner to pay the said sum. Acting in revision, I set aside the order of the learned Magistrate, dated 3-4-61, directing the appellant to pay the sum of Rs. 2073.50 cts., on or before the 10th of November, 1961. The appellant is entitled to Rs. 105/- as costs of appeal.

Application allowed.

Present : **Gunasekera, J. and Sinnetamby, J.**

PATHIRANE *vs.* PATHIRANE

S.C. 351/58 (F)—*D.C. Kurunegala No.* 5810/M.

Argued on : 3rd June, 1961.
Decided on : 25th July, 1961.

Partnership—Dissolution—Action for accounts—Procedure to be adopted—Civil Procedure Code, sections 508, 511, 513 *and* 518—*Accounts submitted by Managing partner unsupported by books—Effect.*

One partner securing advantages to carry on separate business in his own name at the same premises with partnership assets unknown to the other—Is such partner liable to share profits until the date of payment of capital and costs—Partnership Act, sections 39 *and* 42.

Under a partnership agreement dated 30-12-1942, P 1, the plaintiff and the defendant carried on business as agents of the Caltex Company for the sale of petrol. The defendant was the managing partner. Consequent on differences between them, the plaintiff instituted an action in March 1948, claiming profits for three years ended 31-3-48 and obtained decree for Rs. 10550/- in 1954. In the meantime in September, 1948 the defendant gave plaintiff 3 months notice of terminating the partnership in terms of P 1.

The plaintiff instituted the present action in 1949, averring dissolution of the partnership, failure to enter atrue and correct account from 1st April, 1945, and asking (1) that the accounts of the partnership be taken; (2) for distribution of assets and division of profits. The plaintiff also averred that prior to the notice of termination the defendant fraudulently obtained from the Caltex Company an agreement for the sale of their products in the same premises in his own name and claimed profits made by the defendant in conducting that business in his own name up to the date on which assets are distributed.

The defendant in his answer denied that he failed to render accounts from 1-4-45 and stated that only a sum of Rs. 200/ was due to the plaintiff as his share of the profits.

At the trial the defendant submitted some accounts unsupported by books which the learned District Judge rejected and entered judgment for the plaintiff (*a*) for profits at the rate of Rs. 2,000/- per year from 31-3-48 up to the date of payment of his capital and costs; (*b*) Rs. 2,300 being his share of the assets and goodwill.

The defendant appealed.

Held : (1) That the learned District Judge was justified in assessing the profits on the basis of the earlier decree-viz. Rs. 10,550/- as profits for three years.

(2) That the failure of the defendant to produce the account books entitled the court to draw every adverse inference against him, although such inferences were unnecessary in this case.

(3) That the defendant was liable to share with the plaintiff the profits he made by obtaining a renewal in his own name of the several agreements the partnership had made with the Caltex Company and utilising the partnership assets therefor before the termination of the partnership.

(4) That on the facts in this case the plaintiff is entitled to recover profits on the basis of the court's order up to the date of the decree, for by its decree the court has in effect, distributed the assets, and not up to the date of payment of capital and costs as ordered by the court.

(5) That after the decree the plantiff would only be entitled to legal interest on the aggregate sum found due to him.

(6) That where a partner continues a business after dissolution utilising partnership assets, the other partner is entitled to recover profits until the final distribution of profits or in the alternative, interest on the capital, whichever is higher.

Case referred to : *Seneviratne vs. Kariawasam*, XLII C.L.W. 20.

Procedure that should be adopted in actions for accounts as between partners set out with reference to section 508 and other relevant sections of the Civil Procedure Code.

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

E. B. Wikremanayake, Q.C., with *T. W. Rajaratnam*, for the plaintiff-respondent.

SINNETAMBY, J.—

The plaintiff and defendant were partners and carried on a business under a partnership agreement marked P 1 bearing No. 285 dated 30th December, 1942. The nature of their business involved the sale of petrol and other products of Caltex (CEYLON) Ltd., in premises belonging to the Caltex company. They were permitted to use the equipment provided by the company on payment of a nominal hire and were subject to the conditions set out in the agreements entered into between the partnership and Caltex (CEYLON) Ltd., embodied in the documents D 1, D 3 and D 14. The partners were, for the purpose of this business, regarded as the business agents of the Caltex company, though in point of fact, they were not agents in the legal sense. Differences appear to have arisen between the partners and the plaintiff had instituted an action against the defendant in the District Court of Kurunegala on 18th August, 1948, claiming profits for the three years ended 31st March, 1948. He obtained a decree in November, 1954, in a sum of Rs. 10,550/- on account of his claim of the profits. In the meantime, on 10th September, 1948, the defendant gave the plaintiff, in terms of the partnership agreement P 1, three months notice terminating the partnership as from 10th December, 1948.

The present action was instituted prior to the decree in that case on 25th August, 1949, averring the dissolution of the partnership and asking that the accounts of the partnership be taken. The plaintiff also asked for distribution of the assets and for division of profits.

The defendant, according to the partnership agreement, was the managing partner and it is not denied that he kept books ; indeed, in the earlier action he produced his books to a firm of chartered

accountants who reported on them to the court. Even in the present action he called as a witness a gentleman employed in a firm of accountants and submitted a statement prepared by him. The plaintiff averred that the defendant had failed to render a true and correct account of the partnership from 1st April, 1945. Article 7 of the partnership agreement P 1 requires that on the 31st of March each year a balance sheet should be prepared showing the assets and liabilities and each partner's share of the capital and profits. Article 9 provides that these accounts should be audited by a recognised auditor.

Article 11 further provides that neither partner shall draw a sum exceeding Rs. 150/- per month except with the consent of the other partner. The need for an annual balance sheet and a profit and loss account was thus imperative. Each partner contributed a sum of Rs. 2,000/- to the business as capital. They also appear to have borrowed money from the bank to finance the business and this had been subsequently liquidated. Although the defendant said he had liquidated this loan out of his personal funds he has not established it by satisfactory evidence and the learned Judge has, in my view, rightly rejected his contention.

The plaintiff also averred that prior to the notice of termination of the partnership the defendant fradulently obtained from the Caltex company an agreement for the sale of their products in the same premises in his own name after inducing them to cancel the agreement with the partnership. This, under the agreements, they could have done at short notice. The plaintiff claimed the profits made by the defendant in conducting the business in his own name from the date of the cancellation of the agreement with the Caltex company up to the date on which assets are distributed. The defendant, in his answer denied that he failed to render accounts from 1st April, 1945, and stated that only a sum of Rs. 280/- was due as plaintiff's share of the profits. On the trial date, several issues were framed but there was no issue suggested or adopted in regard to whether the defendant had in terms of the partnership agreement submitted accounts to the plaintiff after March, 1945. The consequence was that the learned trial Judge permitted evidence to be led on various matters which need not have been gone into if the correct procedure had been followed.

Sitting in appeal, I have noticed that in several partnership cases in which the plaintiff has asked for the dissolution of partnership and for an order directing accounts to be taken, some trial courts have not followed the correct procedure and do not appear to have a proper appreciation of the steps that should be taken in the course of such proceedings. Where the plaintiff states that accounts have not been rendered and asks for the taking of accounts, the court should first consider what defence the defendant has put up in regard to that claim. If his defence is that accounts have been rendered, then the first question the court must decide on is whether in fact accounts had been rendered and if so up to what date. It should then make an order directing accounts to be rendered from the date from which it finds they have not been rendered. Section 508 of the Civil Procedure Code expressly provides that in actions of accounts, the court may adjudicate piece meal upon the matters in issue and in such adjudications make interlocutory orders of a final character. Having decided this issue the court should then call upon the defendant if he is the accounting party to file a statement of accounts for such period as it considers necessary. In rendering his accounts the accounting party must comply with the provisions of Section 511 ; it should be verified on oath or affirmation. Thereafter, a date should be fixed for the opposite party to falsify and surcharge. When that has been done, the trial should be confined only to those items in the accounts in respect of which there are disputes. Section 513 provides for the procedure to be followed when the accounting party makes default, The hearing of the main issues in the case should be adjourned until after the accounts are taken in terms of Section 515. There are, of course, several other defences also open to the accounting party when the plaintiff asks the court for an order calling on the defendant to file accounts. If such defences are taken they should first be adjudicated upon before an order is made. In the case of partnerships Section 202 expressly provides that accounts shall be taken before a decree for dissolution is made. Ordinarily, in partnership cases, an action for accounting is never instituted except when it is associated with a prayer for an order of dissolution unless in point of fact there has already been a dissolution. If after accounts are filed the court thinks it requires the services of an accountant, it may issue a commission in terms of Section 430 and 431 of the Civil Procedure Code, to an accountant to examine and report on the accounts. This should only be done it the court considers such a reference necessary and should not be done solely on the initiative of either or both parties—*Seneviratne vs. Kariawasam*, (42 Ceylon Law

Weekly, p. 20). If courts of first instance would only follow these provisions of the Civil Procedure Code in taking partnership accounts much time would be saved and the issue narrowed to a smaller compass.

In the present case, the defendant was not called upon to submit an account and, indeed, he did not submit one which was supported by books, but several issues were framed and the main ones with which the appeal was concerned and in respect of which argument was addressed to us were issues 1, 2, 3 (1), 3 (2), 4, 5 and 6. After trial the learned Judge entered judgment for the plaintiff for profits at the rate of Rs. 2,000/- per year from 31st March, 1948, up to the date of payment of his capital and costs". There was no express direction in the judgment or in the decree specifying what amount had to be paid on account of capital, but, in answer to issue 2, the learned Judge fixed the amount due to the plaintiff on account of his share of the assets and goodwill at Rs. 2,300/-. Against the judgment of the learned District Judge, the defendant preferred the present appeal.

The defendant, as stated earlier, failed to submit any accounts to the court ; he only called an accountant who submitted a statement unsupported by any books. The court was accordingly entitled to draw inferences adverse to the accounting party. Lindley in his book on Partnership refers to the effect of non-production of books in the following terms :—

> "If a partner has books or accounts in his possession, and he will not produce them, an account may, nevertheless, be arrived at by presuming everything against him. Thus in a case where an account was directed at the suit of the representatives of a deceased partner against the surviving partner, and the latter would not produce the books necessary to enable the Master to take the accounts, the Master estimated the nett profits at £10 per cent. on the capital employed, and the Court, on exception to his report, confirmed it, adding that if he had set the nett profits down at £20 per cent. his report would have been equally confirmed."

In the present case, therefore, the failure of the defendant to produce the account books entitles the court to draw every adverse inference against him but the court had material upon which it could have proceeded. In the earlier action to which I have referred, a firm of chartered accountants audited the books and prepared and submitted a statement of the profits disclosed up to the end of March, 1948. They were fixed at Rs. 10,550/- after deduction of drawings. The learned Judge assessed the profits for the subsequent period on that basis, and it was not argued in appeal that his method of assessment was wrong. I think it was perfectly open to him to proceed on that basis. Indeed, the learned Judge has been very considerate to the defendant for on that basis he should have allowed profits to be fixed at about Rs. 3,000/- per annum but having regard to the fact that it was the defendant who managed the business the learned Judge has allowed Rs. 1,000/- per year to be deducted on that account and assessed the profits at Rs. 2,000/- per year, despite the fact that the remuneration allowed for his services in the partnership agreement was only Rs. 50/- per month. The plaintiff did not in appeal contest the correctness of this award. It is not clear how the learned Judge arrived at the value of the capital contributed and the assets and goodwill at Rs. 2,300/- but this figure too was not seriously contested. What the defendant did contest, however, was that the plaintiff was not entitled to claim any profits after the Caltex company had terminated its agreement with the partnership. This was done by letter D 9 addressed by the Caltex company to the partners dated 23rd September, 1948, terminating the petrol agreement by giving a month's notice. In regard to kerosene, a new agreement with the defendant was entered into as from 1st October, 1948.

The notice of termination by the Caltex company was, as would appear from D 8, made in in consequence of a letter written by the defendant to the Caltex company dated 21st September, 1948, which has been produced marked D 13. Obviously, in D 13, there are misrepresentations upon which the company appears to have acted. For instance, in it the defendant says that the plaintiff had withdrawn his capital of Rs. 2,000-/. This was in September, 1948, and is totally inconsistent with the decree entered in the earlier case No. D.C 5029 in which judgment was only for the profits and the assets fixed at Rs. 3,232.84, were directed to be carried forward to the next account. The defendant's accountant produced statements of account D 15 and D 16 which the Judge has quite rightly rejected. In regard to profits not included in the partnership accounts made by a partner by utilising partnership assets before the termination of the partnership, Section 29 of the Partnership Act would apply. In my view it clearly applies to the profits made by the defendant after he secretly wrote letter D 13 to the Caltex company and thereby induced them to cancel the original agreement with the partners and to enter into a new agreement with him personally. This was done without the knowledge of and without notice to

the plaintiff, and at a time when the partnership had not been terminated. Lindley refers to several cases where a partner, who, on the termination of the partnership, obtains renewal of a lease in his own name, was ordered to accounts to the partnership for the profits he thereby made. In my opinion, the defendant was liable to share with the plaintiff the profits he made by obtaining a renewal in his own name of the several agreements the partnership had made with the Caltex company.

The learned Judge in his judgment has ordered that the defendant should pay the plaintiff profits as decreed till the date on which the payment is made of the capital and costs. The only question that now remains for decision is whether this order is right. The learned counsel who appeared for the respondent conceded that he was not entitled to ask for profits until the date of payment of capital and costs. This question is not easy to determine and would depend in each case upon the facts and circumstances established therein. The accounts of a partnership must be kept open even after the date of dissolution for the purpose of debiting and crediting the parties with monies payable by them and monies they are entitled to receive both in respect of new transactions as well as old transactions. The same will be the case with partnerships which continue to do business in the partnership name after dissolution. The main question to be taken into account is whether the business is being conducted with property belonging to the partnership and not to the individual partner who continues to trade in the partnership business without the consent of his co-partner. The general rule in such a case, as stated by Lindley, is for the continuing partner to be condemned to pay either a share in the profits till final distribution of the assets or in the alternative, interest on the capital at the usual rate, whichever is higher.

In the present case, the partnership agreement expressly provides that fresh capital brought in should carry interest at 6% but the profits were definitely larger. The plaintiff should, therefore, be entitled to recover profits so long as the business of the partnership continues. This is provided for by Section 42 of the Partnership Act, which, however, restricts the right of interest to 5% on the outgoing partner's share of the partnership assets. In this case, as assets had not been distributed at the time of the action, it seems to me that the plaintiff is entitled to recover profits on the basis of the Judge's order up to the date of the decree for by its decree the court has in effect distributed the assets and, therefore, it cannot be said that the defendant was still carrying on the business utilising partnership assets. The plaintiff's right in short have been merged in the decree and as learned counsel for the plaintiff-respondent conceded, the order as to profits must come to an end on the date of the decree. Thereafter, the plaintiff would only be entitled to legal interest on the aggregate sum found due to him.

I would accordingly vary the decree by directing that the defendant do pay to the plaintiff profits at the rate of Rs. 2,000/- per year from 31st March, 1948, up to the date of the decree and his share of the assets and goodwill amounting to Rs. 2,300/- and that thereafter, he should pay legal interest on the aggregate amount till payment in full with costs of action. Subject to this variation, I would dismiss the appeal with costs.

GUNASEKERA, J.—
I agree.

Decree varied.

Present : **Weerasooriya, J.**

Application for Revision in M.C. Colombo, No. 1246/C.
(Application No. 301)

MERCANTILE CREDIT LTD. *vs.* S.I., PELIYAGODA & ANOTHER

Argued and decided on : July 25, 1961.

Excise Ordinance (Cap. 42), section 51(2)—Order of confiscation in respect of car used for offence—Application by absolute owner to have order set aside—Requirement that owner should be given an opportunity of being heard before order of confiscation made—No order to be made unless evidence implicates owner in offence.

After certain persons had been convicted of an offence under the Excise Ordinance, an order of confiscation was made in respect of a motor car used for the commission of the said offence. This order the learned Magistrate purported to make under section 51(2) of the Excise Ordinance, after notice had been duly served on the registered owner to show cause why the car should not be confiscated. In the present application, the petitioner sought to have this order set aside on the ground that absolute ownership of the car had vested in it prior to the date of the offence and that it still was the absolute owner. The position of the petitioner was that over a year prior to the date of offence, it had hired the said car on a hire-purchase agreement to one *P* who was the person who had been the registered owner at the time the offence was committed. It was on *P* that the notice to show cause had been served, before the order of confiscation was made.

Held : (1) That it was clear that the petitioner had been the absolute owner of the car at the time when the order of confisication was made.

(2) That confiscation of a motor car under section 51(2) of the Excise Ordinance, should not be ordered without the owner being given an opportunity of being heard and that where the owner himself is not convicted of the offence, no order of confiscation should be made unless there is evidence that implicates him in the offence.

Followed : *Excise Inspector Fernando v. Marther & Sons*, 1 C.L.W. 249.

G. D. C. Weerasinghe with *M. T. M. Sivardeen*, for the petitioner.

J. A. D. de Silva, Crown Counsel, for the 1st respondent.

WEERASOORIYA, J.

This application arises out of an order of confiscation of a motor car bearing registered No. 2 Sri 3172 which the Magistrate made in M.C. Case No. 1246/C.

Four persons were charged in that case with the commission of the offence of having in their possession without lawful authority, on the 24th May, 1961, a quantity of unlawfully manufactured arrack which was transported in the aforesaid car. The accused pleaded guilty to the charge and the Magistrate made the order of confiscation after notice to the registered owner of the car, one B. Peter Perera, to show cause why the car should not be confiscated. On the 8th June, 1961, when the matter came up for enquiry, Peter Perera was absent and the Magistrate, purporting to act under section 51 (2)* of the Excise Ordinance, made order confiscating the car, and that it be sold by public auction and the proceeds credited to revenue.

It would appear that according to a statement made by Peter Perera to the Police, he had sold the car to one Nihal Salgado on the 25th of May, 1961, and was, therefore, not interested in showing cause against the confiscation of it. The present application for the revision of the order of confiscation is made by the Mercantile Credit Limited of Colombo on the ground that the absolute ownership of the car vested in the Company and that it had hired the said car to Peter Perera on a hire purchase agreement No. 2580/M dated the 23rd March, 1960. On the affidavit filed with the petition I am satisfied that the Mercantile Credit Limited was the absolute owner of the car at the time when the order of confiscation was made, and still is the absolute owner. It has been held by this Court in several cases, of which I need refer only to *Excise Inspector Fernando* v. *Marther & Sons*, 1 *C.L.W.* 249, that confiscation of a motor car under section 51 (2) of the Excise Ordinance should not be ordered without the owner being given an opportunity of being heard, and that where the owner himself is not convicted of the offence, no order of confiscation should be made unless there is evidence that implicates him in the offence. In the present case as no notice was given to the petitioner of the proposed order of confiscation, I would on that ground alone set aside the order made by the Magistrate and remit the proceedings to him so that the petitioner may be given an opportunity of showing cause why the car should not be confiscated.

Set aside and sent back.

*Now section 54 (2) of Cap. 52

Present : **Herat, J. and Abeyesundere, A.J.**

DONA PAVISTINA HAMINE *vs.* PIYADASA & ANOTHER

S.C. No. 90—*D.C. Gampaha, No.* 6886

Argued on : April 2 and 3, 1962.
Decided on : April 3, 1962.

Servitude—Right of using threshing floor—Acquisition thereof by prescription—User commencing with leave and licence—Evidence of adverse user for over prescriptive period thereafter—Effect.

Held : That even though the exercise of a servitude over another's land commenced with the permission of the owner of the servient tenement, a right of servitude by prescription could be acquired, if, subsequently there is user as of right for over the prescriptive period. On the facts of the present case, any presumption that the subsequent user too was by continued permission has been rebutted and it was established that the servitude had been acquired.

Followed : *Malan v. Nabygelegen Estates*, 1946 A.D. 562
Distinguished : *De Soysa v. Fonseka*, 58 N.L.R. 501

Cecil de S. Wijeratne, for the plaintiff-appellant.

S. W. Walpita with *D. R. P. Goonetileke*, for the 2nd defendant-respondent.

HERAT, J.

The plaintiff-appellant sued the 2nd defendant-respondent for a declaration that as owner of the paddy field called Kosgahakumbura she was entitled to a servitude of threshing paddy on the threshing floor depicted as lots 1 and 2 in the plan at page 40 of the typewritten record. It appears that the soil on which the threshing floor stands belonged at one time to a person called Baba Hamine who died between 1948 and 1950 and whose heirs transferred the same to the 2nd defendant-respondent in 1952. The plaintiff-appellant gave evidence and called witnesses to show that the threshing floor in question had been used by her, her husband and other predecessors-in-title for over 30 years. It appears that in 1929 the co-owners of the larger land, on a portion of which the threshing floor in question stands, amicably partitioned the larger land by a deed, and with the assistance of the plan marked X. The plaintiff-appellant and her predecessors in title were not parties to this deed, and we are of the view that the execution of that deed of partition does not affect the rights, if any, of the plaintiff-appellant and her predecessors in title to the servitude in question. In the circumstances the user of this threshing floor by the plaintiff-appellant and her predecessors in title even prior to 1929 becomes relevant for the decision of this case.

The plaintiff-appellant has called the witness Podisingho who was an usufructuary mortgagee under the plaintiff-appellant's husband. Podisingho states that for nearly four years he used the threshing floor in question to thresh the paddy from the field of which he was the usufructuary mortgagee. He says that he did not even know who the owner of the threshing floor was. This evidence satisfies us that his user of the threshing floor was not merely open and peaceable but exercised as a matter of right. The plaintiff-appellant's case is also strengthened by the evidence of James Appuhamy who says that for a period of 14 years prior to his giving evidence he is aware that the plaintiff-appellant used this kamatha although he says he does not know whether this user was with the permission of anybody. The judgment of the learned District Judge shows that he was satisfied with the plaintiff-appellant's version that she and her predecessors in title had used the kamatha in question, but he held that the user by the plaintiff-appellant of the threshing floor was not as a matter of right because of certain evidence given by the plaintiff-appellant in the course of the trial. That evidence is at page 45 of the typewritten record and is as follows :—

"Q. I put it to you that you have not used the right of *kamatha* over this field as a right but with the permission of Baba Hamine and Sirisena?

A. We obtained Sirisena's consent later. We obtained Baba Hamine's permission and later Sirisena's. Baba Hamine is related to me."

On that evidence the learned District Judge has held that the user of the threshing floor was not as of right but with continued permission of the soil owners and therefore did not give the plaintiff-appellant a prescriptive right of servitude of threshing paddy on this threshing floor.

Now the case for the plaintiff-appellant was that at the time Baba Hamine was the owner of the soil on which the kamatha now stands. the plaintiff-appellant's father-in-law, with the permission of Baba Hamine, constructed this threshing floor or kamatha, and that thereafter her father-in-law, her husband and later she herself had used the said kamatha as a threshing floor. The learned District Judge seems to have taken the view that if the user of the threshing floor commenced at one terminal point of time with the consent of the land owner it would preclude the person who uses the kamatha as a threshing floor from acquiring a servitutal right by prescription. The judgment of the Appellate Division of South Africa in the case of *Malan* v. *Nabygelegen Estates*, 1946 *Appellate Division* 562, shows that this is not so. It was there decided that although the right to draw and lead water from a fountain on the land of X to the land of Y commenced with the express permission and consent of X's predecessors in title but continued openly and as of right for over the prescriptive period it would entitle the owners of Y's land to a prescriptive right of servitude unless there is evidence that the subsequent user was also the result of continued permission. The fact that it started with permission will not prevent a servitude being acquired if the user is subsequently as of right.

Learned counsel for the respondent has cited to us the judgment of this Court reported in 58 *N.L.R.* 501 where it was held that if it is shown that the commencement of the exercise of a servitude is with permission it is presumed that it is continued in the same character, and he who asserts the acquisition of a servitutal right by prescription must rebut this presumption. Even so, we feel on the evidence in this case of the plaintiff-appellant read in the light particularly of Podisingho's evidence, that any such presumption of a user by continued permission has been rebutted.

The case of the 2nd defendant as contained in his answer is that the plaintiff-apppellant did use the kamatha in question on three or four occasions in Baba Hamine's time with her permission. He says that he became the owner about 1952 but he does not expressly state that any subsequent user was with his permission. In the light of what we have said we feel that the evidence of the plaintiff-appellant quoted above should be interpreted as meaning what was in fact her case, namely, that Baba Hamine's permission was originally obtained for the construction of the kamatha by her father-in-law. Sirisena, referred to in her evidence, is the 2nd defendant-respondent, and we interpret what the plaintiff-appellant said when she uttered the words " and later Sirisena's permission " as really meaning that there was no obstruction or hindrance by Sirisena, the 2nd defendant-respondent, to the continued use of the kamatha. In the circumstances we are of the opinion that the plaintiff-appellant has established the acquisition of a right of servitude of the threshing floor in respect of her field Kosgahakumbura over lots 1 and 2 depicted in the plan P 2 which lots belong to the 2nd defendant-respondent. Damages for the obstruction of her servitude were agreed on by the parties at the trial and was assessed at Rs. 5/- up to the date of the action and thereafter at Re. 1/- per month till the obstruction is removed. We therefore allow the appeal and set aside the order of the learned District Judge dismissing the plaintiff's action, and direct that decree be entered declaring the plaintiff-appellant, as the owner of the field called Kosgahakumbura, entitled to a right of servitude of threshing paddy on the kamatha depicted as lots 1 and 2 in the plan marked P 2 and belonging to the 2nd defendant-respondent, with damages at the rate of Rs. 5/- up to the date of the action and thereafter at the rate of Re. 1/- per month until the obstruction is removed. The plaintiff-appellant will be entitled to her costs both in the court of first instance and in this Court.

ABEYESUNDERE, A.J.—

I agree.

Appeal allowed.

Present: T. S. Fernando, J. and Sinnetamby, J.

KALIAPPA PILLAI *vs.* CASSIM AND ANOTHER

In the Matter of an Application for Conditional Leave to Appeal to the Privy Council in S.C. No. 679/D.C. Colombo No. 36600/M.

S.C. Application No. 288 of 1960.

Argued on : 4th November, 1960.
Decided on : 24th July, 1961.

Privy Council—The Appeals (Privy Council) Ordinance (Cap. 85), Rule 1 (a) of Schedule—Rent and ejectment action—Order of ejectment against tenant—Application for conditional leave to appeal as of right under Rule 1 (a)—Is it the value of the property or the value of the claim in question that is material in deciding whether petitioner should be given leave to appeal under Rule 1 (a)—Effect of uncontradicted affidavit that premises in suit worth more than Rs. 35,000 and right of occupancy more than Rs. 5,000.

The petitioner was a tenant who had been successfully sued by his landlord (in a rent and ejectment action) and whose ejectment had, in appeal, been ordered by a judgment of the Supreme Court. He now applied for conditional leave to appeal to Her Majesty in Council. The premises in question were subject to the Rent Restriction Act, 1948, and the monthly rental was Rs. 210/83. The present application was made on the basis that an appeal lay as of right under Rule 1 (*a*) of the Rules in the Schedule to the Appeals (Privy Council) Ordinance (Cap. 85). The petitioner had also filed an affidavit in support of his application in which he declared that the premises in question were worth more than Rs. 35,000 and valued his occupancy right at more than Rs. 5000.

Held : That the petitioner should be granted conditional leave to appeal under Rule 1 (*a*) as,

(*a*) on the facts of the present application it is the *value of the property* and not the value of the claim in question, which was the determining factor ;

(*b*) his affidavit which declares that his right to occupation of the premises as a protected tenant is worth more than Rs. 5000 stands uncontradicted.

Followed :*Meghji Lakhamshi & Brothers vs. Furniture Workshop*, 1954 A.C. 80; 1954 (1) A.E.R. 273.

Distinguished : *Subbiah Pillai vs. Fernando*, (1950) 52 N.L.R. 217.

Referred to : *Lipshitz vs. Valero & Others*, 1948 A.C. 1.

H. V. Perera, Q.C. with *S. Sharvananda*, for the petitioner.

H. A. Koattegoda with *S. Mohamed*, for the 1st respondent.

T. S. FERNANDO, J.—

This is an application for conditional leave to appeal to Her Majesty in Council by a tenant in a rent and ejectment action who has been sued successfully by his landlord and whose ejectment has been ordered by a judgment of the Supreme Court delivered on 3rd June, 1960.*

It is common ground that the premises from which the petitioner has been ordered to be ejected are subject to the operation of the Rent Restriction Act, 1948, and that the monthly rental thereof is Rs. 210/83.

The application is being made on the basis that an appeal lies as of right in terms of Rule 1 (*a*) of the Rules in the Schedule to The Appeals (Privy Council) Ordinance (Cap. 85). It is being resisted by the landlord who contends that the matter in dispute on the appeal is not of the value of five thousand rupees and that the appeal does not involve directly or indirectly some claim or question to or respecting property of that value.

In support of the application reliance is placed on two decisions of the Privy Council. The first of these is the case of *Lipshitz vs. Valero*, 1948 A.C.1, where the Judicial Committee had to consider the interpretation of Article 3 (*a*) of the Palestine (Appeal to Privy Council) Order in Council, 1924, which is on all material points similar to Rule 1 of our Schedule Rules, except that the specified value there is £500. The respondent in

*See 58 C.L.W. 64.

that case claimed an order for possession of land which he had leased to the appellant on a monthly tenancy at a rent of £13.500 a month, and on which the appellant had erected a building at a cost of £450. The appellant pleaded, *inter alia*, that the action was contrary to the provisions of the Rent Restrictions (Business Premises) Ordinance of Palestine. The respondent being successful in the Supreme Court, the appellant applied for and obtained from the Supreme Court leave to appeal to the Privy Council, the Supreme Court holding that the tenancy right amounted in value to at least £50 and the value of the building to £450. On an objection by the respondent that the Privy Council had no jurisdiction to entertain the appeal on the grounds that all that was in dispute was the appellant's right to occupy a small piece of land, and that the value of the building did not enter into the value of "the matter in dispute", the Judicial Committee held that the Supreme Court had applied the right test under Article 3 which was whether it was worth £500 to the appellant that the Rent Restrictions (Business Premises) Ordinance should be held to give him protection against an order to vacate the land leaving on it a building which cost £450 to erect.

The other case relied on by the petitioner is that of *Meghji Lakhamshi & Brothers vs. Furniture Workshop*, 1954 A. C. 80, also a decision of the Judicial Committee interpreting a similar article to be found in the Eastern African (Appeal to Privy Council) Order in Council, 1951. Lord Tucker, delivering the opinion of the Committee, stated that "on the true construction (of the Article) it is the value of the property, not the value of the claim or question, which is the determining factor". This was a case where leave to appeal had been sought by a landlord, and Their Lordships went on to say that " looked at from the angle of the landlords, the value of the property, vacant possession of which they were claiming, was correctly taken on a capital value basis". They did go on to say, however, that "it by no means necessarily follows that the result would have been the same if the tenants had been the appellants", and referred to certain decisions of the Court of Appeal for Eastern Africa which unfortunately are not available to us here for reference. Had there been no expression of opinion by the Privy Council on the point in question, I would myself have been inclined to favour the opinion that it is the value of the claim or question and not the value of the property that is material. I must add that in support of his application the petitioner has put forward an affidavit in which he declares that the premises in suit are worth Rs. 35,000/- and values his occupancy right at more than Rs. 5,000/-. The landlord who has had notice of the tendering of this affidavit has not atempted to contest by counter affidavit this declaration as to the value of the occupancy right. His counsel referred us to the decision of this Court in *Subbiah Pillai vs. Fernando*, (1950) 52 N.L.R. 217, where it was held that in an action between landlord and tenant, the right to possession of the premises in question must, for the purpose of valuing the matter in dispute in an application for conditional leave to appeal to the Privy Council, be valued at the rental reserved by the contract of tenancy. I feel bound to add that that case came to be decided without the complication we meet with here of the statutory protection afforded to a tenant by the Rent Restriction Act.

This application is said to be the first of its kind where a tenant of premises to which the Rent Restriction Act applies and which were occupied by him on a monthly tenancy at a rental which is below the value specified in Rule 1 (*a*) of the Schedule Rules is seeking leave to appeal to Her Majesty in Council against an order of ejectment. My brother and I felt that, if the application is successful, it is reasonable to anticipate that there will be many more similar applications. That consideration combined with our view that the interpretation of the relevant limb of Rule 1 (*a*) is not free from doubt or difficulty led us to make, on January 5, 1961, a direction that this application be submitted to His Lordship, the Chief Justice in terms of Section 51 of the Courts Ordinance to consider the assembling of a fuller Court to decide the question of law that arises here. The Registrar has since brought to our notice a minute made by His Lordship, the Chief Justice, on June 2, 1961, which indicates that he does not propose to exercise his powers under Section 51 in this instance as "there is neither a difference of opinion among the Judges who heard this case nor a conflict of decisions of the Supreme Court". It therefore becomes necessary that we should now deliver our order on the application for conditional leave as counsel have intimated that they have no further arguments to adduce.

We consider that in the state of the facts before us on the present application we should apply the decision in *Meghji Lakhamshi's Case* (*supra*) that it is the value of the property, not the value of the claim or question, which is the determining factor. Moreover, the petitioner claims leave under both

limbs of Rule 1 (*a*), and his affidavit which declares that his right to occupation of the premises as a protected tenant is worth more than Rs. 5,000/- stands uncontradicted. In these circumstances I would grant the application on the usual conditions.

The petitioner is entitled to the costs of this application.

SINNETAMBY, J.—

I agree.

Application allowed.

Privy Council Appeal No. 49 *of* 1960

Present : **Lord Tucker, Lord Hodson, Mr. L. M. D. de Silva**

RAJARATNAM SIVAKUMARAN (Executor of the Estate of Veeragathipillai Rajaratnam, deceased)

vs.

VEERAGATHIPILLAI RAJASEGARAM,

From

THE SUPREME COURT OF CEYLON

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

DELIVERED THE 20TH FEBRUARY, 1962.

Partnership—Prevention of Frauds Ordinance, section 18*—Absence of written agreement—Whether business carried on in partnership or co-ownership—Proof of partnership—Trusts Ordinance, section* 96.

The plaintiff sued the defendant for a declaration that he was the owner of two-thirds share of the assets and goodwill of a business named S. V. & Sons, and for an order for an accounting of assets taken charge of by the defendant and of profits of the business from 31st December, 1950. The claim was made on the basis of co-ownership. The defendant, having denied co-ownership, stated that the business was carried on in partnership between the plaintiff and the defendant, and that in the absence of an agreement in writing as required by section 18 of the Prevention of Frauds Ordinance, the action was not maintainable. The District Judge held that the facts of the case taken together did not shut out the existence of a co-ownership and decided in favour of the plaintiff. On appeal, the Supreme Court held that no conclusion other than that the business was a partnership was reasonably possible, and set aside the order of the District Judge. The plaintiff appealed. On appeal before the Board it was also argued that the plaintiff was entitled to relief on the basis of a constructive trust arising by virtue of section 96 of the Trusts Ordinance.

Held : (i) That on the evidence the business had been carried on as a *de facto* partnership and had never assumed character of a co-ownership.

(ii) That the interests of the plaintiff and the defendant in the business arose at the moment they were taken into the business and constituted partners. Therefore the parties were never co-owners, and no argument based on the fact that they had once been co-owners could succeed.

(iii) That before the plaintiff could take advantage of section 96 of the Trusts Ordinance, he must be in a position to establish the partnership. Since he could not do this, the argument failed.

Cases referred to : *Pate vs. Pate*, (1915) 18 N.L.R. 289.
Balasubramaniam vs. Valliappar Chetty, (1938) 39 N.L.R. 553 ; XI C.L.W. 87.
Rajaratnam vs. The Commissioner of Stamps, (1938) 39 N.L.R. 481; XI C.L.W. 15.

E. F. N. Gratiaen, Q.C. with *Walter Jayawardene*, for the plaintiff-appellant.

Dingle Foot, Q.C. with *D. J. Tampoe*, for the defendant-respondent.

MR. L. M. D. DE SILVA

The plaintiff (appellant on this appeal) instituted this action in the District Court of Point Pedro against the defendant (respondent on this appeal) who was his brother for a declaration that he, the plaintiff, was the owner of a two-third share of the assets and goodwill of a business carried on at Jaffna under the name of S. Veeragathipillai & Sons and for an order on the defendant for an accounting of all the assets taken charge of by the defendant and of the profits of the business from

the 31st December 1950. He filed with the plaint a balance sheet of the business made up to 31-12-50 audited and certified by duly appointed auditors. He complained that no accounts had been rendered since that date. He further complained that the defendant had taken possession of the business denying the rights of the plaintiff thereto since the the 7th June 1952 and was making use of the said business as property belonging solely to him. The claim was made on the basis of co-ownership. The defendant denied the co-ownership. He pleaded that the business had been carried on by the plaintiff and himself in partnership, that there was no agreement in writing as required by section 18 of the Prevention of Frauds Ordinance 1840 and that consequently the action was not maintainable. He also raised certain other defences involving questions of fact which were rejected by the learned trial judge. With regard to these no questions arise on this appeal.

With regard to the question of partnership the learned trial judge held that " though an agreement for a partnership may be inferred the facts of this case taken together do not shut out the existence of a co-ownership ". He held that the plaintiff was entitled to the relief he claimed and entered decree in his favour. On appeal the Supreme Court held that " no conclusion other than that the business is a partnership is reasonably possible ", set aside the learned trial judge's judgment and dismissed the action.

It is convenient at this stage for their Lordships to examine the provisions of section 18 of the Prevention of Frauds Ordinance (Chapter 57 Ceylon Legislative Enactments) which is as follows :—

> " 18. No promise, contract, bargain, or agreement, unless it be in writing and signed by the party making the same, or by some person thereto lawfully authorised by him or her, shall be of force or avail in law for any of the following purposes :—
>
> (*c*) for establishing a partnership where the capital exceeds one thousand rupees ;
>
> Provided that this shall not be construed to prevent third parties from suing partners, or persons acting as such, and offering in evidence circumstances to prove a partnership existing between such persons or to exclude parole testimony concerning transactions by or the settlement of any account between partners ".

Sub-sections (*a*) and (*b*) have no bearing upon this case. On the argument on this appeal a business with a capital of over one thousand, carried on without an agreement in writing but with the other elements necessary to constitute a partnership was called a *de facto* partnership. This term will be used in this judgment to convey the same meaning.

It was held by the Board in 1951 in the case of *Pate vs. Pate* (18 N.L.R. 289) and has been settled law since that an action by a partner of a de *facto* partnership brought against another in possession of the business for an accounting could not be maintained as the plaintiff's rights as a partner could not be established in the absence of a writing. The judgment of the Board also contains the following observations.

With regard to the law relating to partnership it observed at p. 290 " Ordinance No. 22 of 1866 enacted that English law is the law of partnership in Ceylon, but this in no way enlarged or diminished the prior Ordinance No. 7 of 1840 ".

Referring to the fact that in particular cases the application of the Ordinance may result in hardship it said at p. 293,

" Whenever the law enacts that the truth shall be proved by one form of testimony only, and not by all admissible and available forms, there is peril of doing particular injustice for the sake of some general good, and even of enabling some rogue to cloak his fraud by taking advantage of a statutory prescription the policy of which was the prevention of fraud. This the Legislature must be taken to have weighed before enacting the Ordinance ".

Various allegations of reprehensible conduct have been made by the parties against each other. Their Lordships have not considered them to the extent necessary for deciding upon their truth or falsity. As will presently appear, upon the views they have formed, the truth or falsity of these allegations would not affect the result of the case.

Later cases decided by the Supreme Court of Ceylon laid down the principle that a *de facto* partnership could be alleged and proved to defeat on the facts an action brought by one partner of a *de facto* partnership against another on a false basis of fact asserted to avoid the necessity for basing the claim on partnership such latter claim being bound to fail for lack of writing. There is no reason why such a course should not be permitted because although the agreement behind a *de facto* partnerships is of no force or avail in law to establish a partnership there is nothing which makes the facts involved in it inadmissible in evidence for the purpose of destroying an allegation of a false set of facts upon which a claim on a false basis is sought

to be made. In *Balasubramaniam vs. Valliappar Chettiar* (39 N.L.R. 553) the plaintiff, the executor of the will of one Muttiah founded his claim against the defendant on an allegation that the defendant had been the agent of Muttiah. The defendant denied the allegation of agency and sought to sustain his plea by proving by parole evidence that the true relationship was that of *de facto* partnership. This he was allowed to do. Keuneman, J. said at p. 558 :

> " The plaintiff alleges that there was a gratuitous agency on the part of defendant in relationship to Pillai. The defendant seeks to rebut that allegation, and to prove that the relationship between these persons was one of partnership, but that in consequence of the absence of any written agreement, that relationship was of no force or avail at law, and that the plaintiff cannot maintain this action."

He held that the defendant was entitled to lead such evidence remarking—

> "If a defendant in this position were not allowed to give such evidence, a ready means would be available for a dishonest plaintiff so to frame his action as to escape the effect of section 21" (now section 18).

Their Lordships will now consider the material upon which the Supreme Court came to the conclusion that the business was a de facto partnership and not a co-ownership.

The plaintiff and the defendant are the sons of one Veeragathipillai who carried on business at Jaffna and Point Pedro as a trader in a number of commodities among which were rice, paddy, tiles and timber and also as a money-lender and pawnbroker. In 1929 he took the plaintiff and defendant into the business giving each of them a one-third share in it. An application for the registration of the business under the Business Names Registration Ordinance (Chapter 120 Ceylon Legislative Enactments) was made on the 6th March 1929 the date of the commencement of the business being there given as the 2nd March 1929. The business which commenced on that date was no doubt the business of the father and the two sons because Veeragathipillai's business run by himself alone had commenced many years before 1929. In the application in the cage headed "The present name in full of every individual who is partner in the firm" the names of Veeragathipillai, the plaintiff and the defendant have been entered.

Attached to the plaint and pleaded as part of it there is, as stated in the opening paragraph above, a financial statement audited and certified by duly appointed auditors. In this statement under the heading " Profit and Loss Appropriation Account" appears an item " Transfer to partners current account " in which money is appropriated to the plaintiff and the defendant. Commenting on this statement and on similar statements for 1946, 1947, 1948 and 1949 the Supreme Court states correctly " all these statements have been prepared on the basis that the business is a partnership ". ' Partnership ' here and in several places in the judgment of the Supreme Court is used in the sense of a *de facto* partnership.

Mr. Kumaraswamy, a chartered accountant, stated in evidence that the accounts had been kept on the basis of a partnership. Mr. Kumaraswamy had been in close touch with the accounts. His evidence was not rejected and there is no reason to distrust what he said. His evidence covers the period after the death of the father referred to immediately.

Veeragathipillai died on the 3rd December 1933 leaving a last will dated 14th October 1933. By that will he left his one-third share in the business to the plaintiff making provision for such claims as his wife had on it under the law of Tesawalamai applicable to the parties. Those provisions have been complied with and plaintiff without doubt became entitled to his father's one-third share. The plaintiff says that the business was conducted after the father's death in exactly the same way and was of the same nature as in the father's lifetime except that the plaintiff was regarded as entitled to two-thirds share in place of the original one-third. It is not disputed that till 1952 the business was so carried on. It is to be inferred that on the death of the father there was immediate agreement between the plaintiff and the defendant to carry on the business on exactly the same basis as it had been carried on during the father's lifetime. In 1952 disputes between the plaintiff and defendant came to a head. In view of the decision which their Lordships have arrived at on the question of partnership those disputes are not relevant to the result of the case.

On the 14th October 1933 (the day of the execution of the will) Veeragathipillai, plaintiff and defendent executed a solemn document, presumably to place on record their respective positions with regard to the business, which was produced in evidence by the plaintiff in the father's Testamentary Case Jaffna No. 58. The following is the relevant portion of the translation put in in that case ;—

" Know all men by these presents that we, Sinnathamby Veeragathipillai and sons, Veeragathipillai Rajaratnam and Veeragathipillai Rajasegaram, all of Thondamannar, declare as follows :—

Whereas we are carrying on business in partnership under the name, firm and style of "Veeragathipillai & Sons " in paddy, rice, tiles, teakwood (timber) and tobacco and various other goods and also pawn-broking, and whereas we have registered the said business on 8th day of March 1929, under No. in the Vilasam of " S.V." and whereas we the three persons are entitled to equal shares in the said Business and whereas it appears to us that it is necessary that we should make a declaration of the same.

Know all men by these presents that we the said Sinnathamby Veeragathipillai, Veeragathipillai Rajaratnam and Veeragathipillai Rajasegaram, declare that we the three persons have equal shares in the partnership business carried on by us under name, firm and style of " S.V." and " S. Veeragathipillai & Sons ".

It was attested by a notary public who stated in his attestation :—

" I, Sinnathamby Subramaniam, Notary Public, Jaffna, do hereby certify and attest that the foregoing Instrument was read over and explained by me."

The same document was put in evidence in the present case by the plaintiff with a translation which has substituted for the word " partnership " the words 'joint business'. It has to be remembered that in the earlier case (the testamentary case) the present dispute had not arisen.

Several cheques were produced signed by the plaintiff as 'partner'. A plaint was produced in an action brought by the plaintiff and defendant in which they described themselves as partners. After an examination of the documents mentioned above and several other documents in which the plaintiff and defendant described themselves as partners the learned District Judge came to the conclusion that " The inference to be drawn from all these documents in which they have described themselves as partners would be that this business appears to have been carried on on the basis of a partnership. But the matter does not stop there. One has to probe further and consider the other documents and evidence placed in this case to determine whether in fact there was only a partnership that had come into existence or whether the facts could also be consistent with co-ownership." The Supreme Court after examining the same documents and the other evidence said that the only possible conclusion was that the business was a partnership (meaning a *de facto* partnership). Their Lordships agree with the view of the Supreme Court. Whatever the extent may be in which the " facts could also be consistent with co-ownership " they demonstrate that the plaintiff and defendant regarded themselves as partners and avowedly conducted business on that basis.

An examination of the evidence given by the plaintiff in District Court Case Jaffna 58 Testamentary and the circumstances in which it was given throws considerable light on the matter now under consideration. The case related to estate duty payable on the father's estate. The evidence was given in 1937 before the questions now in dispute between the plaintiff and the defendant had arisen. The plaintiff said—

" This business was registered as partnership business in 1929.

Before it was registered there was a verbal agreement between my father and myself and my brother with regard to this business. My father said that as we have already joined in the business we would be given equal shares in the business with him. In 1929 there was an agreement that this business should be carried on in partnership—1/3rd share each. My father applied for registration of the business."

He was confronted with this evidence in the present action and his answer ran thus :

" *Q.*—Did you say " in 1929 there was an agreement that this business would be carried on in partnership ?"

A.—I gave evidence in Tamil as " Pangkali ". I do not know how it was interpreted. My lawyers knew the English language. Mr. C. Cumaraswamy was the District Judge and Mr. N. Nadarajah was the counsel who appeared for me in the Testamentary case."

Mr. Cumaraswamy and Mr. Nadarajah are both Tamil gentlemen and it was so stated to their Lordships by counsel on this appeal. There could not have been a blatant mistake on the part of the interpreter because it would have been noticed at once by the Court. There has, in fact been no complaint that the interpreter has made a mistake in his translation. The case for the plaintiff put at its highest could only be that he used a word capable of being translated into English either as 'partner' or 'co-owner', that he meant to convey the meaning of 'co-owner' and that it has been translated as 'partner'. In support of this posi

tion it is pointed out that the trial judge has held that the plaintiff "never appreciated the difference between a partnership and a co-ownership and the legal consequences that flowed directly from them." But the plaintiff was not the only person to whom responsibility for the word 'partner' in the evidence as translated and recorded is to be attributed. He was advised and represented in Court by lawyers in that case and if the plaintiff had meant to say co-owner and not partner they would have known that fact. They would before taking any part in the proceedings have gone in detail into all the facts and, if such was the case, have known that the interpretation 'partnership' though it could not be said to be wrong as a matter of language did not carry the connotation that the plaintiff intended. They could have intervened to put the matter right but did not do so. This indicates that the plaintiff did intend to say 'partnership' and nothing less or more.

It has no doubt to be remembered that in the testamentary case the issue between "partnership" and "co-ownership" had not arisen and plaintiff would have succeeded equally on the basis of "partnership" as on that of co-ownership. But it is not lightly to be presumed that the lawyers who appeared would not have seen to it that the evidence recorded was accurate and precise ; in the background of the rest of the evidence in this case it does not appear that they failed to do so.

The bequest to the plaintiff by the father by Last Will is made in the following language :—

> "Out of the money and articles in the business carried on under the names and style of "S.V., S. Veeragathipillai & Sons". One third share belonging to the said Veeragathipillai and the whole of our lands, mortgage amounts, Promissory Note amounts, sailing vessels, and boats "Nadai Vaththai" and other movables should devolve on our son Veeragathipillai Rajaratnam."

It is argued that the language is inappropriate if Veeragathipillai had regarded himself as a partner. The language is also inappropriate if Veeragathipillai had regarded himself as a co-owner because (as correctly stated by counsel for the appellant in another connection) a co-owner would own an undivided one-third share of each article not a one-third share "out of the articles". A bequest by a co-owner could have properly taken the form "my undivided one-third share". Their Lordships do not think any weight can be attached to the language used. In any case even if some weight were to be attached their Lordships are of the view that the rest of the evidence completely outweighs the point sought to be made.

The Supreme Court (Soertsz, J. with whom de Kretser, J. agreed) held in Case No. 58 Testamentary Jaffna referred to above (reported in 39 N.L.R. 481) that in 1929 the father gifted a one-third share in the business to each of his sons. It has been argued that the gift so made created a co-ownership. An examination of the judgment of the Supreme Court in that case shows the argument to be erroneous.

The facts relevant to the present case arising from Case No. 58 Testamentary Jaffna are the following. On the death of the father the Commissioner of Stamps took up the position that the whole of the business passed on the father's death and sought to levy estate duty on the value of the whole. The plaintiff (in the present case) resisted on the ground that the father had divested himself of a two-thirds interest in 1929. In the words of Soertsz, J. at p. 484 :—

> "The appellants based their claim on the ground that from March 1929 a partnership had subsisted between them and their father ; alternatively, on the ground that by virtue of what occurred in March 1929 when the business was registered in the names of the three of them there was at least a gift of a one-third of the father's share to each of them and that they took *bona fide* possession and enjoyment of it immediately and thenceforward retained it to the exclusion of the donor."

He rejected the first ground of partnership because there was no agreement in writing. He said of certain documents produced in the case "This Court, held, if I may say so, quite rightly that documents such as these prove that the parties were carrying on business in partnership and nothing more. They do not prove what section 21(4) (now section 18) requires namely that the agreement for carrying on the business in partnership was in writing. Consequently the position that results from the evidence in the case is that there was a business conducted by these parties which cannot, however, be adduced to a court of law as a partnership 'of force or avail' because a rule of evidence stands in the way and prevents it from being so adduced". He then turned to the second ground. He said "There was the alternative claim that when in March 1929 the deceased admitted his two sons into the business on an equal footing with himself as evidenced by A 4 (this is the declaration made shortly before death) there was in effect a gift of a third of the business to each

of his sons and that that gift satisfied the condition necessary to ensure that their share did not pass on death ". After considering various arguments and authorities he upheld this argument. It will be seen that upon the view taken in that case the " gift " was the result of the creation of the *de facto* partnership. The inference that there was a donation resulting in a co-ownership cannot be drawn from what was held in that case.

The learned District Judge has held—

> " In all the circumstances of this case I find that though an agreement for a partnership may be inferred the facts of this case taken together do not shut out the existence of a co-ownership, the character which this business assumed originally. In any event it is my opinion that the vanishing point of co-ownership has not been established in this case."

Their Lordships do not think that the business ever assumed the character of a co-ownership. They are of the view that the interests of the plaintiff and defendant in the business arose at the moment they were taken into the business and constituted partners. The application for registration as partners under the Business Names Registration Ordinance was made on the 6th March 1929 and the date of commencement of the business appears from the said application to have been the 2nd March 1929 immediately before the application. There is nothing to warrant the view that there were two separate acts one of donation and another of the creation of a partnership. There was in fact a donation because the father ceased to be the absolute owner and the rights of the plaintiff and defendant as partners were dependent on the voluntary parting with absolute ownership by the father ; but those rights of the plaintiff and defendant in the business, derived though they were from the father, were the result of the creation of the *de facto* partnership and not something independent of it.

An argument was addressed to their Lordships based on the Roman Dutch Law of co-ownership that the parties once having been co-owners never became partners. What has been stated earlier disposes of this argument because their Lordships are of the view that the parties were never co-owners.

The learned District Judge says " even though it could be said in this case that all other conditions existed there certainly was no division of or sharing of profits in this case ". This view would appear to be erroneous. Alagasunderam a witness called by the plalintiff whose evidence there is no reason to doubt said he " had been working as a kanakapulle (accounts clerk) from the time of the late Veeragathipillai " and went on to say " The business has been carried on as partners and profits have been ascertained from time to time and divided between the partners ". If this correction is made in what the learned District Judge said his view would appear to be that all the conditions necessary for a *de facto* partnership existed.

The Supreme Court said :—

> " The principal reason that appears to have induced the trial Judge to take the view that co-ownership could not be excluded in regard to the business carried on after Veeragathipillai's death is that the shares of the plaintiff and the defendant in the business and the division of the profits between them were in the proportion of two-thirds and one-third respectively, and that the inequality of shares is inconsistent with partnership."

There is much force in the observation. The learned District Judge in more than one place in his judgment indicates that he was influenced by that view. At one point after referring to certain things said and done by the defendant he says " he cannot now be heard to say that the allocation should have been on the basis of 50 : 50 which would be the case if it was a partnership ".

Their Lordships will now examine an argument addressed to them that the defendant must be held to be a trustee for the plaintiff. The only basis on which the plaintiff made his claim was co-ownership and upon that basis he pleaded in the plaint that the defendant had since the 7th June 1952 taken possession of the business and that his possession of the plaintiff's share must be held to be in trust for the plaintiff. No other claim on the basis of trust was made so that the claim as made fails on the view that there was no co-ownership. On appeal no argument was addressed to the Supreme Court " that if the business is a partnership and not a co-ownership the plaintiff is entitled to any relief on the basis of a constructive trust by virtue of section 90 or 96 of the Trusts Ordinance ". It was however urged before their Lordships that in any case the defendant must be held under section 96 to be a trustee for the plaintiff. Section 96 reads :—

> " In any case not coming within the scope of any of the preceding sections where there is no trust, but the person having possession of property had not the whole beneficial interest therein, he must hold the property for the benefit

of the persons having such interest, or the residue thereof (as the case may be), to the extent necessary to satisfy their just demands."

Their Lordships would observe that before the plaintiff can make a " just demand " recognised by law he must be in a position to establish the partnership. This he is unable to do and consequently the argument fails. If the argument prevailed it would mean that in most, if not all, cases a party to a *de facto* partnership could use the argument to escape from the disabilities imposed on him by section 18 of the Frauds Ordinance and thus reduce the section to one of no consequence. The Legislature could never have intended such a result.

It appears from what has been said that their Lordships are of the view that the business was conducted on the basis of a *de facto* partnership. Any claim on the basis of partnership would fail and in fact has not been made. The claim on the basis of a co-ownership which has been made must fail because no co-ownership existed. For these reasons their Lordships will humbly advise Her Majesty that the judgment of the Supreme Court be affirmed and the appeal dismissed. The appellant must pay the costs of this appeal.

Appeal dismissed.

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

H. B. PREMAWATHIE *vs.* H. G. WELIS*
B. G. SUGATHADASA *vs.* H. G. WELIS

S.C. Nos. 492 *and* 519 *(F) of* 1959—*D.C. Galle No. X.* 2376.

Argued on : 18*th and* 19*th October*, 1961.
Decided on : 6*th November*, 1961.

Divorce—Husband suing wife on grounds of adultery with 2nd defendant and constructive malicious desertion—Only issue on adultery confined to one date—Evidence led indicated only preparation towards act of adultery—Other evidence consisted only of (a) *evidence of behaviour of defendants prior to that date;* (b) *letters written by 2nd defendant to the 1st defendant and found in her almirah;* (c) *later attempt by 1st defendant to reside at 2nd defendant's house—Is such evidence sufficient to establish issue on adultery or constructive malicious desertion—Can a respondent to an appeal canvass a finding of the trial judge although he has not appealed therefrom—Civil Procedure Code, Section* 772.

Where an issue as to whether the 1st defendant (wife) committed adultery with the 2nd defendant on or about the 19th December, 1957, was answered by the trial judge in the affirmative basing his finding on the evidence (*a*) that the 1st and 2nd defendants were about to copulate when they were prevented by the unexpected intervention of the plaintiff (husband) who had been watching their movements ; (*b*) of a witness who spoke to their behaviour on previous occasions; (*c*) contained in some letters written by the 2nd defendant to the 1st defendant and found in the latter's almirah.

Held : (i) That the finding of adultery was insupportable as the evidence led and accepted was insufficient to establish adultery on the date mentioned in the issue.

(ii) That it was open to the plaintiff-respondent to canvass in appeal the trial judge's finding that desertion was not established, notwithstanding the fact that he had not appealed therefrom.

(iii) That on the facts accepted by the trial judge, namely, the said incident of 19-12-57, the previous behaviour of the defendants as deposed to by the witness, the letters received from the 2nd defendant and found in the 1st defendant's almirah, and an attempt by the 1st defendant some time after she left her husband's house to take up residence at the 2nd defendant's house, it is safe to assume that the marriage had broken down completely, and even if it is not possible to impute to the 1st defendant an *animusdeserendi* at the time she left the plaintiff's house on 19-12-57, such *animus* could have been imputed to her by the time the plaint came to be filed on 4-6-58.

Prins Gunasekera, with *G. P. S. de Silva* for the appellant in S.C. No. 492.

Colvin R. de Silva, with *Mangala Moonesinghe* for the appellant in S.C. No. 519.

H. W. Jayewardene, Q.C., with *M. T. M. Sivardeen* for the plaintiff-respondent.

*For Sinhala Translation, see Sinhala section Vol. 3, part 5, p. 17

T. S. FERNANDO, J.—

The plaintiff in this action claimed a divorce from his wife, the 1st defendant, on two grounds, (i) of her adultery with the 2nd defendant on or about 19th December, 1957, and (ii) of constructive malicious desertion. The 2nd defendant, as co-respondent, was sued for the recovery of damages by reason of the adultery aforesaid. The 1st defendant, while denying the adultery and desertion alleged against her, in turn alleged that the plaintiff was living in adultery with a woman of the name of Amawathie. She, however, did not claim a divorce from her husband on that ground, but prayed for the dismissal of the action against her, for alimony and for the maintenance of the two children of their marriage. After trial, the learned District Judge found that (*a*) the 1st defendant had committed adultery with the 2nd defendant about the 19th December, 1957, (*b*) the allegation of adultery by plaintiff with Amawathie was artificial and false, and (*c*) there was insufficient evidence to hold that the 1st defendant deserted the plaintiff. Accordingly, he ordered a *decree nisi* to be entered dissolving the marriage between the plaintiff and the 1st defendant, and ordered the 2nd defendant to pay the plaintiff a sum of Rs. 4,000/- as damages. Both defendants have appealed to this Court against the judgment of the District Court.

In regard to the appeal of the 2nd defendant (Appeal No. 519), it has been urged with good reason that the learned District Judge's finding of adultery is unsupportable. The only issue raised at the trial in respect of the adultery alleged to have been committed by the 2nd defendant was the following :—

> Did the 1st defendant commit adultery with the 2nd defendant on or about the 19th December, 1957 ?

In regard to this issue all that the evidence disclosed was and the finding of the learned District Judge in fact is that on the date so specified the 1st and the 2nd defendants were "about to copulate and they were prevented by the unexpected intervention of the plaintiff". The evidence makes it clear that the plaintiff who had been watching the movements of the two defendants had surprised them before they could become physically intimate on the 19th December, 1957. The learned District Judge observes that the two defendants had ample opportunities to copulate before this date and that the evidence of a man called Sarnelis and certain letters written by the 2nd defendant to the 1st defendant suggest they had copulated before. Apart from the circumstance that learned counsel for the plaintiff appearing before us at the appeal was himself not prepared to argue that the evidence of Sarnelis and the letters established adultery, the fact that the issue raised at the trial was confined to the adultery alleged to have been committed on 19th December, 1957, appears to have been completely overlooked at the trial. Mr. Jayewardene conceded that he was unable to resist the appeal of the 2nd defendant. It has accordingly to be allowed.

Mr. Jayewardene, however, contended that the plaintiff was entitled to a decree of divorce on the ground of constructive malicious desertion. Mr. Gunasekera for the 1st defendant argued that, the plaintiff not having appealed, it was not open to him now to canvass the trial judge's finding that desertion was not established. I think it is open to the plaintiff, who is the respondent to the 1st defendant's appeal, to seek to maintain the decree on any of the grounds decided against him in the court below—see section 772 of the Civil Procedure Code. Although the evidence accepted by the trial judge disclosed at most preparation towards an act of adultery, the conduct of the 1st and the 2nd defendants, as disclosed by the incident of the 19th December, 1957, and their behaviour on previous occasions spoken to by the witness Sarnelis and the letters received from the 2nd defendant by the 1st defendant and found in her almirah were such that the plaintiff would have been justified either in turning out the 1st defendant from the house or in leaving the house himself Moreover, the trial judge has found as proved that the 1st defendant attempted sometime after she left her husband's house to take up residence at the house of the 2nd defendant. In the circumstances found by the trial judge as proved in this case it is safe to assume that the marriage has broken down completely and that, even if it is not possible to impute to the 1st defendant an *animus deserendi* at the time she left the plaintiff's home on 19th December, 1957, such animus could have been imputed to her by the time the plaint came to be filed on 4th June, 1958. The learned trial judge appears to have dealt with the evidence relating to the issue on desertion only cursorily, perhaps for the reason that he reached emphatic findings on the issue relating to adultery. The issue relating to desertion should in my opinion have been

answered against the 1st defendant, and the finding on this issue reached in the court below is hereby reversed.

In the result, Appeal No. 519 is allowed and the plaintiff's action as against the 2nd defendant is dismissed. The plaintiff must pay the 2nd defendant his costs in both courts. Appeal No. 492 is dismissed with costs, but the *decree nisi* entered on the 7th October, 1959, will have to be amended to reflect the opinion of this Court that only malicious desertion by the 1st defendant has been established. The order of Court in regard to the custody of the children will also remain.

SANSONI, J.—
I agree.

Appeal No. 492 dismissed.
Appeal No. 519 allowed.

Present : **Tambiah, J.**

S.C. No. 125/61—*M.C. Gampola Case No.* 6388.

THE ATTORNEY-GENERAL *vs.* N. SUPPIAH AND ANOTHER

Argued on : 19th May, 1961.
Decided on : 24th May, 1961.

Criminal Procedure Code, sections 148 (1) (*d*), 151 (2), 187 (1), 189 (1)—*Witness giving evidence at pre-trial stage—Must he be recalled or tendered for cross-examination at trial—Evidence Ordinance, section* 138.

Proceedings were initiated in the Magistrate's Court under section 148 (1) (*d*) of the Criminal Procedure Code, by the accused being brought before the Magistrate in custody without process, accused of having committed an offence under section 315 of the Penal Code. Thereupon the Magistrate, acting in terms of sections 151 (2) of the Criminal Procedure Code, examined the injured person, *M.*, and the constable who produced the accused in custody. The constable stated in evidence that he knew nothing of the facts of the case. The Magistrate then proceeded to frame a charge in terms of section 187 (1) of the Criminal Procedure Code, and evidence was led for the prosecution and defence. Although the prosecution called *M.* as a witness, the constable was neither called, nor was he tendered for cross-examination. At the conclusion of the trial, the Magistrate upheld an objection raised by Counsel for the accused that the trial was illegal because the constable had not been called or tendered for cross-examination, and discharged the accused. The Attorney-General appealed from this order.

Held : That a witness who gives evidence at a pre-trial stage, and states that he knows nothing of the facts of the case, need not be called at the trial.

Cases referred to : *Isodor Fernando* vs. *Roy Perera*, (1947) 48 N.L.R. 203.
Perera vs. *Ja-ela Police*, (1959) 61 N.L.R. 260.

V. S. A. Pullenayagum, C.C., with *A. M. Coomarasamy, C.C.*, for the Attorney-General-appellant.

No appearances for the accused-respondents.

TAMBIAH, J.

The point which arises for consideration in this case is whether a witness, who was examined at the pre-trial stage when the accused were brought before the Magistrate otherwise than on summons or warrant and who knew nothing about the facts of the case but stated that he produced the accused before the Magistrate on a charge preferred against the accused, should either be called or be tendered for cross-examination at the trial of the accused.

In this case, the 1st and 2nd accused were charged with having voluntarily caused hurt to one Murugiah with a battle-axe and a knife respectively, under Section 315 of the Penal Code. They were convicted at the first trial. On appeal, the Supreme Court set aside the order of the Magistrate for failing to observe the provisions of section 187 (1) of the Criminal Procedure Code and the case was sent back for re-trial. At the re-trial, the evidence of Murugiah, the injured person, and the evidence of Senaratne, Police Constable 5333, were led before the charges were framed against the accused. Murugiah stated in his evidence that the accused had stabbed him, but Constable Senaratne said that he knew nothing about the facts of the case and that he was

producing the accused since charges of having caused hurt to Murugiah were preferred against the accused. After the evidence of these two witnesses, the accused were charged and evidence was led both for the prosecution as well as for the defence. The prosecution called the injured man, Murugiah, but Senaratne, who had given evidence at the pre-trial stage, was neither called to give evidence nor was he tendered for cross-examination. At the conclusion of the trial, the counsel for the accused, purporting to rely on the ruling in *Perera* vs. *Ja-ela Police*, (1959) 61 N.L.R. 260, contended that the trial was illegal, as the witness, Senaratne, who had given evidence at the pre-trial stage, was neither called to give evidence nor was he tendered for cross-examination, at the trial of the accused. The Magistrate upheld this point and discharged the accused observing that "another illegality has occurred now". The Attorney-General has appealed from this order.

When an accused person is brought before Court, otherwise than on summons or warrant, section 187 (1) of the Criminal Procedure Code states that the Magistrate should, after examination as required by section 151 (2) of the Criminal Procedure Code, frame a charge against the accused if he is of opinion that there is sufficient ground for proceeding against the accused. For this purpose, it is incumbent on the Magistrate to forthwith examine, on oath, the person who has brought the accused before the Court and any other person who may be present in Court able to speak to the facts of the case (*vide* section 151 (2) of the Criminal Procedure Code). These provisions were enacted to prevent abuse of the process of Court and to safeguard the liberty of the subject. When proceedings are instituted under section 148 (*a*), (*b*) and (*c*) of the Criminal Procedure Code, the Magistrate acts on the statements of responsible persons and he has other means of satisfying himself whether there is sufficient cause to proceed against an accused person. But where a person is brought to Court, otherwise than on summons or warrant, the Magistrate has to satisfy himself, on the evidence led at the pre-trial stage, whether there is sufficient cause to proceed against the accused.

A careful scrutiny of the relevant sections of the Criminal Procedure Code shows that when an accused person is brought before the Magistrate, otherwise than on summons or warrant there is no provision of law which compels the prosecution to call all witnesses who had given evidence at the pre-trial stage, at the trial. The procedure to be followed in Magistrates' Courts proceedings is set out in Chapter 18 of the Criminal Procedure Code. Where an accused person pleads not guilty to a charge, the Magistrate has to receive "all such evidence as may be produced by the prosecution or defence respectively". (*Vide* section 189 (1) of the Criminal Procedure Code). Section 189 (1) of the Criminal Procedure Code makes it abundantly clear that the Magistrate is bound to receive so much of the evidence as may be called by the prosecution or the defence and the Magistrate cannot compel the prosecution or the defence to call any witness who has given evidence at the pre-trial stage, and whose evidence the prosecution or the defence was not prepared to lead at the trial. There is no statutory provision requiring a witness, who had given evidence at the pre-trial stage, to testify at the trial. If such a requirement is introduced by statute or otherwise, then it would, in some cases, lead to consequences which may result in the denial of justice. Thus, if a witness, who gave evidence at the pre-trial stage, is either dead or has become insane, and if there is a requirement of law that such a witness must be called or tendered for cross-examination at the trial, it may well-nigh be impossible to proceed with such a case, although there may be other clear and cogent evidence to establish the charge.

In the instant case, no purpose would have been served by calling the witness, Senaratne, as he stated at the pre-trial stage that he had no knowledge of the facts of the case and that he merely produced the accused on the 15th of August, 1958, before the Magistrate of Gampola. Any evidence which witness Senaratne could have given about the facts of the case would have been hearsay. There are two reasons why hearsay evidence is excluded at trials. Firstly, because such evidence lacks the sanction of oath, and secondly, because no opportunity for cross-examination is given to the opponent. (*Vide* Phipson on Evidence (9th Edition) Sweet & Maxwell, at pages 223 and 224). "Lack of oath is never stressed", says Edmund M. Morgan, one of the leading authorities on the Law of Evidence and the Reporter of the American Law Institute's Committee on Evidence, "and unfortunate as it may be, it is now generally recognised that the oath has lost most of its efficacy as a sanction. If lack of opportunity for cross-examination is the real basis for exclusion, as is now almost universally conceded, it must be

because cross-examination may eliminate the imperfections in testimony likely to mislead the trier of fact". (*Vide* Modern Code of Evidence, American Law Institute—Foreword by Edmund M. Morgan—at pages 36 and 37). Hence, even if Senaratne was called to give evidence at the trial, he could only have given hearsay evidence about the facts of the case and such evidence had to be excluded.

The Crown Counsel, who represented the Attorney-General, referred to the ruling in *Perera vs. Ja-ela Police* (supra) and contended that this decision should not be followed. This case, however, could be distinguished from the facts of the instant case. It was there held that a person who gave evidence at the pre-trial stage and who spoke to the facts of the case, should have been recalled at the trial, or, at least, he should have been tendered for cross-examination. The learned Judge, who decided this case, based his decision on three grounds which require careful examination. Firstly, he was of the view that the Magistrate would have been necessarily influenced by the evidence led at the pre-trial stage, at the trial. Secondly, he was of the view that in the case of *Isidor Fernando* vs. *Roy Perera*, (1947) 48 N.L.R. 203, that this Court took the view that the evidence recorded under section 187 (1) of the Criminal Procedure Code could not be utilised by the Magistrate by merely recalling the witness and tendering him for cross-examination. Thirdly, the learned Judge held that section 138 of the Evidence Ordinance requires every witness who is examined, to be subject to cross-examination, if the adverse party so desire.

The Crown Counsel contended that the first proposition assumes that a Magistrate, who is usually a trained judge and one whose mind should not be warped by extraneous considerations would be prejudiced by the information he may have gathered at the pre-trial stage and, therefore, such evidence which has influenced him at the pre-trial stage, must necessarily be tested by cross-examination. The Crown Counsel pointed out that where a Magistrate acts on a report sent under section 148 (1)(*b*) of the Criminal Procedure Code, he has access to the statements in the Information Book, but it has never been held by this Court that a Magistrate who uses the Information Book in this manner and tries the case has acted in a prejudicial manner. Magistrates, unlike jurors, contended the Crown Counsel, are trained and experienced personnel and the maxim *omnia praesumuntur solemniter esse acta* applies to all their acts. Secondly, the Crown Counsel contended that the case of *Isidor Fernando* vs. *Roy Perera* (supra) laid down the proposition that a witness should be called at the trial and his evidence in chief led before he is subjected to cross-examination and the Magistrate, therefore, was not justified in utilising the evidence-in-chief which was led at the pre-trial stage, and the evidence elicited in cross-examination, at the trial, when such a witness was tendered for cross-examination. The Crown Counsel further pointed out that section 138 of the Evidence Ordinance states that any witness who is examined should be subject to cross-examination, if the adverse party so desires. The Crown Counsel contended that this section only applies to those witnesses who are called at the trial and, consequently, the accused has the right to cross-examine any such witness who was called. The Crown Counsel reiterated that this section does not state that a witness who had been called at a pre-trial stage, should be examined at the trial.

I agree with the submissions made by the Crown Counsel in this case. I hold that a witness who was called to give evidence at the pre-trial stage and who states that he knows nothing about the facts of the case, need not be called to give evidence at the trial.

In the instant case, the learned Magistrate has erred in discharging the accused on the point raised by the counsel for the accused. I set aside the order of discharge and send the case back to the Magistrate in order that he might deliver judgment on the evidence led at the trial.

Set aside and sent back.

Present : **Sansoni, J.**

ABDUL WADOOD *vs.* S.I. POLICE, MATARA

S.C. 312—*M.C. Matara, No.* 52322

Argued and Decided on : 9th October, 1958

*For Sinhala Translation, see Sinhala section Vol. 3, part 5, p. 20

Criminal Procedure—Witness giving evidence at pre-trial stage—Requirement that such witness be tendered for cross-examination at trial—Does failure to do so vitiate trial.

Held : That in the present case the Sub-Inspector who gave evidence before the accused was charged should have been called and tendered for cross-examination at the subsequent trial. The failure to do this was a grave irregularity which vitiated the trial.

Sir Lalitha Rajapakse, Q.C., with *S. A. Mohamed* and *D. C. W. Wickramasekara*, for the accused-appellant.

V. C. Gunatilleke, Crown Counsel, for the Attorney-General.

SANSONI, J.

It has been pointed out that the Sub-Inspector who gave evidence before the accused was charged was not tendered for cross-examination at the subsequent trial. This was a grave irregularity and the trial was bad on that account. No evidence was led after the amended plaint was filed and before the amended charge was read to the accused. Whichever view one takes as to the time of institution of the proceedings, the trial which followed was not a good one, and the conviction and sentence must therefore be set aside. The case will go back for fresh proceedings.

Set aside and sent back.

Present : **Herat, J.**

J. M. JAYAWEERA *vs.* M. KARUNAWATHIE

S.C. 836/1961—*M.C. Kandy*, 18262.

Argued and decided on : 21st March, 1962.

Maintenance—Corroboration of applicant's evidence—Statement of defendant recorded under section 122 *of Criminal Procedure Code—Admission of paternity contained therein—Can such statement be used to corroborate applicant's evidence.*

Held : That a statement recorded under section 122 of the Criminal Procedure Code, wherein a defendant in a maintenance case has made an admission of paternity, cannot be used to corroborate the evidence of the applicant.

Followed : *Walbert vs. Zoysa*, 49 N.L.R. 12; XXXV C.L.W. 78.

G. Barr Kumarakulasinghe, for the defendant-appellant.

S. S. Basnayake, for the applicant-respondent.

HERAT, J.—

In this case, the applicant-respondent sued the defendant-appellant for maintenance in respect of a child born to her on the 27th April, 1960, alleging that the child was the result of one and only one act of sexual intercourse which took place on the 15th July, 1959. The defendant-appellant at the trial denied paternity. The point taken by learned counsel for the appellant is that there is no admissible evidence of corroboration of the applicant's story in the case.

After the child was born, in pursuance of a complaint made by the hospital authorities to the Police, the applicant's statement was recorded. The applicant told the Police that the defendant-appellant had had sexual intercourse with her against her will and apparently on this complaint which is tantamount to one of rape, the Police investigated the alleged offence and recorded the statement of the defendant-appellant under section 122 (3) of the Criminal Procedure Code. That statement has been produced and according to that statement the defendant-appellant admitted paternity of the child. At the trial in the maintenance proceeding, however, the defendant-appellant stated that he had made the statement in question under duress and fear.

Learned counsel for the appellant has cited to me a case reported in 49 N.L.R. page 12, wherein Mr. Justice Dias Bandaranaike has expressly held that a statement recorded under section 122 (3) of the Criminal Procedure Code, wherein the defendant in a maintenance case has made an admisson of paternity, cannot be used against that defendant in the maintenance proceeding to provide corroboration of the applicant's story. I respectfully follow the decision of that learned Judge and I hold that in this case there is no corroboration of the applicant's story as is required by law.

I therefore allow the appeal and set aside the order made by the learned Magistrate.

Appeal allowed.

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

WARAWITA APPUHAMY *vs.* PERERA

S.C. No. 159/1959—*C.R. Colombo, No.* 72222.

Argued on : 9th December 1960.
Decided on : 24th March, 1961.

Landlord and Tenant—Agreement that rent payable by tenth of each month—Late payments accepted by landlord as a matter of regular practice—Effect thereof on landlord's right to sue for ejectment—In what circumstances will landlord be entitled to terminate tenancy on ground that rent in arrears.

Held : (1) That where there is a written agreement specifying the date on which the rent must be paid but the landlord has as a matter of regular practice accepted late payments of rent, he would not be entitled to terminate the tenancy for failure to pay rent on the agreed date if the rent was, in fact, tendered in accordance with the regular practice.

(2) That, however, in the present case the landlord was entitled to terminate the tenancy as the delay in payment had extended even beyond the period which he had allowed according to the regular practice.

Per H. N. G. Fernando, J.—" Where there is a written agreement specifying the date on which rent must be paid, that date remains the due date for payment unless it is altered by some new distinct agreement. Where, on the other hand, there is a month to month tenancy without express stipulation as to the date of payment of rent, the last date of each month must be taken to be the due date for the payment of that month's rent. This principle was recognised in the case of *Adamjee Lukmanjee & Sons, Ltd.* vs. *Ponniah Pillai*, 61 *N.L.R.* 181, decided by my Lord, the Chief Justice. In the case last mentioned however, no reference appears to have been made during the argument to my decision in *Jayakody* vs. *Pedris*, which dealt not so much with the question whether acceptance of late payments of rent constitutes an alteration of the due date for payment but with the quite different question whether such acceptance has the effect of qualifying the right to sue for ejectment ".

Cases referred to : *Suppiah* v. *Kandiah*, 58 N.L.R. 479.
T. D. M. Jayakody v. *D. L. F. Pedris*, 60 N.L.R. 422.
Adamjee Lukmanjee & Sons v. *Ponniah Pillai*, 61 N.L.R. 181 ; LVII C.L.W. 62.
Garlick Ltd. v. Phillips, 1949 (1) S.A.L.R. 121.

Colvin R. de Silva with *D. R. P. Goonetilleke*, for the defendant-appellant.

H. W. Jayewardena, Q.C. with *M. L. de Silva*, for the plaintiff-respondent.

H. N. G. Fernando, J.

The written agreement for a month to month tenancy in this case provided that the rent should be payable on or before the tenth day of each month. Rent had been paid and accepted from July, 1946, for a period up to and including July, 1958. But the rent for the month of August, 1958, had not been paid to the landlord by 16th October, 1958, on which date he issued a notice terminating the tenancy on the ground of non-payment of the August rent. At the trial the tenant-appellant proved by the production of rent receipts for a period between January, 1957, and August, 1958, that during this entire period the rent due for any month was accepted by the landlord during the second half of the subsequent month. The appellant relied on my decision in *Suppiah* vs. *Kandiah*, 58 *N.L.R.* 479, in support of the proposition that the date on which the rent was due for any month was not the tenth day of any month but rather a date not earlier than the end of the subsequent month. I do not agree that the decision supports that proposition for in that case unlike in the present one there was no agreement fixing the date on which the rent was to be payable. In any event although I remain of opinion that the tenant in *Suppiah* vs. *Kandiah* (*supra*) was entitled to succeed, I think the grounds on which he was so entitled are more correctly set out in my judgment in *Jayakody* vs. *Pedris*, 60 *N.L.R.* 422, namely, that where for a considerable period a landlord has accepted without demand late payments of rent he cannot, without first informing the tenant explicitly that future delay will not be excused and that legal rights will be insisted on, suddenly take advantage of one late payment in order to sue for ejectment.

Where there is a written agreement specifying the date on which rent must be paid, that date remains the due date for payment unless it is altered by some new distinct agreement. Where on the other hand, there is a month to month tenancy without express stipulation as to the date of payment of rent, the last date of each month must be taken to be the due date for the payment of that month's rent. This principle was recognised in the case of *Adamjee Lukmanjee & Sons, Ltd.* vs. *Ponniah Pillai*, 61 *N.L.R.* 181, decided by my Lord the Chief Justice.

In the case last mentioned however, no reference appears to have been made during the argument to my decision in *Jayakody* vs. *Pedris* (*supra*) which dealt not so much with the question whether acceptance of late payments of rent constitutes an alteration of the due date for payment but with the quite different question whether such acceptance has the effect of qualifying the right to sue for ejectment. That decision was based on the judgment of a Bench of five Judges in *Garlick Ltd.* vs. *Phillips*, of the Appellate Division of the Supreme Court of South Africa, 1949 (1) *S.A.L.R.* 121. It may be helpful if I take this opportunity to add that the South African judgment contains references to several other decisions of the South African Courts as well as to those of English and American Courts to a similar effect. If, as the learned Commissioner of Requests in the present case thought, there is any conflict between the decisions in *Jayakody* vs. *Pedris* (*supra*) and *Adamjee Lukmanjee & Sons, Ltd.* vs. *Ponniah Pillai* (*supra*), the other decisions which I have mentioned above will, no doubt, be duly considered.

In the present case the landlord did accept a particular month's rent as a matter of regular practice when it was tendered to him at some time during the second half of the subsequent month ; and applying the principle of *Garlick Ltd.* vs. *Phillips* (*supra*) he would not in my opinion have been entitled to terminate the tenancy on the ground that the tenant had failed to make payment for any month on the due date specified in the original agreement, if rent was, in fact, tendered in accordance with the regular practice. But the rent for August, 1958, remained unpaid even at the end of September, 1958. Accordingly the delay in payment extended much beyond the period which according to the regular practice had been allowed by the landlord. That being so the landlord was well within his rights in terminating the tenancy on October 16th, 1958, which was sixteen days after the termination of the period during which he had previously ignored delay. The principle to which I have been referring therefore does not apply and the tenant's appeal must be dismissed with costs.

Appeal dismissed.

Present : **Gunasekara, J.**

THE ATTORNEY-GENERAL *vs.* F. M. DHEEN

S.C. 426/1961—*M.C. Galle* 11037.

Argued : June 29 and 30, 1961.
Decided : October 11, 1961.

Criminal Procedure Code, section 168—*Charge of criminal breach of trust—Date of offence specified in charge—Evidence disclosing that offence not committed on specified date—Effect of such evidence—Failure of prosecution to prove charge.*

The charge against the accused was in the following terms :—" . . . that you did . . . at Galle on 18th December, 1951, you being entrusted with property to wit, a sum of Rs. 340.09 in your capacity as agent . . . did commit criminal breach of trust in respect of the said property and that you have thereby committed an offence punishable under section 392 of the Penal Code."

At the trial, it was contended on behalf of the accused that the charge meant that the offence was committed on 18th December, 1951, but that there was no evidence to prove the commission of an offence on that day. Upholding this contention the learned Magistrate discharged the accused. The Attorney-General appealed against this order.

In appeal, it was submitted on behalf of the Attorney-General that the charge did not mean that the offence was committed on 18th December, 1951, but that it was committed in respect of money that was entrusted to the accused on that date. It was further argued (*a*) that the averments in the charge, taken together, were reasonably sufficient to give

the accused notice of the matter with which he was charged ; (*b*) that it was not necessary that the charge should particularize the time of offence ; (*c*) that even if the Magistrate thought the time should have been stated, he should have amended the charge to supply the omission. It was further contended that the Magistrate should have convicted the accused as he had held both that the money had been entrusted to the accused on 18th December, 1951, and that the accused had misappropriated it.

Held : (1) That the charge meant that the offence was committed on 18th December, 1951, and that the prosecution had failed to prove this charge. All the accused had to do was to show that there was no evidence that he misappropriated any money on the day in question.

(2) That there was no omission in the statement of the particulars of the offence that had to be supplied by an amendment.

(3) That as the accused was not tried on a charge of having committed an offence at any time other than the 18th December, 1951, it was not open to the learned Magistrate to find that the accused misappropriated the money.

Cases referred to : See pp. 10, 24, 32, 41, 42, 43, 44, 45.

V. S. A. Pullenayegum, C.C. with *M. Hussein, C.C.*, for the Attorney-General-appellant.

Hanan Ismail, for the accused-respondent.

GUNASEKERA, J.

This is an appeal by the Attorney-General against an order made by a magistrate discharging an accused person at the end of a summary trial held under section 152 (3) of the Criminal Procedure Code.

The charge on which the accused was tried is in these terms :—

> You are hereby charged, that you did within the jurisdiction of this Court at Galle on 18th December, 1951, you being entrusted with property to wit, a sum of Rs. 340.09 in your capacity as agent to wit, Proctor, by K. T. Gunasekera of Galle, did commit Criminal Breach of Trust in respect of the said property and that you have committed an offence punishable under section 392 of the Penal Code.

At the close of the case for the prosecution the accused's counsel stated that he was not calling evidence. He contended that the charge alleged that the offence in question was committed on the 18th December, 1951, but there was no evidence to prove the commission of an offence on that day. The magistrate agreed with this contention and discharged the accused.

It is common ground that on the 18th December, 1951, the accused, who was a proctor, had been entrusted by a school master named K. T Gunasekera with a sum of Rs. 340.09 to be paid to the credit of an action in the Court of Requests of Galle, Case No. 28638, in which Gunasekera had been sued by his landlord for arrears of rent. A decree had been entered in that action on the 14th December, 1951, in terms of a settlement which provided for the payment by Gunasekera to the plaintiff of a sum of Rs. 340.09 within a month. Gunasekera's proctor in that case was Mr. G. E. Abeyewardena, but he entrusted the money to the accused because, according to him, he had failed to meet Mr. Abeyewardena when he looked for him on the 18th December. Admittedly no part of this sum was deposited to the credit of the action.

On the question whether the money was misappropriated by the accused the case for the prosecution was as follows. At some time during a school vacation, which lasted for one month from the 18th December, 1951, Gunasekera asked the accused whether he had deposited the money and the accused replied that he had. A couple of years later Gunasekera discovered that the money had not been deposited and he demanded it from the accused. He made the discovery as the result of a demand of payment that was made from him on behalf of the plaintiff. The accused repeatedly put him off and eventually Gunasekera complained about his conduct to the Law Society by a letter dated the 10th October, 1954. The Law Society held an inquiry into his complaint in October, 1957. Shortly before that inquiry was held the accused gave him in settlement of the amount due, with interest on the original sum, Rs. 175 in cash and two promissory notes for Rs. 200 and Rs. 250, respectively.

The assistant secretary of the Law Society produced in evidence certain documents relating to Gunasekera's complaint to the Society. One of them is a receipt granted to the accused by Guna-

sekera on the 15th March, 1957. It acknowledges the payment to him by the accused of a sum of Rs. 428.50 in full settlement of his claim.

The accused's explanation of his conduct in not depositing the money to the credit of the civil case is indicated in the cross-examination of Gunasekera and a letter from the accused to the Law Society, dated the 15th February, 1955. The explanation is to this effect. The plaintiff fell seriously ill a few days after the decision of the case and Gunasekera thereupon instructed the accused to defer the depositing of the money for some time. Later he asked him to use it to pay himself a debt that was due to him from Gunasekera in respect of professional services rendered by him as a proctor and a notary. He stated in his letter to the Law Society that there was "only a small balance" left in his hands and that he was prepared to pay it to Gunasekera. His explanation of the payment that he made subsequently appears to be that he made it in compliance with a direction given by the Law Society.

While the magistrate discharged the accused on the ground that there was no proof that the offence in question was committed on the 18th December, 1951, he held that the accused did misappropriate the money though it had not been proved that he did so on that day. He says in his judgment :

> It would appear from the evidence in this case that the accused has received a sum of Rs. 340.09 from Mr. Gunasekera. This is proved by P1. According to the case record of C.R. 28638 this sum of money or any part of it has not been deposited by the accused or any one in Court in payment of the amount ordered against Mr. Gunasekera. There is no doubt therefore from the evidence in this case that the accused has misappropriated the money. He has not chosen to refute that.

It was contended on behalf of the appellant that the charge does not mean that the offence was committed on the 18th December, 1951, but it means that it was committed in respect of money that was entrusted to the accused on the 18th December, 1951. Mr. Pullenayegum argued that this averment was sufficient to show that the offence was not prescribed, and that the other averments in the charge taken together with this were reasonably sufficient to give the accused notice of the matter with which he was charged. He maintained that for this purpose it was not necessary that the charge should particularize the time of the offence, and therefore it complied with the requirements of section 168 of the Criminal Procedure Code notwithstanding that it omitted to specify the time of the offence. If, however, the Magistrate thought that the time should have been stated he should, it was urged, have amended the charge to supply the omission. It was further contended that the Magistrate, having held that the money was entrusted to the accused by Gunasekara on the 18th December, 1951, and that the accused misappropriated it, ought to have convicted him.

This argument for setting aside the Magistrate's order is formulated in the "grounds of appeal" as follows :—

(*a*) that the said order is wrong and contrary to law ;

(*b*) that the charge as framed in the case was in substantial compliance with the provisions of Section 168 of the Criminal Procedure Code, Chapter 16 ;

(*c*) that inasmuch as it was the duty of the Magistrate to frame a charge, the Magistrate, if he was of opinion that there had been any omission in the particulars required to be stated in the charge, should have amended it accordingly ;

(*d*) that, in the circumstances of the case, the order of the Magistrate has occasioned a failure of justice.

The basis of the argument is that the charge does not allege that the offence was committed on the 18th December, 1951. With all respect to the learned counsel for the Crown, it seems to me that clearer language could not have been used to say that the accused committed the offence on that day. Even the redundant "you" and "did" serve to emphasize that allegation. The learned magistrate has understood the charge to mean that the offence was committed on the 18th December, 1951. I agree with this view and with his finding that the prosecution has failed to prove this charge. There was no omission in the statement of the particulars of the offence that had to be supplied by an amendment.

In order to defend himself against the charge that he was called upon to answer, it was sufficient for the accused to show that there was no evidence that he misappropriated any money on the day in question. It was not necessary for

him to give or adduce evidence contradicting or explaining other items of incriminating conduct imputed to him by the prosecution, such as was imputed in the evidence that he claimed to have deposited the money to the credit of the civil case. Nor was it necessary for him to adduce evidence in support of his explanation of his omission to deposit it. Under these circumstances an inference that he misappropriated the money at some other time, though he may not have done so at the time in question, cannot be drawn from the fact that he has not chosen to refute any particular allegation. In my opinion there was no sufficient ground for the learned magistrate's finding that the accused misappropriated the money. He was not tried on a charge of having committed such an offence at any time other than the 18th December, 1951.

The appeal is dismissed.

Appeal dismissed.

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

ADAMJEE LUKMANJEE & SONS, LTD. *vs.* L. D. O. ALEXANDER

S.C. No. 166 *of* 1960—*C.R. Colombo No.* 65271.

Argued on : 14th and 17th November, 1961.
Decided on : 12th April, 1962.

Landlord and tenant—Late payments of rent by tenant—Acceptance and acquiescence by landlord—Arrears of rent—Landlord's right to eject tenant—Effect of such acquiescence thereon.

Held : That where for a considerable period a landlord has accepted and acquiesced in the late payments of rent by his tenant, he cannot without first informing the tenant explicitly that future delay will not be excused and that legal rights will be insisted on, suddenly take advantage of one late payment in order to sue for ejectment.

Followed : *T. D. M. Jayakody* v. *D. L. F. Pedris*, (1959) 60 N.L.R. 422.
Distinguished : *Gunaratne* v. *Perera*, (1961) 63 N.L.R. 274.
Referred to: *Suppiah* v. *Kandiah*, (1957) 58 N.L.R. 479.
Adamjee Lukmanjee & Sons v. *Ponniah Pillai*, 61 N.L.R. 181 ; LVII C.L.W. 62.
Warawita Appuhamy v. *Perera*, (1961) LXI C.L.W. 73

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

C. Ranganathan, with *M. T. M. Sivardeen*, for the defendant-respondent.

T. S. Fernando, J.

This is an appeal by a landlord against the dismissal of an action which was instituted in the Court of Requests for the ejectment of his tenant from certain rent-controlled premises on the ground of the rent being in arrears. The plaintiff is a limited liability company and has a fairly large number of tenants. The defendant became a tenant of the plaintiff in respect of these premises so long ago as March, 1939, *i.e.*, even before the enactment of the first Rent Restriction Ordinance of 1942. At the time the defendant first became a tenant of the plaintiff the rent was Rs. 90/- a month, and it is admitted that he deposited with the plaintiff a sum of Rs. 180/- being rent for two months to be retained against the rent of the last two months of his occupancy. Later the rent was slightly increased, and the authorised rent for these premises as computed in terms of the Rent Restriction Act was Rs. 95/42 a month.

It is admitted that rent up to and including that of August, 1956, has been paid by the defendant. On 20th December, 1956, the plaintiff gave notice to the defendant to quit the premises by 31st January, 1957. The plaintiff instituted this action on 26th February, 1957, claiming that the defendant fell into arrears of payment in respect of the rent for the months of September, October, November and December, 1956. It was alleged in the plaint that the rent was payable on or before the last day of each month, but that after the notice to quit was given the defendant on 28th December, 1956, paid, and the plaintiff accepted without prejudice to its rights, a sum of Rs. 286/26 being rent for the months September to November 1956.

The defendant denied that rent was payable on or before the last day of each month and alleged that the practice was to pay the rent once in three or four months. The principal question at the trial was, of course, whether the defendant had fallen into arrears in payment of the rent.

There was admittedly no written agreement regulating the date of payment of the rent. It was also not in serious dispute that the defendant did not observe any regular date of payment of the rent, that the defendant had fallen into arrears of payment several times before (if the due date of payment be considered as that alleged in the plaint) and that there had been no protest on the part of the plaintiff over these late payments. The evidence was overwhelming that generally rent had been paid once in about three months. Even the rent in respect of the period June to August, 1956, was paid in one sum on 14th September, 1956—*vide* receipt D 22. The rent clerk of the plaintiff-company stated that some fifteen or twenty actions for ejectment of tenants were filed about the time the action against this defendant was instituted, but that all these actions save that against this defendant were withdrawn on the tenants entering into tenancy agreements. The defendant apparently has refused to enter into a similar agreement and the case against him proceeded to trial.

After a lengthy trial in the course of which the Court was called upon to examine a very large number of receipts and other documents, the learned Commissioner of Requests has held as follows :—

> "From the documents and from oral testimony of plaintiff as well as defendant in this case I am satisfied that it was never the practice for rent to be paid in any month or the following month for the previous months. It is quite clear that payments were made for three months at the end of the fourth month or in such similar fashion."

Much argument was addressed to me at the hearing of the appeal for and against this finding, but I do not find it possible to say that the learned Commissioner was wrong in reaching this finding on the evidence presented before him at the trial.

The learned Commissioner also purported to follow the judgment of this Court in *Suppiah* vs. *Kandiah* (1957) 58 N.L.R. 479. That judgment was not followed by the Chief Justice in *Adamjee Lukmanjee & Sons, Ltd.* vs. *Ponniah Pillai* (1959) 61 N.L.R. 181. After the decision in *Suppiah* vs. *Kandiah* (*supra*), but before *Adamjee Lukmanjee & Sons, Ltd.* vs. *Ponniah Pillai* (*supra*) came to be decided, there was another decision of some relevance, *Jayakody* vs. *Pedris*, (1959) 60 N.L.R. 422, where H. N. G. Fernando, J., also in a tenancy action, held that where a landlord is indifferent as to late payments of rent he cannot take advantage of such late payments in order to eject the tenant when rent is in arrears for a month. He went on to say that in those circumstances it became the duty of the landlord, if he intended to exercise his rights to sue for ejectment on the ground of late payment to inform the tenant explicitly that any future delay would not be excused and that legal rights would be insisted upon. This aspect of the matter was emphasized by Fernando, J., himself in his later decision in *Warawita Appuhamy* vs. *Perera* (S.C. No. 159 of 1959—C.R. Colombo No. 72222—S.C. Minutes of 24th March, 1961)* when he stated that he thought that the grounds upon which the tenant in *Suppiah* vs. *Kandiah* (*supra*) was entitled to succeed were more correctly set out in his judgment in *Jayakody* vs. *Pedris* (*supra*), viz., that where for a considerable period a landlord has accepted without demand late payments of rent he cannot, without first informing the tenant explicitly that future delay will not be excused and that legal rights will be insisted on, suddenly take advantage of one late payment in order to sue for ejectment. I must mention that Sinnetamby, J., has also had occasion recently—*vide Gunaratne* vs. *Perera* (1961) 63 N.L.R. 274—to examine all the cases referred to by me above save *Warawita Appuhamy* vs. *Perera* (*supra*), and the reason he has stated for not applying there the decision in *Jayakody* vs. *Pedris* (*supra*) was that in the case he was considering the tenant was certainly not led to believe that he would not be sued in ejectment because the right to sue in ejectment had not accrued to the landlord except on two occasions. In the case in appeal now before me, not only is there the finding of fact in regard to the practice of making and accepting payment of rent, it is also clear that on several continuous occasions spread over a number of years although the plaintiff had opportunities to sue the defendant in ejectment no suggestion of court proceedings were hinted at. The first intimation that the landlord was not willing any longer to acquiesce in the accepted mode of receiving payment of rent was the notice to quit which preceded the institution of the present suit.

*61 C.L.W. 73.

Much argument has been addressed to me for and against the application of the decisions referred to above. In the state of the facts of the particular case I am called upon to decide and having regard to the findings thereon by the trial judge, I am of opinion that I should apply the decision in *Jayakody* vs. *Pedris* (*supra*) and dismiss this appeal with costs. I make order accordingly.

Appeal dismissed.

Present : **Basnayake, C.J., Gunasekara, J., and T. S. Fernando, J.**

ATTORNEY-GENERAL *vs.* PIYASENA

S.C. No. 545—*M.C. Chilaw, No.* 25279

Argued on : June 20 and 21, 1961.
Decided on : January 24, 1962.

Autrefois acquit—Accused charged with offences under Excise Ordinance—Charge illegal owing to non-compliance with section 187 (1) *of the Criminal Procedure Code—Order of acquittal—Second prosecution for same offences—Plea of autrefois acquit—Is such plea available in the circumstances—Criminal Procedure Code, sections* 2, 187 (1), 190, 191, 194, 195, 290, 330, 338 (2), 347.

The accused in this case was charged with certain offences under the Excise Ordinance. The charges were read to the accused who pleaded not guilty. Thereafter the prosecution called its witnesses who were cross-examined by the defence and re-examined by the prosecution and the prosecution case was closed. When the accused was called upon for his defence, his pleader stated that he was not calling any evidence on the accused's behalf and submitted that the proceedings were illegal in that the accused who had appeared otherwise than on summons or warrant had been charged without any evidence being led as required by section 187 (1) of the Criminal Procedure Code. The learned Magistrate upheld this submission and purported to acquit the accused. There was no appeal against this purported acquittal. However a second prosecution was subsequently launched against this accused in respect of the same offences. At the second trial the plea of *autrefois acquit* was raised on behalf of the accused by his pleader and this plea was tried as a preliminary issue. The learned Magistrate upheld this plea. The Attorney-General then appealed.

Held : (BASNAYAKE, C.J., dissentiente) :

(1) That the charge in the first case was illegal in view of the decision in *Mohideen* vs. *Inspector of Police, Pettah.*

(2) That since the charge in the first case was illegal, there could have been no valid trial at all and neither a conviction nor an acquittal could have followed on such a charge.

(3) That in the circumstances, the plea of *autrefois acquit* was not available to the accused, as the order made by the learned Magistrate in the first case operated merely as a discharge and not as an acquittal.

Per T. S. FERNANDO, J.—

(*a*) "It is right, however, to take note here of the fact that the Court that decided *Mohideen's* appeal ordered the accused to be tried on a validly-framed charge. If, as Mr. Wikremanayake contended before us, the only order a Magistrate can make after the case for the prosecution has ended is one of acquittal, whether the charge has been legally framed or not, then an examination of the facts of *Mohideen's* case will show that it would not have been competent even for the Supreme Court, section 347 of the Criminal Procedure Code notwithstanding, to have directed a re-trial."

(*b*) "As I understand it, the charge is the very foundation of a criminal case, and our Courts have consistently taken the view that where the charge is defective in the sense that it is illegal, and a *fortiori* where no charge has been framed at all, a conviction cannot be maintained. I am quite unable to see how a distinction can be made when the question to be considered is whether an order can be maintained as an acquittal where it flows from the illegal charge or without any charge at all. The question cannot, in my opinion, be approached one way when the validity of a conviction is under consideration and in a different way when the validity of an acquittal is being examined."

(*c*) "Section 330 of the Criminal Procedure Code seeks to embody the English law doctrine of *autrefois convict* and *autrefois acquit*. In spite of observations to be found in some of the decisions of our Courts that the doctrine so embodied in section 330 is not the same as that obtaining in England, I must confess that I do not appreciate that any real distinction exists."

*For Sinhala Translation, see Sinhala section Vol. 3, part 6, p. 21

Not Followed : *Fernando* v. *Excise Inspector of Wennappuwa*, 60 N.L.R. 227 ; LVII C.L.W. 19.
Solicitor-General v. *Aradiel*, 50 N.L.R. 233 ; XXXIX C.L.W. 17.

Referred to : *Mohideen* v. *Inspector of Police, Pettah*, 59 N.L.R. 217 ; LV C.L.W. 12.
Varghese v. *Perera*, 43 N.L.R. 564.
Abeysekera v. *Goonawardena*, 39 N.L.R. 525.
Rosemalecocq v. *Kaluwa*, 38 N.L.R. 373.
Mendis v. *Kaithan Appuhamy*, 37 N.L.R. 285.
Marambe v. *Kiriappu*, II C.L.W. 122.
Wanigasekera v. *Simon*, 57 N.L.R. 377.
Senaratne v. *Lenohamy*, 20 N.L.R. 44.
Perera v. *Joharan*, 47 N.L.R. 568 ; XXXIII C.L.W. 55.
Guneratne v. *Hendrick Appuhamy*, 52 N.L.R. 43.
Halsted v. *Clark*, 1944 (1) A.E.R. 270.
Attorney-General v. *Silva*, 61 N.L.R. 454.
Fernando v. *Rajasooriya, Inspector of Police*, 47 N.L.R. 399; XXXIII C.L.W. 80.
Attorney-General v. *Kiribanda*, 61 N.L.R. 227 ; LVII C.L.W. 77.

D. St. C. B. Jansze, Q.C., Attorney-General, with *Ananda Pereira, Senior Crown Counsel*, and *V. S. A. Pullenayegum, Crown Counsel*, for the Attorney-General.

E. B. Wikremanayake, Q.C., with *M. M. Kumarakulasingham* and *A. K. Premadasa*, for the accused-respondent.

T. S. FERNANDO, J.

The question that arises upon this appeal is whether an order purporting to acquit an accused person at the close of the prosecution in a summary trial in a Magistrate's Court on the ground that the charge was illegally framed amounts in law to an acquittal or only to a discharge of the accused.

It is necessary to state some facts relevant to consideration of this question :—

V. Appapillai, Inspector of Excise, reported to the Magistrate's Court on June 5, 1957, in terms of section 148 (1) (*b*) of the Criminal Procedure Code that the accused G. S. Piyasena had on or about May 25, 1957, in the course of one and the same transaction committed three offences punishable under sections 43, 43 and 44 respectively of the Excise Ordinance. The proceedings that commenced in the Magistrate's Court on presentation of this report were numbered 21419. At the close of the evidence for the prosecution the pleader for the accused submitted to the Magistrate that the proceedings had were illegal inasmuch as the accused who had appeared before the Court otherwise than on summons or warrant when he made his first appearance there had been charged without any evidence being led as required by section 187 (1) of the Criminal Procedure Code. The Magistrate on February 5, 1958, holding that he was bound by the decision of the Supreme Court in *Mohideen* vs. *Inspector of Police, Pettah*, (1957) 59 N.L.R. 217, stated that the proceedings held were illegal and purported to acquit the accused. *No appeal was preferred against this purported acquittal.* Instead, Inspector Appapillai on February 26, 1958, presented another report, also under section 148 (1) (*b*) of the Code, to the same Magistrate's Court in respect of the alleged commission by the accused of the very same offences specified in his earlier report in Case No. 21419. Proceedings had on the subsequent report were numbered 25279.

Summons issued on the accused, and when he appeared on summons he pleaded not guilty upon being charged by the Magistrate with the commission of the three offences alleged in the report. The pleader for the accused contended that his client had already been acquitted on these identical charges in case No. 21419, and that that acquittal was a bar to his being prosecuted in the present case No. 25279. This plea of *autrefois acquit* was tried as a preliminary issue and, after the production of certain Court records and after he had heard argument, the learned Magistrate (who incidentally was the same Magistrate who had made the order in case No. 21419) on April 27, 1959, upheld the plea. The appeal now before us is one preferred by the Attorney-General who has a right under section 338 (2) of the Code to prefer an appeal to this Court against any judgment or final order pronounced by a Magistrate's Court.

The Attorney-General contended (1) that if the charge in case No. 21419 was bad in that it was illegally framed, then there could have been

no valid trial at all, and that neither a conviction nor an acquittal could have followed on such a charge ; and (2) that to maintain successfully a plea of *autrefois acquit* there must have been a previous acquittal on the merits.

In considering the first of these contentions, it is necessary to advert to the decision of this Court in *Mohideen* vs. *Inspector of Police, Pettah* (*supra*). That was a decision on an appeal referred to a bench of three judges in terms of section 48 of the Courts Ordinance, and, although the head-note of the report of that case appearing in the New Law Reports summarises the decision as being that a charge framed in the circumstances that existed in that case was an irregularity that cannot be cured by applying the provisions of section 425 of the Code, it would be more accurate to state that the main judgment of the majority which was delivered by De Silva, J., held that the charge was illegal. In the judgment of the Chief Justice too the procedure followed was characterised as being more than a mere irregularity and, as he expressed the opinion that the case of *Vargheese* vs. *Perera*, (1942) 43 N.L.R. 217 (where it was held that the absence of a valid charge was not merely a curable irregularity but an illegality) was rightly decided, it would be proper to assume that he too held that the charge was illegal. I find that Pulle, J., who was the dissenting Judge in *Mohideen's* case states that he agrees with the other two Judges that, if the Code ordains a procedural step to be taken preliminary to the framing of a charge, the failure to take that step would vitiate the charge. Mr. Wikremanayake submitted that the charge in case No. 21419 was defective only, and not illegal. I am unable to agree. The view of the majority of the bench in *Mohideen's case* was that the charge was illegal, and for that reason alone the proceedings had to be quashed and the case remitted for trial upon a legally framed charge.

The correctness of the decision in *Mohideen* vs. *Inspector of Police, Pettah* (*supra*) was not raised before us, and I may say that in any event it is not competent for us sitting as a bench of three judges to review a decision also of a bench of three judges. We must, therefore, on this appeal proceed on the basis that the decision in *Mohideen's case* is binding on us. It is right, however, to take note here of the fact that the Court that decided *Mohideen's* appeal ordered the accused to be tried on a validly framed charge. If, as Mr. Wikremanayake contended before us, the only order a Magistrate can make after the case for the prosecution has ended is one of acquittal, whether the charge has been legally framed or not, then an examination of the facts of *Mohideen's case* will show that it would not have been competent even for the Supreme Court, section 347 of the Criminal Procedure Code notwithstanding, to have directed a retrial.

The learned Magistrate in upholding the pled of *autrefois acquit* felt himself bound, as indeea he was in law, by the decision of this Court in *Fernando* vs. *Excise Inspector of Wennappuwa* (1958) 60 N.L.R. 227, a case where the circumstances were exactly the same as those in the appeal now before us. Weerasooriya, J., there upheld a plea of *autrefois acquit*. If this last-mentioned appeal has been correctly decided, this appeal must be dismissed. The contentions pressed before us by the learned Attorney-General were substantially the same as were considered by Weerasooriya, J. With great respect to the latter, I am, however, of opinion for reasons which I shall endeavour to set out below that the first contention of the Attorney-General is sound and must be upheld. If a conviction on a particular charge cannot be sustained because that charge has been illegally framed, I am frankly unable to understand how an acquittal on a charge framed in similar circumstances can be upheld. If the one is unsupportable, the other must be equally unsupportable.

I must also refer to the circumstance that the Magistrate in making his order in case No. 21419 purported to acquit the accused. It has been held by this Court in many cases spread over a long number of years that the phraseology used by a judge is not conclusive of the question of the nature of the order he intended to make. In all cases it is a question of interpreting the nature of the order made after an examination of the relevant proceedings. To take any other view could involve, among other surprising results depriving an accused person of the benefit of an order of a Magistrate acquitting him merely because the Magistrate has described that order as a discharge. It is therefore competent for us to examine the nature of the order of February 5, 1958, and to decide whether it is an order of discharge or one of acquittal.

A view has sometimes been expressed, and this view has been submitted to us by Mr. Wikremanayake as being a correct view, that after the prosecution evidence has been taken a verdict of guilty or not guilty has to be entered by the

Magistrate who tried the case summarily, and that after that stage it is not competent for him to make an order of discharge. This view has been based on the wording of section 181 of the Code which permits a "discharging (of) the accused at any previous stage of the case", and the expression "previous stage" has been taken as meaning, in the context, previous to the close of the prosecution case. One can however, for example, think of cases where some inadmissible evidence is elicited in the course of the taking of evidence for the defence. As the Attorney-General argued, could it be said that in those circumstances the accused has to be acquitted because it is too late to make an order discharging him ? I am inclined to take the view that "at any previous stage of the case" contemplates a stage previous to the entering of the verdict of guilty or not guilty and not merely a stage previous to the closing of the case for the prosecution.

To return to the first contention of the Attorney-General specified already, the Code has made provision for a trial taking place upon a charge framed in accordance with the procedure laid down, that is to say, upon a charge framed in accordance therewith, and not illegally framed. In *Abeysekera* vs. *Goonewardene*, (1938) 39 N.L.R. 525, Abrahams, C.J., in quashing proceedings that had ended in a conviction of the accused persons, observed "There is then the absence of a charge and there is ample authority that the absence of a charge vitiates the proceedings". The charge in that case was held not to have been framed as required by the provisions of section 187 (1) of the Code, and in that sense it was concluded that there was no valid charge. The trial was declared to be illegal *ab initio*. Weerasooriya, J., in *Fernando* vs. *Excise Inspector of Wennappuwa* (*supra*) took the view that the observations of Abrahams, C.J., in that case did not imply that a trial taking place on a defectively framed charge, or without any charge at all, is a proceeding entirely outside the scope of the Magistrate's jurisdiction. With great respect, I am unable to agree. As I understand it, the charge is the very foundation of a criminal case, and our Courts have consistently taken the view that where the charge is defective in the sense that it is illegal, and *a fortiori*: where no charge has been framed at all, a conviction cannot be maintained. I am quite unable to see how a distinction can be made when the question to be considered is whether an order can be maintained as an acquittal where it flows from an illegal charge or without any charge at all. The question cannot, in my opinion, be approached one way when the validity of a conviction is under consideration and in a different way when the validity of an acquittal is being examined.

More to the point than *Abeysekera* vs. *Goonewardene* (*supra*) is the earlier case of *Rosemalecocq* vs. *Kaluwa* (1936) 38 N.L.R. 373, which is also a decision of Abrahams, C.J., where the learned Chief Justice, in setting aside a conviction because a charge was illegal on account of misjoinder of accused and charges, observed :—

> "I can, no doubt, order a new trial. On the other hand, if I do not make any order for a new trial, can I prevent the prosecution of the appellant on the same facts ? If I have the power to make an order of acquittal, that would prevent the appellant being put upon this trial again. Counsel for the appellant argues that I can make an order of acquittal. He cites to me the case of *Mendis* vs. *Kalihan Appuhamy* (1935) 37 N.L.R. 285, where Drieberg, J., following MacDonell, C.J., in *Marambe* vs. *Kiriappu*, 2 C.L.W. 122, allowed an appeal and acquitted the appellant on the ground that to send the case for re-trial in such circumstances as those which existed in the case in question would encourage slackness and inexactitude on the part of prosecutors. I have not examined either of those cases very closely, because if the learned judges who tried those cases are to be taken to have implied that an Appellate Court would acquit in a case where a trial was void I should respectfully differ from them as, in my opinion, any illegal trial is no trial at all, and, therefore, an acquittal either by the trial Court or an Appellate Court would be ineffective."

This case does not appear to have been brought to the notice of Weerasooriya, J.

I might also refer to certain observations made by Gratiaen, J., in *Wanigasekera* vs. *Simon*, (1956) 57 N.L.R. 377 at 381, which have some relevance to the contention that I am now examining. Said that learned judge :—

> "As at present advised, I take the view that under our Code, as in England, a plea of *autrefois acquit* presupposes that the indictment or accusation in the earlier proceedings was sufficient in law to sustain a conviction for the offence charged on the second trial. Similarly, an order "discontinuing" the proceedings against an accused person on the ground that the charge is defective operates only as a "discharge" under section 191. In such an event, the purport of the Magistrate's decision is that there is no charge upon which a verdict (either of conviction or acquittal) under section 190 can properly be based."

I am in respectful agreement with the observations of both these learned judges and, rightly appreciated, they provide the correct manner in which the question I am now considering is to be

approached. I might here also draw attention to the definition of the expression "discharge" contained in the interpretation section (section 2) of the Criminal Procedure Code. "Discharge", with its grammatical variations and cognate expressions, means the discontinuance of criminal proceedings against an accused, but does not include an acquittal. This interpretation was stressed by Wood Renton, C.J., in the Divisional Bench decision in *Senaratne* vs. *Lenohamy*, (1917) 20 N.L.R. 44, where a majority of the Court held that the discharge of an accused without trial under section 191 of the Code is no bar to the institution of fresh proceedings against the accused.

Then again, in the case of *Perera* vs. *Johoran*, (1946) 47 N.L.R. 568, where after the Appeal Court had quashed a conviction of an accused person on the ground that he had been charged under a Regulation which had been repealed, the accused was charged subsequently under the proper Regulation in respect of the same act, the Supreme Court held that the plea of *autrefois acquit* was not available to the accused. Dias, J., stated that "in the earlier trial the accused was never in peril of conviction because, as was judicially declared by Canekeratne, J., it was a nullity. Therefore the accused did not stand in jeopardy of conviction in that case". He cited, apparently with approval, the observation of Abrahams, C.J., in *Rosemalecocq* vs. *Kaluwa* (*supra*) that an illegal trial is no trial at all, and, therefore an acquittal either by the trial Court or an Appellate Court would be ineffective.

In *Gunaratne* vs. *Hendrick Appuhamy*, (1950) 52 N.L.R. 43, where an accused person who had been acquitted on the ground that the charge against him was laid under a repealed Ordinance was subsequently charged, upon the same facts, with the commission of an offence under the proper enactment, Nagalingam, J., in spite of the decision in *Perera* vs. *Johoran* (*supra*) upheld a plea of *autrefois acquit* although he observed that *Perera* vs. *Johoran* was, having regard to its particular facts, correctly decided. He sought to distinguish that case as being inapplicable to the case he had to decide because the Supreme Court in *Perera* vs. *Johoran* (*supra*) had quashed the conviction at the first trial and the authorities were left, if so advised, to take any action against the accused. In regard to the distinction so sought to be made, it seems to me that any observations of the Appellate Court regarding what proceedings were available to the prosecution after the conviction at the first trial had been quashed cannot affect the interpretation of the nature of the order in that first trial. That order was one of discharge and not of acquittal.

Section 330 of our Criminal Procedure Code seeks to embody the English law doctrine of *autrefois convict* and *autrefois acquit*. In spite of observations to be found in some of the decisions of our Courts that the doctrine so embodied in section 330 is not precisely the same as that obtaining in England, I must confess that I do not appreciate that any real distinction exists. I am in agreement with the view expressed by Dias, J., in *Perera* vs. *Johoran* (*supra*) that the English law principle is also the law of Ceylon. He there expressly rejected an argument that because the Magistrate in the earlier case might by amending the charge have convicted the appellant and because the judge in appeal might have done the same thing, therefore the doctrine of *autrefois acquit* applies as a bar to the subsequent charge. Nagalingam, J., in *Gunaratne* vs. *Hendrick Appuhamy* (*supra*), although he approved of one part of the decision in *Perera* vs. *Johoran* (*supra*), does not say whether he approves or disapproves of the rejection by Dias, J., of the argument referred to above. His reference to the English decision in *Halsted* vs. *Clark*, (1944) 1 A.E.R. 270, appears to indicate that he would not have approved of the rejection of that argument. But the observations of Lawrence, J., in the English case will show that the decision there rested on the view taken that at the earlier trial, having regard to the evidence given for the prosecution, it was useless to have amended the summons as no offence appeared to have been committed.

Nagalingam, J., held that in both cases the accused was charged with the commission of the same offence. An offence is defined by our Code (section 2) as meaning any act or omission made punishable by any law for the time being in force in Ceylon. If this definition is kept in mind, it seems to me that, where a person is first charged with the commission of an act or an omission constituting an offence under a repealed law, and is charged at a second trial in respect of the commission of the same act or omission constituting an offence under the existing law, he is not charged with the commission of the same offence.

Mr. Wikremanayake referred us to the case of *Solicitor-General* vs. *Aradiel*, (1948) 50 N.L.R. 233, where our Lord, the Chief Justice (when he was a Puisne Justice) took the view that, where

at the close of the case for the prosecution the accused called no defence but took objection to the validity of the summons and the Magistrate "discharged" the accused, the order amounted in reality to an acquittal. This view appears to have been taken because the Magistrate made the order after the prosecution was closed, a stage after which, according to the learned judge, it was not open to the Magistrate to make an order merely of discharge. I have already indicated earlier in this judgment my opinion that at whatever stage the discovery is made, if a charge is found to be illegal, neither a conviction nor an acquittal can result in that proceeding unless the charge is subsequently rendered legal, and do not therefore find it necessary to add to the reasons which induce me to uphold the first of the Attorney-General's contentions.

There is, however, one other case to which I must refer, and that is *Attorney-General* vs. *Silva*, (1959) 61 N.L.R. 454, where H. N. G. Fernando, J., taking the view that there is no express provision in the Code empowering an order of discharge to be made at a stage subsequent to the closure of the case for the prosecution, upheld a plea of *autrefois acquit* based on an order of "discharge" made by a Magistrate who discovered at the end of the prosecution case and after the accused had stated that he was offering no evidence that no charge had been framed at all in spite of an entry in the record that the accused was charged "from an amended charge sheet". It must, however, be mentioned that the learned judge treated the case as one involving a charge of a comparatively minor nature which had been pending against the accused for nearly two years and expressly stated that the question whether an order of discharge and not of acquittal could properly be made in circumstances such as those in the case before him merited consideration by a fuller Bench.

In regard to the second of the Attorney-General's contentions, that to put forward successfully a plea of *autrefois acquit* there should have been an acquittal on the merits, as it has been termed, in view of the opinion I have formed on the first contention that the proceedings had subsequent to the illegally framed charge are bad in law and that therefore the order made by the Magistrate on February 5, 1958, amounts to no more than an inconclusive order of discharge and that the appeal must be allowed on that ground, I do not feel called upon to consider at any length this second contention. As the matter has, however, been argued before us, it may be useful if I set down very shortly what appears to me to be a tenable position under our law of criminal procedure.

In *Fernando* vs. *Rajasooriya, Inspector of Police*, (1944) 47 N.L.R. 399, Soertsz, J., did observe that a decision upon the merits is essential for a valid plea of *autrefois acquit*. Gratiaen, J., in *Wanigasekera* vs. *Simon* (*supra*) also remarked that the true test is whether (at whatever stage the decision was made) the Magistrate actually intended to record a verdict of acquittal on the merits. And quite recently, Sansoni, J., in *The Attorney-General* vs. *Kiri Banda*, (1959) 61 N.L.R. 227 at 229, himself favoured the view that an acquittal to operate as one made under section 190 of our Criminal Procedure Code must be one made on the merits and on no other ground. I am aware that certain other judgments of this Court have taken the view that an acquittal under our Criminal Procedure Code does not necessarily mean an acquittal on the merits. This view appears to have been influenced largely by the consideration that sections 194 and 195 of the Code contemplate orders which are termed acquittals and which certainly are not made after the merits of the case have been adjudicated upon by the Court. But an examination of those two sections will demonstrate that the orders there termed acquittals follow upon : (1) the absence of the complainant at the hearing of the case (section 194) ; and (2) the withdrawal of the charge by the complainant (section 195). In both circumstances the legislature can be said to have contemplated a situation equivalent to an absence of merits in the complaint. The only other case where an acquittal otherwise than on the merits may be said to be sanctioned by the Code is to be discovered in section 290 relating to the compounding of offences. Sub-section (5) of that section declares that the compounding of an offence thereunder shall have the effect of an acquittal. The compounding of an offence cannot ordinarily be looked upon as an acquittal, but the law deems it an acquittal in the sense that it carries with it the consequences attaching at law to an acquittal. It is in the nature of an exception to the principles that an acquittal must involve a decision on the merits. The case of compounding apart, the instances of acquittals under sections 194 and 195 and even the cases in which orders, although described indiscriminately sometimes as a discharge and at other times as an acquittal, have been held to operate as acquittals where the prosecution found itself unable to proceed with

a case on account of its inability to secure the attendance of necessary witnesses in spite of reasonable opportunity afforded by the Court to do so cannot unfairly be described as examples of cases where at the time the proceedings end or are taken to have ended the prosecution has been unable to establish to the satisfaction of the Court that there are merits in its case. I do not, however, consider it necessary to elaborate on this idea as the opinion I have reached on the question of the legality of the proceedings in case No. 21419 is a sufficient answer to the question we are here called upon to decide.

As the charge in case No. 21419 was, in my opinion, illegally framed, the order made by the Magistrate on February 5, 1958, operates merely as a discharge and not as an acquittal. I would allow the appeal and remit case No. 25279 to the Magistrate's Court for trial according to law. As nearly five years have elapsed since the date of the commission of the offences alleged, and as the question of law has now been decided, the prosecution should consider whether it is necessary to go on with this proceeding.

GUNASEKARA, J.

The facts are set out fully in the judgment of my brother Fernando.

The question for decision is whether the order terminating the proceedings in Case No. 21419 was an order of acquittal or an order under section 191 of the Criminal Procedure Code, discharging the accused. The Magistrate made this order holding that the proceedings were illegal "as the accused appeared in Court otherwise than on summons or warrant and was charged without any evidence being led against him". He went on to say "I therefore make order acquitting the accused". The question is whether, notwithstanding the use of this language, the order was an order of discharge merely. The question is not whether it was a right order or a wrong order of acquittal, but whether it was an order of acquittal at all. If it was an order of acquittal it seems to me that it is immaterial whether it was right or wrong : it was an order that was within the Magistrate's jurisdiction and had not been set aside by the Supreme Court and it would therefore bar a fresh prosecution for the same offences. If it was an order of discharge merely, the Magistrate was in error when he upheld the plea of *autrefois acquit* in the present case.

As my brother has pointed out, the words in which an order has been expressed are not conclusive of the question whether it is an order of acquittal or of discharge, but it must be interpreted in the light of the context.

The order that is in question was made after the close of the case for the prosecution. It has been contended that it was too late at that stage for an order to be made under section 191 of the Code. I do not agree. Section 190 provides for the recording of an appropriate verdict immediately after the Magistrate arrives at a finding of not guilty or of guilty, as the case may be. In terms of section 191 it is open to the Magistrate to discharge the accused "at any previous stage of the case". He is therefore not prevented from making such an order after the close of the case for the prosecution, so long as he makes it before he arrives at a verdict.

A verdict connotes a charge of an offence. A conviction or acquittal of an accused person can have no meaning except in reference to a charge. The ground of the order which terminated the proceedings in Case No. 21419 was that those proceedings (which purported to be a trial of a charge) were illegal for the reason that there was no valid charge. There can be no difference that is material to the present purpose between the absence of a charge and the absence of a valid charge. Therefore, when the Magistrate, having held in effect that there was no charge upon which the accused could be acquitted or convicted, declared that he was making an order "acquitting" the accused, he must be taken to have used this word inadvertently. Construed in the light of the context, the order was in reality an order discharging the accused, although it did in terms purport to be an order acquitting him.

I agree with Fernando, J., that the appeal must be allowed.

BASNAYAKE, C.J.

This is an appeal by the Attorney-General against the order of the Magistrate of Chilaw acquitting the accused-respondent on a plea of previous acquittal in M.C. Chilaw, case No. 21419 raised under the authority of section 330 of the Criminal Procedure Code. The charges in the instant case are as follows :—

"You are hereby charged, that you did within the jurisdiction of this Court at Erunwila, on 25th May, 1957, manufacture an excisable article to wit, arrack without a licence from the Government Agent, Puttalam, Chilaw District, in contravention of section 14 (*a*) of the Excise Ordinance (Cap. 42) and thereby committed an offence punishable under section 43 (*b*) of the Excise Ordinance (Cap. 42).

2. At the same time and place aforesaid did possess and use a still for the purpose of manufacturing an excisable article other than toddy to wit, arrack without a licence from the Government Agent, Puttalam, Chilaw District, in contravention of section 14 (*e*) of the Excise Ordinance (Cap. 42) and thereby committed an offence punishable under section 43 (*j*) of the Excise Ordinance.

3. At the same time and place aforesaid did without lawful authority have in your possession an excisable article to wit, 20 drams of arrack which had been unlawfully manufactured and thereby committed an offence punishable under section 44 of the Excise Ordinance (Cap. 42)."

The charges in M.C. Chilaw, 21419, are as follows :—

"You are hereby charged that you did within the jurisdiction of this Court at Nankadawara, on 25.5.57, did manufacture an excisable article to wit, arrack without a licence from the Government Agent, Puttalam, Chilaw District, in contravention of section 14*a* of the Excise Ordinance (Chapter 42) and thereby committed an offence punishable under section 43*b* of the Excise Ordinance (Chapter 42).

2. At the same time and place aforesaid did possess and use a still for the purpose of manufacturing arrack without a licence from the Government Agent, Puttalam, Chilaw District, in contravention of section 14*e* of the Excise Ordinance (Cap. 42) and thereby committed an offence punishable under section 43*f* of the Excise Ordinance (Chapter 42).

3. At the same time and place aforesaid did without lawful authority have in his possession about 20 drams of unlawfully manufactured arrack and thereby committed an offence punishable under section 44 of the Excise Ordinance (Chapter 42)."

The acquittal in case No. 21419 was on the ground that the Magistrate had framed a charge against the accused without adopting the procedure prescribed under section 187 (1) of the Criminal Procedure Code. The relevant portion of the learned Magistrate's order is as follows :—

> "Learned counsel for the accused at the close of the case for the prosecution did not call any defence but brought to my notice that proceedings were illegal in that the accused who appeared otherwise than on summons or warrant has been charged without any evidence being led as required under section 187 (1) of the Criminal Procedure Code.
>
> "I find upon a perusal of the record that the accused did not appear before this Court on summons or a warrant. The accused has been charged without any evidence being recorded. In view of a recent decision of the Supreme Court in S.C. 1345/M.C., Colombo, No. 19682, the proceedings are illegal. I therefore acquit the accused."

The plea of *autre-fois acquit* is founded on section 330 of the Criminal Procedure Code. The relevant portion of that section reads :—

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

The question that arises for decision is whether the accused was "tried by a Court of competent Jurisdiction for an offence and acquitted of such offence and the acquittal remains in force." To decide that question it is necessary to look at what happened at the trial. The charges were read to the accused, he pleaded not guilty, the prosecution called its witnesses, they were cross-examined by the defence and re-examined by the prosecution, and the prosecution case was closed. When the accused was called upon for his defence his pleader stated that he was not calling any evidence on the accused's behalf and made the submission that the charge was defective, in that the provisions of section 187 (1) had not been complied with, as the requirements of section 151 (2) of the Code had not been observed. The learned Magistrate upheld this contention.

In my opinion the accused had been tried by a Court of competent Jurisdiction and acquitted, and his plea of *autre-fois acquit* has been rightly upheld. In *Mohideen* vs. *Inspector of Police*,

Pettah (59 N.L.R. 217), it was held that non-compliance with the requirements of section 151(2) of the Criminal Procedure Code renders the proceedings void and that such non-compliance was not curable under section 425. The fact that the proceedings are void does not render an order of acquittal made by a Court of competent Jurisdiction not an order of acquittal, while the order remains unreversed by the Appellate Court. The cases on the meaning of "acquittal" and "discharge" in regard to other sections of the Code, such as sections 191 and 336, in my opinion have no application to section 330. My view would apply equally to a case in which an accused person is convicted and punished without the requirements of section 151 (2) being observed. While the conviction remains unreversed the accused will have to undergo the punishment imposed by the Court and if he is charged for the same offence while the conviction remains in force he is entitled to plead the previous conviction in bar. I understand the words "remains in force" in this context to mean unreversed by an appellate Court.

I am of opinion that the appeal should be dismissed.

Set aside and sent back.

Present : **H. N. G. Fernando, J. and L. B. de Silva, J.**

A. K. DAVID *vs.* M. A. M. M. ABDUL CADER

Application for Conditional Leave to Appeal to the Privy Council in S.C. 234
D.C. Puttalam 6327.

S.C. Application No. 180/1961.

Argued on : 21.7.1961.
Decided on : 15*th December*, 1961.

Privy Council—Application for conditional leave to appeal thereto—Appeals (Privy Council) Ordinance—What is a final order within meaning of rules in Schedule to Ordinance.

The plaintiff instituted an action for damages on the ground that the defendant had maliciously refused to issue to the plaintiff a licence under the Public Performances Ordinance authorising the use of the plaintiff's cinema for "public performances". On a preliminary issue as to whether the plaint disclosed a cause of action, the District Judge held that if the refusal to grant the licence had been malicious, a cause of action for damages would have enured to the plaintiff, but that such an action would lie, not personally against the individual who had refused the licence, but against the person in his capacity as the authority empowered by law to grant the licence, that is, as the Chairman of the Urban Council of Puttalam. The District Judge therefore dismissed the action on the ground that it had been brought against the defendant personally and not in his capacity as Chairman of the Council. On appeal to the Supreme Court, the dismissal was affirmed, but on the different ground that the proper remedy, if any, open to the plaintiff was by way of an application to the Supreme Court for a mandamus calling upon the proper authority to issue the licence, and not by way of an ordinary action in a civil Court. The plaintiff now sought to appeal from the order of the Supreme Court, and it was argued for the defendant that the order was not a final order within the meaning of the rules in the Schedule to the Appeals (Privy Council) Ordinance.

Held : (1) That the result of the order dismissing the action was that the question whether, in the circumstances alleged in the plaint, the plaintiff might recover damages on the ground that the licence was unlawfully refused, had been finally terminated. The plaintiff could not again seek to recover damages on the same ground from the defendant as an individual.

(2) That even though the ground of the dismissal of the plaintiff's action was that the District Court had no jurisdiction to entertain it, yet a plaintiff who alleges that a Court has jurisdiction is entitled to a determination on the question of jurisdiction ; and a determination that there is no jurisdiction would appear to be an order finally determining the rights of the parties unless there is a further explicit or implicit determination that some other authority has the jurisdiction to entertain the plaintiff's claim.

(3) That the order of the Supreme Court was therefore a final order from which an appeal lay under the rules to the Appeals (Privy Council) Ordinance.

Case discussed : *Salaman* v. *Warner*, (1891) 1 Q.B. 734; 60 L.J.Q.B. 624

Cases referred to : *Abdul Rahman* v. *Cassim & Sons*, (1933) A.I.R. 58 (P.C.).
Amatul Fatema v. *Abdul Alim*, (1920) A.I.R. 86 (P.C.).
Lall v. *Emanuel*, (1931) 33 N.L.R. 91.
Palaniappa Chetty v. *Mercantile Bank of India, Ltd.*, (1942) 43 N.L.R. 352 ; XXIII C.L.W. 13.
Settlement Officer v. *Vander Poorten*, (1942) 43 N.L.R. 436 ; XXIV C.L.W. 14.

C. Ranganathan with *Nimal Senanayake*, for the plaintiff-appellant.

H. V. Perera, Q.C., with *M. T. M. Sivardeen* and *M. A. M. Baki*, for the defendant-respondent.

H. N. G. FERNANDO, J.

This is an application for conditional leave to appeal to Her Majesty-in-Council against the judgment of this Court delivered on 24th March, 1961, on an appeal to the Court from a judgment and decree of the District Judge of Puttalam. The cause of action stated in the plaint was for damages alleged to have been sustained by the plaintiff by reason of the alleged malicious refusal of the defendant to issue to the plaintiff a licence under the Public Performances Ordinance (Cap. 134) authorising the use of the plaintiff's cinema for the presentation of "public performances". On a preliminary issue, namely, the question whether the plaint disclosed a cause of action against the defendant, the learned District Judge held that if the refusal to grant the licence had been malicious, a cause of action for damages would enure to the plaintiff. But in his view such an action would lie, not personally against the individual who had refused the licence, but rather against the person in his capacity as the authority empowered by law to grant the licence, that is, as the Chairman of the Urban Council of Puttalam. The District Judge dismissed the action on the ground that the action had been brought against the defendant personally and not in his capacity as the Chairman of the Council.

In the Supreme Court the dismissal was affirmed but on the different ground that the proper remedy if any is by way of an application to this Court for a Mandamus calling upon the proper authority to issue the licence and not by way of an ordinary action in a civil Court.

Assuming that the plaintiff's action was properly dismissed, whether upon the ground stated in the District Court or alternatively that stated in the judgment of this Court, it seems clear that the result of the order dismissing the action is that the question whether in the circumstances alleged in the plaint the plaintiff may recover damages on the ground that the licence was unlawfully refused has been finally terminated. The plaintiff chose to assert the existence of a right in him to sue the defendant as an individual for damages alleged to have been suffered by an alleged wrongful act of the defendant as an individual, and the effect of the judgment of this Court on appeal is that the plaintiff cannot again seek in the Courts to recover damages on the same ground from the defendant as an individual. Even though the ground of the dismissal of the plaintiff's action may be that the District Court has no jurisdiction to entertain it, a plaintiff who alleges that the Court has such jurisdiction is entitled to a determination on the question of jurisdiction, and a determination that there is no jurisdiction would appear to be an order finally determining the rights of the parties unless there is a further explicit or implicit determination that some other authority has the jurisdiction to entertain the plaintiff's claim. No indication of any such further express or implied determination is to be found in the judgment of this Court against which the plaintiff now seeks to appeal.

For the argument that the decree of this Court against which leave to appeal is now sought is not a final order within the meaning of the Appeals to the Privy Council Rules, counsel for the respondent relies greatly on the decision of the Court of Appeal in England in *Salaman* vs. *Warner*, (1891) 1 Q.B. 734. That decision construed the meaning of the terms "final order" and "interlocutory order" in a certain rule of procedure. The defendants in that action raised the point of law that the statement of claim did not disclose any cause of action, and the Judge at Chambers ordered the point to be set down for argument and disposed of before trial. The Divisional Court after hearing argument ordered that the action should be dismissed. Thereupon the plaintiff gave notice of appeal against the order dismissing his action. The question whether the order dismissing the action was final or interlocutory arose in connection with the notice of motion to appeal which was given by plaintiff. Under *Order LVIII, Rule* 3, of the English Rules of the Supreme Court, the notice of appeal from a final order must be a "fourteen days' notice", while the notice of appeal from an interlocutory order is a "four day notice". The "fourteen days" and "four day" period, in this context, is not the period within which the notice must be given (that matter is dealt with in *Order LVIII, Rule* 15); *Rule* 3 refers to the day which should be mentioned in the notice of motion to appeal, being the first day which can be named in the official list as the day of hearing of the motion to appeal and the notice should be given for that day.

In other words, the notice of appeal against a final order must state the motion to appeal will be set down for hearing on the 14th day after the date of the service of the notice, whereas the day to be so specified where the appeal is against an interlocutory order must be the 4th day after service of the notice. This was the effect of *Order LVIII, Rule* 3 as it stood in 1955, and the Rule existing at the time of the decision in *Salaman* vs. *Warner*, (1891) 1 Q.B. 734, could not have been substantially different.

In considering the applicability of the decision of the Court of Appeal in construing the Rules in Ceylon regulating appeals to Her Majesty-in-Council, it is necessary to cite fairly fully from the judgments of Lord Esher, M.R., and Fry, L.J., and for convenience of comment I shall italicise parts of the *dicta* which seem to me of much importance.

> "*Taking into consideration all the consequences that would arise from deciding in one way and the other respectively*, I think the better conclusion is that the definition which I gave in *Standard Discount Co.* vs. *La Grange* (3 *C.P.D.* 64 *at p.* 71) is the right test *for determining whether an order for the purpose of giving notice of appeal under the rules* is final or not. The question must depend on what would be the result of the Divisional Court, assuming it to be given in favour of either of the parties. If their decision, whichever way it is given, will, if it stands, finally dispose of the matter in dispute, *I think that for the purpose of these rules it is final.* On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but, if given in the other, will allow the action to go on, then I think it is not final, but interlocutory. That is the rule which I suggested in the case of *Standard Discount Co.* vs. *La Grange* (*supra*), and which on the whole *I think to be the best rule for determining these questions ;* the rule which will be most easily understood and involves the fewest difficulties." (*per Lord Esher, M.R. at p.* 735).

> "The 3rd and 15th rules of Order LVIII have raised considerable difficulties because they use the term "interlocutory order", of which no definition is to be found in the rules themselves or, so far as I know, by reference to the earlier practice, either of the Common Law or of Chancery Courts. These difficulties are well illustrated by various cases that have been decided. *We must have regard to the object of the distinction drawn in the rules between interlocutory and final orders as to the time for appealing.* The intention appears to be to give a longer time for appealing against decisions which in any event are final, a shorter time in the case of decisions where the litigation may proceed further. I think that the true definition is this. I conceive that an order is "final" only where it is made upon an application or other proceeding which must, whether such application or other proceeding fail or succeed, determine the action. Conversely I think that an order is "interlocutory" where it cannot be affirmed that in either event the action will be determined.". (*per Fry, L.J., at p.* 736).

It will be seen that the Court of Appeal has for the purposes of the rules which regulate giving of the notice of appeal adopted a test which will enable a party or his lawyers to determine beforehand whether the order ultimately obtained in a proceeding will be final or else interlocutory ; a proceeding for this purpose would appear to fall necessarily or at least ordinarily into one of three categories :—

(1) If the point raised in the proceeding is such that the order ultimately made will result in the final termination of the proceeding in the Court before which it is held, *whichever way the order will go*, then the order will be "final" for the purposes of the rules.

(2) If the order which will ultimately be made, whichever way it goes, will not be a final termination and if after the order is made the action will continue, then the order is "interlocutory".

The distinction between the two kinds of orders respectively mentioned above is a straightforward one, distinguishing between orders which, on the one hand, are manifestly interlocutory and, on the other hand, manifestly final. But in the third class of case, where such a distinction is inapplicable, the Court of Appeal decided that an order, which if I may say so with respect, is not manifestly "interlocutory", will be regarded as being interlocutory for the purposes of the Rules.

(3) The third class of case is one where, although the order may finally determine the rights of the parties in the sense that it has the effect of finally terminating the action in the Court, it is nevertheless regarded as interlocutory because if the decision had been given the other way the action would have continued in that Court.

With much respect to the learned Judges of the Supreme Court of Ceylon who have referred to the judgments in *Salaman* vs. *Warner*, (1891) 1 Q.B. 734, in considering the meaning of the expression "final order" in our rules regulating appeals to the Privy Council, it seems to me that those parts of the *dicta* of the Court of Appeal which I have italicised did not receive due attention. In determining whether the third class of case mentioned above should be regarded as leading to an order which is final or interlocutory the Court of Appeal appears to have had strong

reason for considering it proper and convenient that the order should be treated as an interlocutory order *for the purposes of determining which of the two notices required by the English Rules should be given*. I have little doubt that if what was involved was, not merely the question of the day to be mentioned in the notice, but the more important and fundamental question whether an appeal lies at all, the third class of order would not have been regarded as interlocutory, having regard to the consequence that it would then be non-appealable.

The decision of the Privy Council in *Abdul Rahman* vs. *Cassim & Sons*, (1933) A.I.R. 58 (P.C.), did not adopt the ruling of the Court of Appeal in *Salaman's case* (*supra*) in the same sense in which that ruling was relied upon in the argument before us. The order from which an appeal was there taken to the Privy Council was one which reversed a decree of dismissal and which remanded the suit to the original Court for trial on the merits. In fact, therefore the order appealed against to the Privy Council did not finally determine the rights of the parties, for those rights were left to be determined by the original Court.

> "The finality must be a finality in relation to the suit. If, after the order, the suit is still a live suit in which the rights of the parties have still to be determined, no appeal lies against it under section 109 (A) of the Code."

But there is nothing in the judgment of the Privy Council to show that if the Appellate Court in India had confirmed the decree of dismissal the order of confirmation would not be a final order against which the party aggrieved had his right of appeal. The case of *Amatul Fatema* vs. *Abdul Alim*, (1920) A.I.R. 86 (P.C.), which was followed was equally one where the order appealed from, being an order which refused a stay of suit, left the rights of the parties to be determined by the Courts and therefore did not finally dispose of those rights.

The decision in *Salaman's case* (*supra*) has been referred to more than once in judgments of this Court relating to the construction of the term "final order" in the context now under consideration. In regard to those judgments to which our attention has been drawn in the argument, *Lall* vs. *Emanuel*, 33 N.L.R. 91, *Palaniappa Chetty* vs. *Mercantile Bank of India, Ltd.*, 34 N.L.R. 352, *Settlement Officer* vs. *Vander Poorten*, 43 N.L.R. 436, I note that in each of them, although leave to appeal was properly refused, there was no necessity to rely upon the ruling in *Salaman* vs. *Warner*, (1891) 1 Q.B. 734.

As has been stated above the effect of the order made by the Supreme Court against which the plaintiff now seeks to appeal is that he is finally prevented from asserting his alleged claims as against the defendant as an individual. Unless the test laid down in *Salaman's case* (*supra*) is to be applied (and for reasons already stated that test is in my opinion inapplicable), I find no ground upon which to hold that the decree dismissing the plaintiff's action is not a final order for the purposes of the rules regulating appeals to Her Majesty-in-Council.

The application for conditional leave to appeal is allowed with costs fixed at Rs. 315/-.

L. B. DE SILVA, J.
I agree.

Application allowed.

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

MARTIN APPUHAMY *vs.* SUB-INSPECTOR OF POLICE, JAFFNA

S.C. No. 1003/59—*M.C. Jaffna, No.* 17894.

Argued on : June 6, 1961.
Decided on : April 11, 1962.

Criminal Procedure Code, sections 148, 150, 151, 187 (1)—*Cases where an accused is brought to Court other than on summons or warrant—Must a Magistrate hold the examination directed by section* 151 (2) *in every such case or only in cases falling under section* 148 (1) (*d*)—*Nature of evidence to be recorded at such examination—Is hearsay excluded—Evidence Ordinance, sections* 2 (1), 60.

Held : (1) That in all cases where an accused is brought before Court otherwise than on summons or warrant, a Magistrate must hold the examination directed by section 151 (2) of the Criminal Procedure Code. The decision in *Mohideen* vs. *Inspector of Police, Pettah*, is applicable to all such cases and is not confined to proceedings instituted under section 148 (1) (*d*) of the Criminal Procedure Code.

(2) (H. N. G. FERNANDO, J., dissentiente) : That when a person is being examined in terms of section 151(2) of the Criminal Procedure Code, hearsay evidence must be excluded. The case of *Tikiri Banda* vs. *Perimpanayagam* was, therefore, correctly decided.

Overruled : *Lamanatissa de Silva* v. *Sub-Inspector of Police, Matara,* (1961) 62 N.L.R. 92.

Approved : *Tikiri Banda* v. *Perimpanayagam, Sub-Inspector of Police, Kurunegala,* (1959) 61 N.L.R. 286 ; LVII C.L.W. 65.

Referred to : *Mohideen* v. *Inspector of Police, Pettah,* (1957) 59 N.L.R. 217 ; LV C.L.W. 12.
Mohammado v . *Appuwa,* (1915) 1 C.W.R. 170.
Vargheese v. *Perera,* (1942) 43 N.L.R. 564.
The Queen v. *Buddharakkita Thero et al,* (1962) 63 N.L.R. 433.

M. L. de Silva with *K. Jayasekera*, the for accused-appellant.

D. St. C. B. Jansze, Q.C., Attorney-General, with *Ananda Pereira, Senior Crown Counsel*, and *V. S. A. Pullenayegum, Crown Counsel*, for the complainant-respondent.

BASNAYAKE, C.J.

The following questions were reserved by my brother T. S. Fernando under section 48 of the Courts Ordinance :—

(*a*) " Is the decision of the Court in *Mohideen* vs. *Inspector of Police, Pettah,* (59 N.L.R. at 217) applicable only in the case of accused persons against whom proceedings have been instituted under section 148 (1) (*d*) of the Criminal Procedure Code ? "

(*b*) " Does the decision in the case of *Tikiri Banda* vs. *Perimpanayagam* (61 N.L.R. at 286) in so far as it excludes the admission of hearsay upon an examination of a person in terms of section 151 (2) of the Criminal Procedure Code correctly interpret the relevant provision of law ? "

A Bench of three Judges was constituted for their determination in accordance with an order in that behalf made by me under section 48A of the Courts Ordinance.

In regard to the first question, *Mohideen* vs. *Inspector of Police, Pettah*, deals with a case for which provision is made in section 151 (2), *i.e.*, where proceedings have been instituted under paragraph (*d*) of section 148 (1). That paragraph deals with the case in which a person accused of an offence is brought before a Magistrate in custody without process. For the purposes of section 187 (1) such a person would be an accused who is brought before the Court otherwise than on summons or warrant. That provision requires that the Magistrate shall, in accordance with the direction in section 151 (2), first examine on oath the person who has brought the accused before the Court and any other person who may be present in Court able to speak to the facts of the case, and if on such examination he forms the opinion that there is sufficient ground for proceeding against the accused, frame a charge against him.

While section 151 (2) deals with only proceedings instituted under paragraph (*d*) of section 148 (1), *i.e.*, on any person being brought before a Magistrate in custody without process accused of having committed an offence which such Court has jurisdiction either to inquire into or try, section 151 (1) deals with cases in which proceedings are instituted under paragraphs (*e*) and (*f*) of section 148 (1). Section 151 (1) deals with cases in which the accused is not in custody. In those cases the process indicated in the 4th column of the First Schedule would issue—summons where summons is prescribed in the first instance and warrant where warrant is prescribed ; but before issuing a warrant in any case under paragraph (*a*) or (*b*) of section 148 (1) the Magistrate is bound to examine on oath the complainant or some material witness or witnesses. He may also examine them in a case in which summons may issue in the first instance, but he is not bound to do so. In a case under paragraph (*c*) of section 148 (1) the Magistrate is bound, before issuing process, to record a brief statement of the facts which constitute his means of knowledge or of the grounds of his suspicion, as the case may be.

Where proceedings are instituted under paragraphs (*e*) or (*f*) of section 148 (1) no examination of the complainant or any other person is required as a condition precedent to the issue of summons. The Magistrate is

bound to issue summons or warrant accordingly as the fourth column of the First Schedule provides that the case is one in which a summons or a warrant should issue in the first instance.

Provision is also made in section 150 for a case in which the offence alleged in proceedings instituted under section 148 (1) (*a*) or (*b*) is an indictable offence and no person is accused of having committed it. In such a case too the Magistrate may examine on oath the complainant or informant and any other person who may appear to him able to speak to the facts of the case. If, after recording such evidence, there is in his opinion sufficient ground for proceeding against any person, he is bound to issue process against such person in the manner provided in section 151. Failure to comply with the corresponding provision of the Code [section 149 (4)] prior to its amendment has been held to be fatal [*Mohammado* vs. *Appuwa*, (1915) 1 C.W.R. 170]. In that case Shaw, J. said—"The failure to comply with section 149 of the Code is in my opinion a fatal irregularity which cannot be cured under the provision of section 425." The *ratio decidendi* of the case of *Mohideen* vs. *Inspector of Police, Pettah*, is that the failure to observe conditions precedent to the issue of process is fatal to any proceedings which take place without the observance of such conditions. That decision deals primarily with a case falling under section 148 (1) (*d*) ; but the *ratio decidendi* is applicable to other similar cases.

Now in regard to the second question the relevant sections provide that the Magistrate should examine on oath—

(*a*) in the case of section 150 (1) the complainant or informant and any other person who may appear to the Magistrate to be able to speak to the facts of the case ;

(*b*) in the case of section 151 (1) the complainant or some material witness or witnesses ; and

(*c*) in the case of section 151 (2) the person who has brought the accused before the Court and any other person who may be present in Court able to speak to the facts of the case.

It would appear that the sections contemplate the taking of evidence, and there is no doubt that the proceedings under sections 150 and 151 are judicial proceedings. Section 2 (1) of the Evidence Ordinance provides that the Ordinance shall apply to all judicial proceedings in or before any Court other than Courts-Martial. Therefore in the taking of evidence under sections 150 and 151 the provisions of the Evidence Ordinance must be observed. In an examination under those sections hearsay evidence can be admitted only in cases in which the admission of such evidence is permitted by the Evidence Ordinance and in no other. Oral evidence must in all cases be direct. Section 60 explains what that means—

(1) if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw that fact ;

(2) if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard that fact ;

(3) if it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived that fact by that sense or in that manner ;

(4) if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds.

Any person who gives oral evidence in an examination under section 150 and 151 may only give direct evidence as explained in section 60. *Tikiri Banda* vs. *Perimpanayagam* (61 N.L.R. 286) lays down the law correctly in excluding such hearsay evidence as is not permitted by the Evidence Ordinance.

H. N. G. Fernando, J.

The first question reserved for determination by this Bench is the following :—

"Is the decision of the Court in *Mohideen* vs. *Inspector of Police, Pettah*, (59 *N.L.R.*, at 217) applicable only in the case of accused persons against whom proceedings have been instituted under section 148 (1) (*d*) of the Criminal Procedure Code ?"

It would appear from the terms of the reference made by T. S. Fernando, J., that his reason for reserving this question was that doubts are cast by the decision of my Lord the Chief Justice in *S.C. No.* 712, *M.C. Matara, No.* 55987, *S.C.M.*,

March 14th, 1960 (now reported at 62 *N.L.R.* 92) on the scope of the decision of a bench of three Judges in *Mohideen* vs. *Inspector of Police, Pettah* (*supra*).

The brief judgment in 62 *N.L.R.* 92 refers to the fact that in that case there had been a written report to the Court under section 148 (1) (*b*), and that in addition *the accused was also produced by the police*. On these facts the Chief Justice held "that circumstance does not convert proceedings instituted under section 148 (1) (*b*) to proceedings instituted under section 148 (1) (*d*). The procedure prescribed in section 151 (2) is confined to proceedings instituted under section 148 (1) (*d*)". With respect, the opinion just cited is entirely in accord with that which I myself held, and indeed that was the reason why in reserving the appeal in *Mohideen* vs. *Inspector of Police, Pettah*, (*supra*) for fuller consideration I expressed disagreement with the earlier judgment of Soertsz, J., in *Vargheese* vs. *Perera* (43 *N.L.R.* 564).

But my view was overruled by the majority of the Bench of three Judges who considered the point in *Mohideen* vs. *Inspector of Police, Pettah*, (*supra*). In that case an accused had been produced in Court in terms of section 126A (1) of the Criminal Procedure Code by a police officer who submitted at the same time to the Magistrate the report of an investigation into a cognizable offence. Thereupon the Magistrate acting under section 126 A (2), remanded the prisoner into custody until August 22nd, 1955. On that day the police sergeant filed a report in terms of section 148 (1) (*b*) of the Code and when the report was filed the accused was present in Court under Fiscal's custody. K. D. de Silva, J., writing the principal judgment declined to accept the submission that the case fell under section 148 (1) (*b*) and not under section 148 (1) (*d*), and he decided accordingly that sub-section 2 of section 151 (which in terms applies to a case where proceedings have been instituted under section 148 (1) (*d*)) must be complied with, namely, that the Magistrate must examine on oath the person who brought the accused before the Court and any other person able to speak to the facts of the case.

Much of the reasoning of K. D. de Silva, J., was based on the terms of section 187 (1) of the Code, and his opinion, which in my view was the *ratio decidendi*, was as follows :—

> "This section 187 (1) includes not only a case where the accused is present in custody, but also when he is present on remand on police bail or on being warned by the police to appear in Court. In all those instances it would appear that it is incumbent on the Magistrate to hold the examination contemplated by section 151(2)."

My Lord the Chief Justice (*at page* 218) was of the same opinion :—

> "Be that as it may, the question whether proceedings were instituted under section 148 (1) (*d*) or section 148 (1) (*b*) is of little importance in this case as admittedly the accused was brought before the Court otherwise than on a summons or warrant. In such a case clearly the procedure under section 187 must be followed. The word "brought" in that section does not mean brought by a police officer, but compelled to attend either by virtue of the fact that he is in police custody and is forwarded to Court or is accompanied by a police officer or is compelled to attend by virtue of having executed a bail bond under section 126A or section 127."

In view of these *dicta* the subsequent decision in *Lamanatissa de Silva* vs. *Sub-Inspector of Police, Matara*, (62 *N.L.R.* 92), must be held to have been wrongly decided. The answer to the first question we are now considering is to be found in the *dicta* which I have just cited from *Mohideen* vs. *Inspector of Police, Pettah* (*supra*).

The second question for decision is whether *Tikiri Banda* vs. *Perimpanayagam* (*S.I. Police*), (61 *N.L.R.* 286) rightly decided that in every case where section 187 of the Code renders an examination under section 151 (2) of the Code necessary, a charge cannot be framed against an accused person unless and until "a person able to speak to the facts of the case" has been examined, and that hearsay statements cannot be acted upon for the purpose of framing a charge in such a case.

Section 151 (2) directs the Magistrate to examine on oath—

(i) the person who has brought the accused before the Court ; and

(ii) any other person who may be present in Court able to speak to the facts of the case.

The provision is directly applicable in a case referred to in section 148 (1) (*d*), that is where "a person is brought before a Magistrate in custody without process" ; accordingly it seems to me that the meaning of the provision can be best ascertained by a consideration of its application in that particular case. In very nearly every such case the person would be brought to Court in the custody of a police officer or of some other officer authorised to make an arrest. This officer has necessarily to be examined on oath by the

Magistrate. But his knowledge of the facts of the case, will not, save in exceptional circumstances, be direct, so that his examination by the Magistrate will ordinarily reveal only the substance of the complaint made by some other person and the results of any inquiry which he, or some other officer, may have conducted. In so far therefore as the examination of this officer is concerned, the Court is compelled by section 151 (2) to place on record evidence which can be largely or even totally hearsay.

Turning now to the other examination directed by the section, the Magistrate is expressly required only to examine any person *who may be present in Court* able to speak to the facts of the case. *Prima facie* section 151 (2) appears to be applicable on the occasion when a person is produced in custody, or in other words, to direct what action a Magistrate should take on such an occasion. In the absence of any provision in the section which requires or enables a Magistrate to secure the attendance of some person not present in Court on that occasion, I cannot agree with the view taken in *Tikiribanda* vs. *Perimpanayagam* (*Sub-Inspector of Police*) (*supra*) that the Magistrate is bound by the section to summon and examine some person able to speak to the facts of the case who is not present on the occasion when the accused is produced in custody. Such a view would be justifiable only if there is compelling reason to import into the section a duty or power not expressed therein. It remains to consider whether any such reason is suggested in the context.

Bearing in mind that the "prima" case contemplated in sub-section 2 of section 151 is that in which a person is produced in custody so that no issue of process is necessary, it is clear that the purpose of the examination directed by the sub-section is that the Magistrate may be in a position to decide whether "*there is sufficient ground for proceeding against*" the person brought in custody (*vide* section 187 (1). Since identical language occurs in sub-section (1) of section 151, it seems to me perfectly legitimate to infer that in all probability the legislature intended that the step to be taken under section 187 (1) may be taken upon material of substantially the same weight and value as that upon which a Magistrate may take under sub-section 1 of section 151 the step therein mentioned, namely, the issue of process against a person not in custody.

One knows from experience that in the vast majority of cases where a report under section 148 (1) (*b*) is furnished to the Court, the step of issuing *summonses* is generally taken under sub-section 1 of section 151 solely upon the report: in other words, a Magistrate when he issues summons ordinarily forms, upon the material of the report, the opinion that "there is sufficient ground for proceeding against" some person not in custody. Reverting now to the examination under sub-section 2, it seems to me that even if the police officer who produces a person in custody is only to speak to matters not within his own knowledge and to report only what has been said to him by some other person, the weight or value of what he so orally states can be at least equal to that of material which may be furnished by a police officer in a written report: it may even be of greater value for the reason that it is stated on oath in the presence of the Court and not merely in writing.

The decision in *Tikiribanda* vs. *Perimpanayagam* (*supra*) would render essential the recording of direct evidence, such as that of an eye-witness, which implicates the accused. To my mind the omission of the legislature to provide *expressly* for the taking of evidence of this kind is significant having regard to the difference in the language of sub-section 2 of section 151 as compared with the language of sub-section 1. The proviso (ii) to sub-section 1 expressly requires that, before issuing warrant against a person who is accused in a section 148 (1) (*b*) report, the Magistrate *shall examine on oath the complainant or some material witness or witnesses*. It would seem *prima facie* that even under this proviso it would be sufficient for the Magistrate to examine the complainant, who will ordinarily be the police officer making the report, and that therefore even the language of this proviso may not require as a matter of necessity the examination of "some material witnesses". But assuming for the purposes of argument that this proviso does compulsorily require some direct evidence to be recorded, what is significant is that the legislature in sub-section 2 chose to provide for the examination not of some material witness, but only of any person who may be present in Court able to speak to the facts of the case. One point of difference in sub-section 2 is that there is here no reference to "some material witness": and if that means a person who can give direct evidence, then the person referred to in sub-section 2 might well be one who cannot give direct evidence but

only testify to some matters related to him, say by a person who cannot attend Court because he is lying injured in a hospital. The second point of difference is that a person to be examined under sub-section 2 is a person " who may be present in Court ", so that *prima facie* at least the words do not compulsorily require the Magistrate to examine anyone who is not present in Court on the occasion when the sub-section becomes applicable, that is the occasion when a person is produced in Court. While in the proviso to sub-section 1 it is made clear that the proceeding may have to be adjourned in order to secure the attendance of some material witness, the language of sub-section 2 indicates on the contrary that adjournment for such a purpose need not be a normal step. In my view it would not be reasonable to imply that the language in the two provisos, so different in many important respects, was intended nevertheless to convey the same meaning.

For these reasons my answer to the second question referred for consideration is that section 151 (2) does not compel a Magistrate to record direct evidence implicating an accused person and does not exclude the admission of hearsay upon an examination under the sub-section. I would hold that *Tikiribanda* vs. *Perimpanayagam* (*supra*) was to this extent wrongly decided.

The charge in this case was read after the Magistrate had recorded evidence of the Inspector of Police who had investigated the complaint against the accused. This examination in my opinion satisfies the requirements of section 151 (2) of the Criminal Procedure Code. I would accordingly dismiss the appeal.

SINNETAMBY, J.

I have had the advantage of reading the judgments prepared by My Lord the Chief Justice and my brother H. N. G. Fernando, J. I agree with the conclusions they have reached in regard to the first question reserved for determination by this Bench, namely, that the decision in *Mohideen* vs. *Inspector of Police, Pettah*, 59 N.L.R. 217, is applicable to all cases where an accused person is brought before a Court otherwise than on a summons or a warrant. It would appear that in the case which has been referred to us for consideration of these questions, the accused had first been produced by the Police with a report under section 126 (A) of the Criminal Procedure Code and remanded pending investigations. On a subsequent date the police filed plaint under section 148 (1) (*b*). In *Mohideen* vs. *Inspector of Police* (*supra*), the facts were identically the same. There, too, the accused had first been remanded pending investigations and was under fiscal custody and then plaint was filed under section 148 (1) (*b*). I agree with Fernando, J., that the case *Lamanatissa de Silva* vs. *Sub-Inspector of Police, Matara*, 62 N.L.R. 92, was wrongly decided.

The second question reserved for the consideration of this Bench is one of some difficulty. It is undoubtedly correct that section 151 (2) imposes upon a Magistrate the duty to examine the person who brought the accused before Court and any other persons who may be present and able to speak to the facts of the case ; and it may be that neither the person who produces the accused nor any other person present would be able to give direct evidence of facts to enable the Court to conclude that there are sufficient grounds for proceeding against the accused : it may also be that such a conclusion can only be reached if the person producing the accused person is permitted to give evidence of what eye witnesses had told him. The question that poses itself immediately is whether it is permissible for a police officer, who invariably would be the person producing an accused otherwise than upon a warrant, to give evidence of what witnesses told him in the course of his investigations. It seems to me that he would be debarred from doing so having regard to the interpretation placed upon the relevant provisions of the Criminal Procedure Code and the Evidence Ordinance by a Divisional Bench of this Court in *Queen* vs. *Buddharakita Thera, H. F. Jayawardena and Talduwe Somarama Thera*, S.C. No. 8, M.C. Colombo, No. 2383A, S.C. Minutes of 15.1.1961.* It would follow, therefore, that it is not open to a police officer in giving evidence under section 151 (2) to state what witnesses told him in the course of his investigations. A police officer must confine his evidence to what he actually knows and to the information which he received under section 121 (1) of the Criminal Procedure Code, which, of course, would be admissible evidence. To give evidence of what other witnesses told him would be to act in contravention of the provisions of section 122 (3) as interpreted in the Buddharakita case. On this ground alone, therefore, it seems to me that if the material before the Court on the day the accused is produced is insufficient to enable the Magistrate to frame

*63 N.L.R. 433

a charge then an adjournment should be sought in order that material witnesses may be summoned to give evidence.

There is another aspect of the matter deserving consideration. It is the principle rigidly followed by framers of the Code that wherever the liberty of the subject is involved an independent judgment, that is to say, other than the judgment of the police, is brought to bear upon the facts of the case before an order imperilling the subject's liberty is made. It is for that reason that express provision was made for a police officer investigating an offence to produce an accused person before a Magistrate within twenty-four hours of his arrest and then obtain the Magistrate's order for further remands pending further investigations. That is provided for in section 126 (A) of the Criminal Procedure Code and the Magistrate in doing so undoubtedly is guided by police reports of what witnesses stated in the course of police investigations. The burden of deciding whether the accused should be further remanded is by that section placed on the Magistrate. What the Magistrate peruses is not evidence in the case and it is open to him to refuse to remand the accused. At that stage he is only concerned with deciding whether the complaint is well founded and not with whether the accused should be charged and brought to trial. The report is not evidence in the case.

Section 148 which deals with the way in which the proceedings in the Magistrate's Court may be instituted permits summons to be issued by the Magistrate on complaints whether made orally or in writing. Under sub-section 1 (*a*) the complaint may be made by a private person and under section 1 (*b*) in writing by a person holding an official position. In either case, if it is sought to obtain a warrant of arrest, the procedure expressly provides that the Magistrate shall before doing so examine the complainant or some material witness or witnesses. It makes no difference whether the plaint is a private plaint or a police plaint. In either case, before a warrant is ordered, the law requires the Magistrate to bring his independent judgment to bear upon the facts. Where proceedings are instituted under section 148 (1) (*c*) (*e*) or (*f*) it is open to a Magistrate to issue a warrant in the first instance without any examination ; but in these cases the Magistrate himself, or the Attorney-General or a Judge has brought his mind to bear upon the facts. It will thus be seen that throughout, the procedure prescribed secures in some way an examination of the facts by an independent judicial mind before the liberty of a subject is imperilled. Now, in proceedings under section 148 (1) (*d*) we have a person brought to Court without process. He may be so brought by a police officer or by a private person and he has already been deprived of his liberty. It seems to me that in such a case, too, the Code, following the same policy, requires a judicial mind to be brought to bear upon the facts in order to ascertain whether the accused has been properly deprived of his liberty and to decide whether he should be further remanded or admitted to bail. If upon consideration of the facts the Magistrate thinks that there are no grounds for proceeding against the accused, he would be discharged, but if there are grounds the Magistrate is required to frame a charge. It is essential, therefore, that a Magistrate should be placed in possession of all the material facts and this can only be done by admissible evidence of the facts being led. Such evidence being the material on which the Court acts forms part of the proceedings and the witnesses called are liable to be examined and in due course cross-examined in the normal way. Indeed, it would be wrong and in my view illegal not to recall and tender such a witness for cross-examination.

For these reasons I am of the opinion that the decision in *Tikiri Banda* vs. *Perimpanayagam*, 61 N.L.R. 286, is correct and when a police officer produces accused persons in custody he should take steps to see that the material witnesses are present to be examined by Court, or obtain an adjournment to do so. He should not give hearsay evidence except of the first information.

Set aside.

[**Editorial Note** : In view of the decision of the majority of the Court in this case, T. S. Fernando, J., on 17th May 1962, set aside the conviction and the sentence imposed on the accused-appellant. He also held, however, that in view of the decision in *Attorney-General* v. *Piyasena*, 63 N.L.R. 489 ; 61 C.L.W. 79, this would not bar a fresh prosecution].

Present : **Basnayake, C.J. (President), Sansoni, J., and Sinnetamby, J.**

THE QUEEN *vs.* H. SUMANATISSA THERO

Appeal No. 188 *of* 1961 *with Application No.* 196 *of* 1961—*S.C. No.* 122, *M.C. Gampaha, No.* 51729/*A*

Argued and decided on : February 26, 1962.

Criminal Procedure Code, section 122—*Statements recorded in an investigation under Chapter* 12 *of Code to be used only for the purposes set out in section* 122 (3)—*Tendering of oral evidence in proof of such statements illegal—Evidence Ordinance, section* 145.

Evidence in rebuttal—Not to be called at stage of Crown Counsel's address—Police Officer's evidence of statements made to him by accused not substantive evidence if denied.

Held : (1) That the learned Commissioner was wrong in allowing Crown Counsel to call evidence in rebuttal after the close of the defence case and during Crown Counsel's address to the jury.

(2) That it is illegal to use statements made by an accused in the course of an investigation under Chapter 12 of the Criminal Procedure Code, for any purposes other than those provided in section 122 (3) of the Code.

Followed : *The Queen* v. *Buddharakkita Thera and Others*, (1962) 63 N.L.R. 433.

(3) That the tendering of oral evidence as proof of statements made by a person in the course of an investigation under Chapter 12 of the Criminal Procedure Code, is illegal.

Followed : *The King* v. *Haramanisa*, (1944) 45 N.L.R. 532 ; XXVIII C.L.W. 68

(4) That statements said to have been made by an accused to a Police Officer and denied by the accused at the trial, cannot be used as substantive evidence of the facts stated therein. Such statements are relevant only for the purpose of impeaching the credit of the accused.

Followed : *The King* v. *Silva*, (1928) 30 N.L.R. 193.

A. Deva Rajah (*assigned*), for the accused-appellant.

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

BASNAYAKE, C.J.

The appellant was indicted on the following charge :—

" That on or about the 25th day of July, 1959, at Bollathe, in the division of Gampaha, within the jurisdiction of this Court, you did have in your possession forged or counterfeit currency notes, to wit, five fifty-rupee notes bearing Nos.—

1. A/71 95081
2. A/71 328036 and 28036
3. A/71 310622
4. A/71 78797
5. A/71 142537 and 142436

knowing or having reason to believe the same to be forged or counterfeit and intending to use the same as genuine, and that you have thereby committed an offence punishable under Section 478C of the Penal Code (Amendment) Ordinance No. 19 of 1941."

found guilty by a unanimous verdict and sentenced to undergo 12 months' rigorous imprisonment.

The only material evidence against the appellant was that of Sub-Inspector Wanasinghe. The accused-appellant gave evidence in his own behalf and denied that he possessed these notes with the knowledge that they were forged and gave an explanation as to how he came by them. He pleaded that he was an innocent possessor of the notes. In the course of the cross-examination of the accused he was asked whether he made a statement to the Police and whether the Police asked him how he came by the notes.

The following are some of the questions put to the accused in cross-examination :—

142. *Q.* Did not the police ask you how you came by these notes ?
A. Yes.

157. *Q.* You told us that when you were questioned by the police you gave some answers ?
A. Yes.

158. *Q.* Were your answers taken down ?
A. I cannot remember.

159. *Q.* You can remember answering questions put to you by the inspector who arrested you ?
A. Yes.

160. *Q.* Did you by any chance tell him that H. I. Fernando and R. E. Silva are well known to you ?
A. I cannot remember.

161. *Q.* Did you say this ? "H. I. Fernando, R. E. Silva are well known to me".
A. I cannot remember.

165. *Q.* Did you say this to the Police ? "Proctor Aponso is well known to me".
A. No.

166. *Q.* Did you continue, "He was introduced to me by H. I. Fernando".
A. Yes.

167. *Q.* Did you tell the police that Proctor Aponso was introduced to you by H. I. Fernando ?
A. No. I cannot remember.

168. *Q.* So you know a single person who trades in forged currency notes ?
A. No.

169. *Q.* Did you say this to the police ? "I was aware that Silva was trading in forged currency notes".
A. No.

199. *Q.* The Police found only five Rs. 50/- notes in your inner garment ?
That is what the police say.

200. *Q.* Is that false?
A. I had no money. I was under the impression that what I had was genuine money. The police say that the money I had was forged.

Thereafter the defence closed its case and Crown Counsel commenced his address. In the course of it he informed the Court that he had forgotten to call evidence in rebuttal and asked for permission to do so. The learned Commissioner allowed his application, and Sub-Inspector Wanasinghe was re-called and asked whether he recorded the statement of the accused and when he said that he did he was asked to refresh his memory ; but it is not clear how he did so. The following questions were put to him:—

205. *Q.* Did he say anything as to whether he knew two persons called H. I. Fernando and R. E. Silva ?
A. Yes.

206. *Q.* What did he say ?
A. He said he knew H. I. Fernando and R. E. Silva.

207. *Q.* Did he say anything about a Proctor Aponso ?
A. He said he knew Proctor Aponso, too.

208. *Q.* Well ?
A. Well.

209. *Q.* Did he say how he came to know Proctor Aponso ?
A. He said "He was introduced to me by H. I. Fernando".

210. *Q.* Did he say anything about Silva ?
A. Yes.

211. *Q.* What did he say ?
A. He said that he was aware that Silva was trading in forged currency notes.

212. *Q.* After you recorded that statement I take it you read it back to the accused he admitted it to be correct ?
A. Yes.

In the first place the learned Commissioner was wrong in allowing Crown Counsel to call evidence in the course of his address and in the next place the proof of statements made by the accused in the course of an investigation under Chapter XII of the Criminal Procedure Code for purposes other than that provided in Section 122 (3) was illegal [*Reg.* vs. *Buddharakkita and Others* (S.C. 8/M.C. Colombo No. 23838)*].

If the course learned Crown Counsel meant to adopt was that provided in section 145 of the Evidence Ordinance he should have observed the requirements of that section. The tendering of oral evidence as proof of statements made by a person in the course of an investigation under Ch. XII is illegal (*The King* vs. *Haramanisa*, 45 N.L.R. 532).

Quite apart from the above illegalities there is also a grave omission in the summing-up. The learned Commissioner failed to warn the jury that the statements said to have been made by the accused to Sub-Inspector Wanasinghe and denied by him at the trial, cannot be used as substantive evidence of the facts stated therein, and that such statements were only relevant for

*63 N.L.R. 433.

the purpose of impeaching the credit of the accused. (*King* vs. *Silva*, 30 N.L.R. 193). On the contrary he directed them that the important evidence in this case is the evidence of Inspector Wanasinghe.

On account of the illegalities pointed out above the conviction of the accused is vitiated and we quash the conviction and direct that a verdict of acquittal be entered.

Appeal allowed.

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

THAMBAGAMUWA KUMARIHAMY *vs.* THAMBAGAMUWA BUDDHARAKKITA

S.C. No. 96—*D.C. Ratnapura No.* 1368/*T.*

Argued and decided on : March 17, 1961.

Civil Procedure Code, Chapter LIV—Procedure to be followed in administration proceedings thereunder—Property belonging to deceased claimed by person cited—Oral evidence given in support of claim—Effect of not filing affidavit as required by section 714 (3)*—No order as to delivery of immovable property to be made in proceedings under this Chapter.*

Held : (1) That although section 714 (3) of the Civil Procedure Code sets out that the proceedings as to the property claimed shall be dismissed on the person cited filing an affidavit claiming such property, the fact that the respondent in the present case had not filed an affidavit was no bar to the dismissal of the proceedings as she had on affirmation claimed to be the owner of the property.

(2) That in proceedings under Chapter LIV of the Civil Procedure Code, no order for delivery of possession of immovable property can be made.

N. E. Weerasooria, Q.C., with *W. Wimalachandra*, for the respondent-appellant.

H. W. Jayewardene, Q.C., with *N. S. A. Goonetileke*, for the petitioner-respondent.

BASNAYAKE, C.J.

This is a matter arising in the course of administration proceedings. By a petition dated 15th August, 1958, the executor of the last will of the deceased Rajapakse Mudiyanse Ralahamillage Ran Bandara Thambagamuwa prayed that the deceased's widow Thambagamuwa Kumarihamy, the respondent-appellant, be ordered to hand over to the petitioner-respondent an Austin car bearing No. Z 6040 and an elephant called Menike which the petitioner-respondent alleged belonged to the deceased and ought to be delivered to him.

The learned District Judge made order in favour of the petitioner-respondent granting him not only the elephant and the motor car but also Thambagamuwa Estate which he did not claim in his petition.

The respondent-appellant when under examination presumably under section 714 (1) of the Civil Procedure Code stated that she was the owner of the elephant and claimed the car which was in her possession and was insured by her and registered in her name. It is submitted by counsel for the respondent-appellant that the order of the learned District Judge is bad as the procedure prescribed in Chapter LIV of the Civil Procedure Code has not been observed. Section 714 of the Civil Procedure Code provides :

"(1) Upon the attendance of a person in obedience to such citation and order, he shall be examined fully and at large, on oath or affirmation, respecting any money or other property of the testator or intestate, or of which the testator or intestate was in possession at the time of or within two years preceding his death.

"(2) A refusal to be sworn or to answer any question allowed by the Court is punishable in the same manner as a like refusal by a witness in a civil case.

"(3) In case the person cited puts in an affidavit that he is the owner of the said property, or is entitled to the possession thereof by virtue of any lien thereon or special property therein, the proceedings as to such property so claimed shall be dismissed."

In a proceeding under Chapter LIV the petitioner should pray an inquiry respecting the property claimed and that the person complained of may be cited to attend the inquiry and to be examined accordingly [section 712 (1)]. If the Court is satisfied upon the material placed before

it that there are reasonable grounds for inquiry it is required to issue a citation. The form of citation is prescribed in the Schedule to the Code and is as follows :—

"(TITLE)

To.....

Whereas one A.B. (executor of the last will of ....., deceased, *or* administrator of the estate and effects of....., deceased), has presented a petition to this Court praying that you may be cited to attend an inquiry whether (*set out shortly the substance of the application*) ; and whereas the said A.B. has satisfied this Court that there are reasonable grounds for such inquiry ; You are hereby cited and required personally to be and appear before this Court on the.....day of....., 19...., at....o'clock of the forenoon, then and there to answer (*set out what the subject of the inquiry is*).

(*Signed, &c.*)....., *District Judge*."

In the instant case there is no petition and no citation in the prescribed form. The petitioner—

(*a*) prays that the said Florence Thambagamuwa Kumarihamy, the respondent abovenamed, be ordered to hand over the said car and the said she-elephant to the petitioner ;

(*b*) asks for costs or for such other and further relief as to this Court shall seem meet.

The notice issued to the respondent-appellant reads—

" Whereas it has been brought to the notice of this Court that you are in the possession and control of (*a*) an Austin Car bearing No. Z 6040, and (*b*) the She-Elephant called and known as 'Menike' belonging to the Estate of the late Rajapaksa Mudiyanse Ralahamillage Ran Bandara Thambagamuwa of Thambagamuwa.

" You are hereby required to attend this Court in person on the 12th day of September, 1958, at 10 o'clock, in the forenoon to show cause if any why the said Motor Car and the said Elephant should not be forthwith handed over to the petitioner as Executor of the said Estate."

When the respondent-appellant appeared in response to the notice the matter was fixed for inquiry and she was examined on affirmation. In the course of her examination she claimed that the elephant was her property and did not belong to her deceased husband. She also claimed the car as it was registered, licensed and insured in her name. A retired Village Headman of Thambagamuwa and the person who trained the elephant gave evidence in support of her claim.

As the respondent-appellant has on affirmation claimed to be the owner of the elephant and the motor car her failure to do so by affidavit is not a bar to the dismissal of the proceedings as provided in sub-section (3).

We, therefore, set aside the order directing the respondent-appellant to deliver possession of the motor car and the she-elephant. In regard to the motor car learned counsel does not challenge the respondent-appellant's right to it. The learned District Judge has further ordered the respondent-appellant to deliver to the petitioner-respondent possession of the entirety of Thambagamuwa estate as described in the lease bond marked A 1 (excluding a block of twenty-five acres on the left side of the Ratnapura-Hambantota Road). That order cannot be sustained in proceedings under Chapter LIV of the Civil Procedure Code, nor does learned counsel for the petitioner-respondent seek to support it. We accordingly set aside that order as well.

The respondent-appellant is entitled to the costs of the appeal.

H. N. G. FERNANDO, J.
I agree.

Appeal allowed.

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

M. DON ANTHONY *vs.* THE BRIBERY COMMISSIONER

S.C. No. 3 *of* 1961—*Bribery Tribunal, Case No.* 11/I. 168/59.

Argued on : 16th March, 1962.
Decided on : 5th April, 1962.

Bribery Act, No. 11 *of* 1954, *as amended by Act, No.* 40 *of* 1958—*Ceylon (Constitution) Order-in-Council,* 1946—*Bribery Tribunal—Whether members exercise judicial power even at the stage prior to*

conviction—Validity of entire Bribery Act challenged—Right of appeal to the Supreme Court conferred by section 69A of the Act—Can an appellant challenge the validity of the very Act of Parliament which confers a right of appeal on him.

It was submitted on behalf of the appellant that a Bribery Tribunal as constituted under the present Bribery Act purported to exercise judicial power not only at the stage of convicting and punishing a person but even at the stage of ascertaining and declaring the liabilities of persons charged before it. It would then follow from the decision in *Senadhira* v. *The Bribery Commissioner*, that such power could not be validly exercised by the Tribunal as the giving of such powers to the Tribunal was unconstitutional. Any statute which purported to confer such powers on the Bribery Tribunal would be invalid.

A preliminary objection was taken by Crown Counsel that the appellant could not attack the validity of the very Act of Parliament which gave him a right of appeal. (It might be noted that section 69A of the Bribery Act, as amended, gives a convicted person a right of appeal to the Supreme Court).

Held : (1) That the preliminary objection must be upheld and that the appellant could not attack as invalid the very statute which conferred on him a right of appeal to the Supreme Court. Any relief on the ground of the invalidity of the Act must be found by a process other than appeal.

(2) That, however, following the decision in *Senadhira* v. *The Bribery Commissioner*, the sentence of fine imposed on the appellant must be set aside.

Followed : *Senadhira* v. *The Bribery Commissioner* (1961) 63 N.L.R. 313 ; 60 C.L.W. 65.

Referred to : *The King-Emperor* v. *Benoari Lal Sarma*, 1945 A.C. 14.

M. Tiruchelvam, Q.C., with *K. Thevarajah*, for the accused-appellant.

V. S. A. Pullenayegum, Crown Counsel, for the respondent.

T. S. FERNANDO, J.

In *Senadhira* v. *The Bribery Commissioner*, (1961) 63 N.L.R. 313 ; 60 C.L.W.65, this Court upheld an argument that the power given by the Bribery Act, No. 11 of 1954 as amended by the Bribery (Amendment) Act, No. 40 of 1958, to a Bribery Tribunal to pass sentence on a person accused of a bribery offence is *ultra vires* the provisions of the Ceylon (Constitution) Order-in-Council, 1946. It was there held :—

(i) that the power given to a Bribery Tribunal to sentence a person found guilty of having committed a bribery offence to a term of imprisonment or to order such a person to pay a penalty amounts to the conferring on the Tribunal of a judicial power whereas the members of such a Tribunal have not been validly appointed to exercise such powers ; and

(ii) the provisions of the Bribery Act conferring judicial power on the Tribunals are distinct and severable from other provisions which confer other powers.

Sansoni, J., with whom I agreed, in the case above referred to, was inclined to think that the essential difference between arbitral power and judicial power was that, while the function of the former was to ascertain and declare, the function of the latter was not merely to ascertain and declare but also to enforce the rights and liabilities so declared. Mr. Tiruchelvam has on this appeal sought to take the argument put forward in *Senadhira's case* (*supra*) even further and has contended that, rightly interpreted, a Bribery Tribunal, as constituted under the relevant law, even at the stage of ascertaining and declaring liabilities of persons charged before it, purports to exercise judicial power. It may be mentioned that in *Senadhira's case* (*supra*), Mr. H. V. Perera expressly conceded that a Bribery Tribunal acts not unconstitutionally up to the point of finding a person brought before it guilty or not guilty of the specific offence alleged against him. We are free to say that we found the argument presented to us by Mr. Tiruchelvam not without attraction, but do not feel called upon to consider it here as we feel compelled to uphold the preliminary objection raised by learned Crown Counsel that it is not competent for the appellant to attack as invalid the very Act of Parliament which alone confers on him the right to appeal to this Court. Any relief on the ground of the invalidity of the Act must be found by a process other than appeal. Crown Counsel's objection finds support in the observations of the opinion of the

Judicial Committee in the case of *The King-Emperor* vs. *Benoari Lal Sarma* (1945) A.C. 14, at 20, and we must give way to it.

At the same time, however, we would on this appeal apply the decision of this Court in *Senadhira's case* (*supra*) and make order setting aside the sentence of fine of Rs. 1,000/- imposed on him.

H. N. G. FERNANDO, J.
I agree.

Conviction and sentence set aside.

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

THEGIS APPUHAMY & OTHERS *vs.* HENDRICK SINGHO & OTHERS

S.C. No. 26/59—*D.C. Gampaha, No.* 4937/*P.*

Argued on : July 12, 1961.
Decided on : March 16, 1962.

Partition action- -Land which is not part of the land to which the action relates wrongly included in survey plan—Power of Court to exclude it.

Held : That in a partition action, where the Commissioner includes in his survey plan land which is not part of the land to which the action relates, the Court has power to exclude it.

Luinona v. *Gunasekera*, (1958) 60 N.L.R. 346, explained.

H. W. Jayewardene, Q.C., with *L. C. Seneviratne*, for the plaintiffs-appellants.

A. L. Jayasooriya with *D. R. Wijegoonewardene* and *H. Ismail*, for the 10th, 22nd, and 50th defendants-respondents.

D. R. Wijegoonewardene, for the 23rd, 24th, 25th, 26th, 52nd, 55th, 60th and 62nd defendants-respondents.

BASNAYAKE, C.J.

This is an appeal by the plaintiffs in a partition action against the order of the District Judge dismissing it.

The plaintiffs sought to partition a land called Galabodawatta valued at Rs. 12,000/- bounded on the North by the field of Galolukankanamalage Juwan Appu, East by the land of Edirisinghe Magiris Appu and others, South by the land of Galolukankanamalage Henderick and others, West by the garden of Edirisinghe James Appu and in extent about nine bushels paddy sowing extent. They named as defendants to the action 53 persons. There were others who intervened and were added as defendants. The corpus to be partitioned was divided by the Commissioner into 17 blocks marked A—Q. Some of the defendants claimed distinct blocks of the corpus surveyed as their exclusive property, others maintained that the surveyor had included in his survey a land called Delgahawatte which was their property. The right of the plaintiffs to the distinct allotments they claimed was disputed by some of the defendants. At the trial the folowing points of contest were suggested :—

"1. Do lots D and F form part of the corpus that is sought to be partitioned ?

2. Do lots K to P depicted in plan No. 1034 form part of a different land and should they be excluded ?

3. Does lot G form part of another land called Galabodawatta ?"

After hearing the evidence tendered by the plaintiffs and the defendants the learned Judge delivered judgment dismissing the plaintiffs' action without deciding the matters in dispute. His reason for doing so was that in view of a recent decision of this Court (S.C. 182/D.C. Gampaha, 3076P—S.C. Minutes 18.12.1958)* he was precluded from excluding any portion of the land

*60 N.L.R. 346.

surveyed from the partition. He then went on to hold—

> "As I can neither hold that the land depicted in the plan is the land which constitutes the subject-matter of the action as set out in the plaint, nor exclude any portion of the lots for which exclusion is sought, and I will have to exclude some portion of the land depicted in the plan, which is 6A.—3R.—37P. in extent as against nine bushels of paddy sowing in the plaint, I have no option but to dismiss this action."

The judgment referred to by the learned judge affords no authority for the course taken by him. The land surveyed by the Commissioner is not in every case the land to which the action relates. That decision does not hold that the Court has no power to exclude land included in his survey plan by the Commissioner as being part of the land to which the action relates when, in fact, it is not. The learned District Judge was wrong in taking the course he did. We therefore set aside his judgment and send the case back for hearing and determining the questions of law and fact arising in the action as required by section 25 of the Partition Act. The learned Judge seems to have taken the view that the Commissioner had surveyed a larger extent than that given in the Schedule to the plaint, wherein the extent is given in the ancient surface as "about nine bushels paddy sowing extent", which according to the learned Judge when reduced to the legal surface measure is 4 acres and 2 roods.

The land surveyed is 6 acres 3 roods and 37 perches. There is no evidence that nine bushels paddy sowing extent is the same extent as 4 acres 2 roods, but if that be so the Commissioner appears to have travelled outside his commission in surveying a land of 6 acres 3 roods and 37 perches for the Commission authorised him to survey the land described in the Schedule to the plaint and to survey a larger land "if any of the defendants named in the Plaint point out to you a larger land than that described in the Plaint as the land which should be the subject-matter of this Partition Action".

Now the Commissioner does not say in his report that any of the defendants named in the plaint pointed out a larger land. This aspect of the matter will, no doubt, receive the attention of the Judge at the re-trial which we have ordered. The appellants are entitled to the costs of this appeal.

The costs of the abortive trial will abide the final result.

H. N. G. FERNANDO, J.

I agree.

Appeal allowed.

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

V. KITNAPILLAI & OTHERS *vs.* T. THAMBIRASA & ANOTHER

S.C. 549/59(*F*)—*D.C. Trincomalee, No.* 5532.

Argued on : 31st January, 1961.
Decided on : 6th November, 1961

Co-owners—Entirety of land claimed by one co-owner—Prescriptive possession—Nature of evidence necessary to establish ouster.

Held : (1) That where a co-owner seeks to establish title by prescriptive possession to the common property on the basis of an ouster, very clear and strong evidence of the ouster is called for, and unless the evidence is compelling and convincing, the inference of an ouster should not be drawn.

(2) That the fact that damage compensation and rent compensation (under the Defence Compensation Regulations) were paid to one of several co-owners does not by itself establish anything in the nature of an ouster referable to a date prior to the date on which compensation had been paid.

Per SINNETAMBY, J.—"The principle laid down in *Corea* v. *IserisAppuhamy* (15 N.L.R. 65) is still good law and has been consistently followed. The rule laid down therein is that the possession of one co-owner enures to the benefit of the other co-owners. It is only if there are special circumstances which warrant it, that exclusive possession by one co-owner would justify a presumption of ouster".

Cases referred to : *Simpson* v. *Omeru Lebbe*, 48 N.L.R. 112.
Sederis Appuhamy v. *James Appuhamy*, 60 N.L.R. 297.

Corea v. *Iseris Appuhamy*, 15 N.L.R. 65.
Rajapakse v. *Hendrick Singho*, 61 N.L.R. 33.
Tillekeratne et al. v. *Bastian et al.*, 21 N.L.R. 12.
Abdul Majeed v. *Ummu Zaneera*, 61 N.L.R. 361; LVIII C.L.W. 17

J. D. Aseervatham, for the plaintiffs-appellants.

S. Sharvananda, for the defendants-respondents.

SINNETAMBY, J.

This is an action for a declaration of title of a 2/3rd share of the land described in the schedule to the plaint. The 2nd defendant claimed the entirety of the land on a deed of transfer from the fiscal, who had sold the property in execution of a decree against the 1st defendant, her husband. She claimed the entirety of the land on the basis of her husband's prescriptive possession. The learned trial judge, at the judgment stage, dismissed the action against the 1st defendant with costs on the ground of misjoinder. No issue was raised in regard to this matter, the 1st defendant took part in the trial up to the very end, and I do not think the learned Judge was justified at that stage of the case, in dismissing the action against the 1st defendant. We do not know on what grounds both defendants were joined and unless objection was taken thereto, or there was at least an issue raised, it would be difficult to ascertain on what basis the 2nd defendant had been joined. In any event the plaintiffs should have been given an opportunity of being heard before an order adverse to them was made.

It is not disputed that the original owner of the land was one Kandan Vyran who derived title on a Crown grant P.1 dated 31st August, 1937. Kandan Vyran had four children, Naki, Kathirasi, Thamban and Apirani. Apirani died without issue and her share devolved on the three others. 1st, 2nd and 3rd plaintiffs are the children of Kathirasi. 4th, 5th, 6th and 7th plaintiffs are the children of Seethavy, a daughter of Naki. The 1st and 4th plaintiffs gave evidence in support of the plaintiff's case. The 1st defendant, Thambirasa, is a son of Thamban already referred to. It is clear from this pedigree that Thamban could not have inherited more than 1/3rd share of the land. Thambirasa, and his father before him, had lawful title to a 1/3rd share of the land in question and being a co-owner, their possession must be referable to this lawful title. Thambirasa gave evidence. He is unable to say on what title his father Thamban came to possess this land but he claimed the entirety of the land on the basis of exclusive possession. The question the learned trial Judge had to decide was, as he himself says, whether the evidence established something in the nature of an ouster from which adverse possession as against Thamban's co-owners can be inferred. The burden which is a heavy one is on the 2nd defendant. I should like first of all to point out that in cases of this kind, where a co-owner seeks to establish title by prescriptive possession to the common property on the basis of an ouster, very clear and strong evidence of the ouster is called for, and, unless the evidence is compelling and convincing, the inference of an ouster should not be drawn ; *Simpson* vs. *Omeru Lebbe*, 48 N.L.R. 112. In the present case, such evidence is totally lacking. It is true that the plaintiffs, upon the evidence led, did not possess the land. It is also true that on the 1st plaintiff's evidence, Thamban, the father of the 1st defendant possessed the land, but, says the 1st plaintiff " it was done with his mother's permission ". The learned Judge has rejected this evidence in regard to the alleged permission of the mother : but, where there are several co-owners, there are diverse reasons why one of them is permitted to be in possession of the common property. As between brothers and sisters that is not altogether uncommon, but if by virtue of his possession a co-owner desires to establish an ouster the evidence of that ouster must be clearly established ; and, so far as a presumption of an ouster is concerned, the mere fact that a co-owner possessed the common property for a period of 30 years or more is insufficient. In fact, this Court has held that even possession for over fifty years, in the absence of any special circumstance, will not justify a presumption of an ouster. In *Sederis Appuhamy* vs. *James Appuhamy*, 60 N.L.R. 297, even though the land which a co-owner claimed had been separated by fences, mere possession for fifty years was not considered sufficient to establish prescriptive title.

In the present case, apart from the fact of possession by Thamban and Thambirasa, the other evidence led to establish an ouster, or a presumption of an ouster, is the fact that the

defendant was paid compensation under the Defence Compensation Regulations when during the war the military requisitioned the property. From the documents produced and the evidence of the defendant it would appear that rent compensation was paid to the 1st defendant and that later damage compensation was also paid to him. It must be noted that under the regulations, rent compensation is payable to the person in occupation and it does not matter that the person in occupation is not the owner of the land. What the competent authority is concerned about in regard to payment of rent compensation is only occupation, and it is to the occupier that compensation is payable. The competent authority undoubtedly considered the 1st defendant to be in occupation of the land at the time of the requisition but according to the plaintiffs, they too made a claim which, however, does not appear to have been accepted. This payment was made in March, 1949, and if that is to be regarded as evidence of ouster, the ouster must be related to that date, which would be within 10 years of action brought. Damage compensation is payable to the owner of the land, and, in that case, the competent authority is obliged to ascertain who the owner is. If he is in doubt, he generally refers the parties to Court to obtain a decision in regard to ownership. In any event, even damage compensation was paid only after 1946, according to D. 3. Documents D. 2 and D. 3 do not specifically establish that payment was made, but the defendant's evidence is that payment was made to him. I do not think, however, that these documents by themselves establish anything in the nature of an ouster referable to a date prior to the date on which compensation had been paid. The learned Judge was, in my view, therefore, wrong in inferring from the payment to the 1st defendant that he was in exclusive possession of the co-owned property. The principle laid down in *Corea* vs. *Iseris Appuhamy*, 15 N.L.R. 65, is still good law and has been consistently followed. The rule laid down therein is that the possession of one co-owner enures to the benefit of the other co-owners. It is only if there are special circumstances which warrant it, that exclusive possession by one co-owner would justify a presumption of ouster. In most of the cases where such a presumption had been drawn there were special circumstances to justify it, and in *Sederis* vs. *James Appuhamy* (*supra*) reference has been made to some of these cases.

The learned trial Judge purported to follow the judgment of My Lord the Chief Justice in *Rajapakse* vs. *Hendrick Singho*, 61 N.L.R. 33. The basis of that decision was that if a co-owner was not only in occupation of the land but also took its produce to the exclusion of the other co-owners and their predecessors in title, and gave them no share of the produce, paid them no share of the profits, nor any rent, and did no act from which an acknowledgment of a right existing in them would fairly and naturally be inferred, that is evidence of an ouster. The principle therein enunciated, if I may say so with respect, is inconsistent with the views expressed in earlier cases. In *Tillekeratne* vs. *Bastian*, 21 N.L.R. 12, Sampayo, J., stated :—

> "While a co-owner may without any inference of acquiescence in an adverse claim allow such natural produce as the fruits of trees to be taken by the other co-owners, the aspect of things will not be the same in a case where valuable minerals are taken for a long series of years without any division in kind or money."

In fact, in a subsequent case *Abdul Majeed* vs. *Umma Zaneera*, 61 N.L.R. 361, where this question was reconsidered, the majority of the divisional bench held that proof that one of the co-heirs let out the premises and appropriated to himself the entire rent for 37 years was insufficient by itself to bring the case within the provisions of Section 3 of the Prescription Ordinance. The learned Chief Justice adhered to the views he had already expressed in *Rajapakse* vs. *Hendrick Singho* (*supra*) but K. D. de Silva and H. N. G. Fernando, JJ., took the view that mere long continued possession was insufficient. Indeed, to establish ouster there must be some special circumstances from which such an inference may properly be drawn. In *Tillekeratne* vs. *Bastian* (*supra*) the circumstance was the taking of valuable minerals from the land which constituted a greater part of its worth. In my view, the defendants in this case have not establish an ouster or circumstances from which one would be entitled to presume an ouster : the possession of the defendants must be referable to their lawful title.

I would accordingly set aside the judgment of the learned District Judge. In regard to the shares of the plaintiffs, the learned Judge has held that 1st to 3rd plaintiffs are entitled to a 1/9th share each and the 4th to 7th a 1/60th share each. I see no reason to interfere with those findings.

I would accordingly allow the appeal and direct that judgment be entered in favour of the plaintiffs declaring them entitled to the shares stated above. They will be entitled to costs both of this appeal as well as of the trial in the Court below.

TAMBIAH, J.

I agree.

Appeal allowed.

Present : **Basnayake, C.J., and L.B. de Silva, J.**

MOTHA & ANOTHER *vs.* PERERA & ANOTHER

Application for Conditional Leave to Appeal to the Privy Council in S.C. No. 268
D.C. Colombo, No. 5293/*MB.*
Application No. 185

Argued on : September 29 and October 11, 1961.
Decided on : October 11, 1961.

Privy Council—Application for leave to appeal thereto—Appeals (Privy Council) Ordinance, rule 2 *of Schedule—Two appellants—Proxy signed by one only—Effect—Sufficiency of notice given under rule* 2*—Whether appeal severable.*

An application was made under the Appeals (Privy Council) Ordinance for leave to appeal to the Privy Council. The motion and petition filed with it were signed by a Proctor on behalf of the appellants, who were two in number. The proxy given to the Proctor for the purpose of making the application was, however, signed by only one of the appellants.

Further, notice of the intended application for leave to appeal, which is required to be given by rule 2 of the rules in the Schedule to the Appeals (Privy Council) Ordinance, was given in the following ways :—firstly, by a telegram, bearing the name of one of the appellants as sender, and sent by the Manager of the appellants' business in the name of that appellant and by a telegram bearing the name of the other appellant as sender, and similarly sent by the Manager of the business ; secondly, by a written communication sent by post, and signed by only one appellant, both on his own behalf and on behalf of the other appellant.

Held : (1) That the Proctor had no authority to make the application on behalf of both appellants, and that therefore the application was defective.

(2) That the application must also be disallowed in that no sufficient notice had been given in terms of rule 2 of the rules in the Schedule to the Appeals (Privy Council) Ordinance. For—

(*a*) The telegrams did not constitute notice given by the appellants and did not satisfy rule 2.

(*b*) The written communication did not constitute sufficient notice, inasmuch as it was not clear that the appellant who signed had authority to give notice on behalf of the other appellant.

The rule requires that, where there is more than one appellant, notice should be given by all of them.

(3) That it was not possible to allow the application in respect of that appellant alone who had given notice on his own behalf, because the appeal was not severable in that way.

Case referred to : *British Ceylon Corporation* v. *United Shipping Board*, (1934) 36 N.L.R. 225.

C. Ranganathan with *T. Arulanathan*, for the plaintiffs-appellants.

H. W. Jayewardene, Q.C., with *S. S. Basnayake* and *H. E. P. Cooray*, for the defendants-respondents.

BASNAYAKE, C.J.

This is an application under the Appeals (Privy Council) Ordinance for leave to appeal to the Privy Council. The motion and the petition filed with it are signed by a proctor on behalf of the appellants, Manuel Louis Motha and Cruz Benedict Motha. There is an affidavit by only one of them, Cruz Benedict Motha, in support of the petition. Objection is taken to the application, on the ground, *inter alia*, that the proctor had no authority to make the application he

seeks to make on behalf of both appellants as the proxy is signed by only one of them. The material portion of the proxy reads as follows :—

"KNOW ALL MEN BY THESE PRESENTS THAT WE, Cruz Benedict Motha and Manuel Louis Motha, both carrying on business in partnership at 861, Aluthmawatte Road, Mutwal, under the name of 'The Queen Confection Company' have nominated, constituted and appointed, and do hereby nominate, constitute and appoint Sapapathy Kanagarajah, Proctor of the Honourable the Supreme Court of the Island of Ceylon, to be our true and lawful Proctor and for us and in our name and behalf before the said Honourable Court to appear and this proxy to exhibit and by virtue hereof to apply to the said Honourable Court for conditional leave to appeal to Her Majesty the Queen in Council from the Judgment and the decree of the said Honourable Court delivered on the 24th day of March, 1961, in proceedings in S.C. No. 268 (Final 1959), D.C., Colombo, No. 5293, and make all incidental applications in regard to thereto and thereafter to apply for and obtain final leave to appeal to Her Majesty in Council . . ."

The objection must be upheld as it is clear that only one of the appellants has signed the proxy.

Objection is also taken to the application on the ground that the requirements of rule 2 of the rules in the Schedule to the Appeals (Privy Council) Ordinance have not been satisfied. That rule reads as follows :—

"Application to the Court for leave to appeal shall be made by petition within thirty days from the date of the judgment to be appealed from, and the applicant shall, within fourteen days from the date of such judgment, give the opposite party notice of such intended application."

In the instant case the appellants rely on two separate telegrams, one bearing the name of M. L. Motha as the sender and the other bearing the name of C. B. Motha, as well as on the following communication sent by registered post as giving the notice required by rule 2 :—

"Please take notice that we, Manuel Louis Motha and Cruz Benedict Motha, both carrying on business at 861, Alutmawatte Road, under the name of 'The Queen Confection Company' the respondents in S.C. 268/59 intended to make an application to the Honourable the Supreme Court of Ceylon for conditional leave to appeal to Her Majesty the Queen in Council against the judgment, order or decision of the said Supreme Court in appeal in this action pronounced on the 24th day of March, 1961. The application for conditional leave will be filed in the Supreme Court within 30 days of the said judgment."

It would appear from the affidavit of Ramasamy Devanesan Joseph, the manager of the business of the appellants, filed with the motion that it was he who sent the telegrams in the name of the appellants. Those telegrams do not constitute notice given by the appellants and does not satisfy rule 2. The written communication quoted above is signed by C. B. Motha alone. He signs both on his behalf and on behalf of M. L. Motha. There is no proof that C. B. Motha had M. L. Motha's authority to give, on his behalf, notice of an intended application to the Privy Council. The notice of intended application has therefore been given by one only of the two appellants, viz., C. B. Motha.

The rule cited above requires that the applicant should within the prescribed time give notice of the intended application. Where there is more than one applicant the notice should be given by all. The rule is not satisfied where one of two applicants alone gives notice. In the instant case M. L. Motha has not given notice of his intended application for leave to appeal to the Privy Council. It has been held by this Court that the failure of an appellant to give notice of his intended application for leave to appeal to the Privy Council is fatal.

Learned counsel contended that the notice given by C. B. Motha satisfied the rule and that, even though the notice given on behalf of M. L. Motha was bad, the application should be allowed in respect of C. B. Motha. An appeal is not severable in that way especially in a case such as the one before us. The principle governing a matter such as this is not different from that applied in the case of *British Ceylon Corporation* v. *The United Shipping Board* (36 N.L.R. 225 at 258).

We accordingly refuse the application with costs.

DE SILVA, J.
I agree.

Application refused.

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

P. SAMARAWICKREMA *vs.* S. SUBRAMANIAM

S.C. No. 93 of 1959—C.R. Colombo, No. 70621.

Argued on : 8th and 13th November, 1961.
Decided on : 15th December, 1961.

Contract—" Rent-A-Car " service—Hiring of cars registered as private cars—Prohibition and penalty contained in Motor Traffic Act—Illegality of such contract—Unenforceability thereof—Motor Traffic Act, No. 14 of 1951, sections 2 (1), 5 (1), 25 (1), 26, 29, 45, 177, 179, 197, 214 (2), 240.

The plaintiff sued the defendant to recover a specified sum of money on a contract according to which the plaintiff hired to the defendant a car on certain conditions. The car had been registered as a private car and the revenue licence was that of a private car. The defendant took up the position that the contract was illegal and therefore unenforceable.

Held : (1) That the contract was illegal inasmuch as it violated the provisions of section 45 of the Motor Traffic Act No. 14 of 1951, such violation being also penalised by section 214 (2) of the said Act.

(2) That the contract is therefore also unenforceable.

Held further :

(3) That in the present case no claim based on tort could have succeeded as the plaintiff had expressly pleaded that his claim was based on the contract between himself and the defendant.

Cases referred to : *Victorian Daylesford Syndicate, Ltd.* v. *Dott,* (1905) 2 Ch. 624; 93 L.T. 627; 74 L.J. (Ch.) 673.
Fernando v. *Ramanathan,* (1913) 16 N.L.R. 337.

Siva Rajaratnam, for the defendant-appellant.

J. C. Thurairatnam, with *M. T. M. Sivardeen,* for the plaintiff-respondent.

T. S. FERNANDO, J.

This appeal raises the question of the legality of contracts whereby private cars are hired out to persons by those conducting what are popularly called " RENT A CAR " Services.

The plaintiff sued the defendant to recover a sum of Rs. 131/- which he claimed in his plaint to be due from the latter on a contract according to which he hired to the defendant his (the plaintiff's) car on certain conditions. The agreement to hire the car and the conditions referred to were embodied in document P 1 which he produced at the trial. The action was resisted by the defendant on the ground that the contract sued on was illegal and unenforceable.

By P 1 the defendant agreed with the plaintiff to hire the latter's car (Car No. EY 3591) described therein as a " Drive Yourself " car on the following, among other, conditions :—

(*a*) that he pays hire at the rate of Rs. 20/- a day, the defendant being allowed to travel 50 miles in it each day ; for any travelling in excess of 50 miles a day he agreed to pay at 30 cents a mile ;

(*b*) that he returns the car without damage to it, and that if the car is damaged by accident he pays Rs. 100/- towards the cost of repairs.

It is not disputed that the defendant travelled in the car for a distance in excess of 50 miles a day, and that therefore in terms of the agreement he was required to pay a sum of Rs. 31/- in respect of the excess travelling done. The Commissioner of Requests has also found that the car was damaged while it was in the charge of the defendant and that the defendant must pay Rs. 100/- as provided for in the agreement. In regard to the defence based on the illegality of the contract the Commissioner has held that in hiring the car in question to the defendant the plaintiff has not violated any provisions of the Motor Traffic Act. The defendant contends that the decision arrived at in the Court below is erroneous and it becomes necessary to examine in detail the relevant provisions of the statute.

Section 2 (1) of the Motor Traffic Act, No. 14 of 1951, prohibits the user of a motor car unless the car is registered, and section 25 (1) prohibits the use of a motor car for which a revenue licence is not in force. Section 5 (1) requires that, if a car is intended to be used for the carriage of persons for fee or reward, the car be registered as a hiring car. A car is to be registered as a private car only if it is intended to use the car for the carriage of persons otherwise than for fee or reward. The plaintiff who asserted in the very plaint filed in this case that he is carrying on business under the name and style of "Auto-Touring Service" stated in evidence that the business of this Auto-Touring Service consisted of hiring out cars to customers on terms which are set out in printed forms of agreement, of which P 1 was an example. For the purpose of registering the business under the Business Names Ordinance the plaintiff himself described its general nature as that of supplying hiring cars.—*vide* document D3. As revenue licence D 2 shows, this car EY 3591 has been licensed for the carriage otherwise than for fee or reward of persons and their personal effects. It is indeed not disputed that this car was registered as a private car and that the revenue licence taken out was a private car licence as is referred to in section 26 of the Act. Section 45 of the Act prohibits the user of a motor car for any purpose not authorised by the revenue licence for the time being in force for that car or in contravention of any of the conditions in that licence. The question that arises for determination upon this appeal really depends upon the answer to the further question whether the document P 1 embodies a contract for the doing of an act prohibited by section 45. I might add that section 214 (2) of the Act penalises certain classes of persons who are guilty of contraventions of the Act. It enacts that, where a motor vehicle is used or where anything is done in connexion with a motor vehicle in contravention of any provision of the Act or any regulation, the person on whom a duty or prohibition or the liability in respect of such contravention is imposed by such provision or regulation and the driver and the owner of the motor vehicle (subject to certain exceptions which do not arise for consideration on this appeal) shall be guilty of an offence.

The plaintiff, to use his own words in agreement P 1, hired out his car (which had a seating capacity of four persons) so that it may be used for the carriage of persons. When he agreed with the defendant that the latter may use it for the carriage of himself or any others and received payment therefor, the plaintiff was, in my opinion, agreeing to allow the car to be used for a purpose not authorised by the revenue licence in force. He was thereby either procuring the commission of or abetting a contravention of section 45 of the Act.

The learned Commissioner of Requests, drawing attention to the definition of "passenger" in the interpretation section (section 240) of the Act as a person carried in a hiring car, but as excluding the driver, and accepting the defendant's evidence that he drove this car himself, has concluded that no passengers were carried for hire. Then stating that the only prohibition in the Motor Traffic Act in the case of private cars is in respect of carrying passengers for hire he has formed the opinion that there was no agreement in P 1 to contravene the provisions of the Act and given judgment in favour of the plaintiff as prayed for. In following the line he did, the trial judge has, in my opinion, misdirected himself as to the approach to the problem before him. Was the contract an illegal one ? If it was a contract for the purpose of committing a contravention of the Act, a contravention moreover which has been penalised by the Act itself, then it was an illegal contract. I have already set out my reasons for my conclusion that P 1 embodied an illegal contract. In regard to the question whether the contract is also unenforceable, the principle to be applied is stated thus by Buckley, J., in *Victorian Daylesford Syndicate, Ltd.* vs. *Dott*, L.R. (1905) 2 Ch.D., at 629, a case concerned with the Money Lenders Act of 1900 :—

> "The next question is whether the Act is so expressed that the contract is prohibited so as to be rendered illegal. There is no question that a contract which is prohibited, whether expressly or by implication, by a statute is illegal and cannot be enforced. I have to see whether the contract is in this case prohibited expressly or by implication. For this purpose statutes may be grouped under two heads—those in which a penalty is imposed against doing an act for the purposes only of the protection of the revenue, and those in which a penalty is imposed upon an act not merely for revenue purposes, but also for the protection of the public . . . If I arrive at the conclusion that one of the objects is the protection of the public, then the act is impliedly prohibited by the statute, and is illegal."

I might also refer to the words of Wood Renton, A.C.J., in *Fernando* vs. *Ramanathan*, (1913) 16 N.L.R. at 343, that "athough a contract or act may be made illegal by a statute passed for the

protection of revenue alone, the presumption of illegality will be greater where the statute is one embracing other important objects of public policy as well, and where it contains prohibitory language, besides imposing a penalty". The learned Chief Justice was there considering the Opium Ordinance, No. 5 of 1899, but an examination of some of the provisions of the Motor Traffic Act will suffice to show that the distinction between private cars and hiring cars is maintained and emphasized in the Act not merely for purposes of revenue but primarily for the protection of the public. Section 29 of the Act requires a hiring car to be examined and certified to be fit for use before a revenue licence will be issued in respect of it ; section 197 requires the registered owner of the hiring car in certain contingencies to pay the fees of the examiner ; secton 177 casts an obligation on the owner and the driver of a hiring car to keep it in a clean and sanitary condition ; and section 179 penalises the carriage in a hiring car of passengers in excess of the authorised number.

I am of opinion that the contract sued on in this case is both illegal and unenforceable and that the plaintiff's action should have been dismissed.

Before concluding, I should refer to an argument addressed in the Court below that, even if the agreement embodied an illegal contract, that would affect the recoverability only of the sum of Rs. 31/- but not the claim to recover the sum of Rs. 100/- in respect of damage to the car. The learned Commissioner appears to have viewed this argument with favour on the ground that the defendant cannot possibly be heard to say that he is not liable to make good the damage caused to the car, presumably by his negligence, while it was in his custody. In expressing that view the learned Commissioner appears to have overlooked that the claim to recover this sum of Rs. 100/- was not based on tort but was expressly pleaded in the plaint as being founded on the agreement P 1. I should add that counsel for the plaintiff at the appeal did not seriously urge that, if the agreement P 1 was held unenforceable, he could advance any further argument for judgment in respect of damage caused to the car.

The appeal has to be allowed and the plaintiff's action dismissed with costs in both Courts.

Appeal allowed.

Present : **De Silva, J., and Sansoni, J.**

PEIRIS *vs.* THE COMMISSIONER OF INCOME TAX

S.C. No. 1—*Income Tax Case, No. BRA.* 261.

Argued on : 3rd & 4th October, 1960.
Decided on : 11th October, 1960.

Income Tax Ordinance (*Cap.* 188), *sections* 11 (6), 11 (6*B*), 74—*Government employee seconded for service with University—Is there a cessation of employment within the meaning of section* 11 (6) (*a*)—*Meaning of term " employment "—Each employer regarded as a distinct source of income—Person employed by another—Ceasing to be such employee—Effect.*

The appellant was a Visiting Surgeon of the General Hospital, Colombo, and a Visiting Lecturer, first at the Ceylon Medical College and later at the University of Ceylon. He was paid a salary by the Ceylon Government for his work as a Visiting Surgeon and by the University for his work as a Visiting Lecturer. From the 1st June, 1952, his services were released by the Public Services Commission and he was seconded for service with the University as Professor of Surgery. During the period of secondment the Government could have asked him to resume his service under the Government and he also had the right to go back of his own accord. The work which he did after the 1st June was substantially the same as the work he did before that date. The appellant claimed that from the date of his secondment, there was a cessation of employment in terms of section 11 (6) (*a*) of the Income Tax Ordinance. He also claimed that he could invoke the provisions of section 11 (6B) as being applicable to his case.

Held : (1) That inasmuch as he had only been seconded for service he did not cease to be an employee of the Government.

(2) That even if he had ceased to be employed by the Government and found a new employer as from the date of secondment, he had not ceased to carry on an employment within the meaning of section 11(6)

inasmuch as there was no material change in the nature of the work done by him. The word "employment" means that on which a person is employed and is synonymous with business or occupation and does not indicate a particular contract of service under a particular master.

(3) That section 11 (6B) had no application since that section only applied to a case where a person carried on a trade, business, profession or vocation as an employee of another, and not on his own account or in partnership with another, and then ceased to do so. In the present case the employee did not cease to be an employee of another during the years of assessment, but at most merely changed his employer.

Followed : *The Commissioner of Income Tax* v. *Rodger*, (1933) 35 N.L.R. 169 ; II C.L.W. 275.

Referred to : *Rowan* v. *The Commissioner of Income Tax*, (1939) 40 N.L.R. 4 ; XIII C.L.W. 85.

S. Ambalavaner, with *F. X. J. Rasanayagam*, for the appellant.

A. C. Alles, Acting Solicitor-General, with *A. Mahendrarajah, C.C.*, for the respondent.

SANSONI, J.

This is a case stated by the Board of Review under this provisions of Section 74 of the Income Tax Ordinance, Chapter 188*, at the request of the assessee, Dr M. V. P. Peiris.

From 1936, he was a Visiting Surgeon of the General Hospital, Colombo, and also a Visiting Lecturer, first of the Ceylon Medical College, and from 1942 of the University of Ceylon. He was paid a salary by the Ceylon Government for the work done as Visiting Surgeon, and by the University for his work as a Visiting Lecturer. The Public Service Commission released his services and he was seconded for service with the University from 1st June, 1952.

During the period of secondment, the Government could have asked him to resume his service under the Government, and he had the right to go back to Government service of his own accord. By arrangement between the Government and the University his pension rights were preserved, the University making a contribution for the period he served under it. It has also been found by the Board of Review that prior to 1st June, 1952, as Visiting Surgeon the assessee had to work in the Out-Patients' Department Clinic on certain days , and had 85 beds allocated to him in the General Hospital ; and as Visiting Lecturer he had a certain number of students allotted to him, and they received instruction from him in the Clinic and also followed his operations and post-operatve treament. After 1st June, 1952, also as Professor of Surgery he had to work at the Out-Patients' Department Clinic on certain days, and he also had to work as a Surgeon at the Hospital where he had 65 beds allocated to him. His students received instruction from him just as they had done prior to 1st June, 1952.

The assessee claimed that there was a cessation of employment in terms of section 11 (6) (*a*)† of the Ordinance, when he ceased to be a Visiting Surgeon and assumed duties as Professor of Surgery. The material provisions read :

> 11. (6) Where a person whether resident or non-resident ceases to carry on or exercise a trade, business, profession, vocation, or employment in Ceylon, or being a resident person, elsewhere, his statutory income therefrom shall be—
>
> (*a*) as regards the year of assessment in which the cessation occurs, the amount of the profits of the period beginning on the first day of April in that year and ending on the date of cessation ; and
>
> (*b*) as regards the year of assessment preceding that in which the cessation occurs, the amount of the statutory income as computed in accordance with the foregoing sub-sections, or the amount of the profits of such year, whichever is the greater,
>
> and he shall not be deemed to derive statutory income from such trade, business, profession, vocation, or employment for the year of assessment following that in which the cessation occurs.

The Board of Review held against him on the grounds : (1) that he did not cease to be employed under the Government inasmuch as he was only seconded for service in the University, and (2) that even if it be assumed that he terminated his services under the Government when he became Professor of Surgery, he did not cease to carry on an employment, because there was no material change in the manner in which he was employed after he was appointed Professor.

I think that on both points the decision of the Board of Review was correct. With regard to the period of secondment, it would seem that no

*Cap. 242 of 1956 Edition

†Now section 13 (6) (a)

pension was paid to the assessee : it was merely a temporary arrangement whereby the assessee worked in the University of Ceylon until such time as he or the Government chose to terminate that arrangement, if either party desired to do so.

The more important question, however, is whether, even if the assessee ceased to be a Government servant on 1st June, 1952, it could be said that he ceased to carry on an employment on that date, either on the ground that there was a radical change in the nature of his employment or on the ground that he was working for a new employer. The former is a question of fact and I have already referred to the finding of the Board that there was no material change in the nature of the work done by the assessee. That finding must be upheld. We are then left with the question of law whether, when a person goes over to a new employer but continues to do the same kind of work, he can be said to cease to carry on an employment when he leaves his former employer. On this question we are bound by the decision in *Commissioner of Income Tax* vs. *Rodger* (1933) 35 N.L.R. 169. Although Drieberg, J., had to deal in that case with the meaning of the word "employment" in section 11 (4), and we are dealing with the meaning of the word in section 11 (6), that decision binds us because the principle underlying it is applicable to both cases. The word was held to mean that on which a person is employed, and to be synonymous with business or occupation, and not to indicate a particular contract of service under a particular master.

Mr. Ambalavaner sought to distinguish that case on its facts from the present case, but I can see no distinction between the two in this respect. He was also constrained to argue that the decision was wrong in principle, and his main argument was that it overlooks the scheme of the Ordinance whereby, in the machinery of assessment, each employer is regarded as a separate and distinct source of income so that on a cessation of a particular contract of employment the source ceases. Drieberg, J., has not overlooked this question of source in his judgment, and it seems to me that the meaning one gives to the word "employment" in the particular sub-section decides the question. This judgment was followed in *Rowan* vs. *Commissioner of Income Tax*, (1939) 40 N.L.R. 4, where Poyser, J., applying the reasoning of Drieberg, J., that an accountant commences an employment as an accountant when he first begins to do the work of an accountant, taking remuneration for his services, held that a proctor who was employed on a salary does not cease to carry on an employment as a proctor when he is admitted as a partner of a firm of proctors.

Finally, Mr. Ambalavaner submitted that the case was governed by section 11 (6B)* which was added to the Ordinance in 1939 and reads :

> 11. (6B) For the purposes of this section, a person shall be deemed to carry on or exercise an employment notwithstanding that he carries on or exercises a trade, business, profession or vocation if such trade, business, profession or vocation is carried on or exercised by him as the employee of another and not on his own account or in partnership with another ; and a person so deemed to carry on or exercise an employment shall be deemed to commence or cease to carry on or exercise such employment when he commences or ceases to be such an employee :
>
> Provided that if a person who is so deemed to carry on or exercise an employment carries on or exercises in addition to such employment, any trade, business profession or vocation on his own account or in partnership with another, the profits arising from such trade business, profession or vocation shall be assessed as profits from a separate source.

I do not think that this provision helps the assessee, and I agree with the decision of the Board on this point also. It deals with the case of a person who carries on or exercises a trade, business, professon or vocation as an employee of another, and not on his own account or in partnership with another, and then ceases to do so. Such a person is deemed (1) to carry on or exercise an employment ; and (2) to commence or cease to carry on or exercise it when he commences or ceases to be employed by another. Since the assessee in this case did not cease to be an employee of another during the years of assessment under consideration, but at most merely changed his employer, the sub-section has no application to this case. In my view the sub-section left the decision in *Rodger's case* (*supra*) unaffected, though it probably nullified the effect of the decision in *Rowan's case* (*supra*).

The appeal is dismissed with costs.

DE SILVA, J.
I agree.

Appeal dismissed.

*Now section 13 (8)

END OF VOLUME LXI

පතිපත්ති ලංකා නීතිය

ඉංග්‍රීසි භාෂාවෙන් පළවන තෝරාගත් සමහර නඩු තීන්දුවල වාතීා සහ විශේෂ අවස්ථා වලදී
ශ්‍රේෂ්ඨාධිකරණය කැඳවන සභාවල පැවැත්වෙන කථාවන්හි
වාතීා ද අඩංගු වේ.

සංහිතාව

---

3 වෙනි කාණ්ඩය

ගෞ: **රාජනීතිඥ හේම එච්. බස්නායක**
අග්‍ර විනිශ්චයකාරතුමා
(උපදෙශක කතෘ)

ජී. පී. ජේ. කුරුකුලසූරිය
ශ්‍රේෂ්ඨාධිකරණයේ අධිනීතිඥ
(කතෘ)

බී. පී. පිරිස් එල්.එල්.බී. (ලන්ඩන්)
වී.රත්නසභාපති බී.ඒ.(ලංකා),එල්.එල්.බී.(ලන්ඩන්)
සූ. ඒ. එස්. පෙරේරා එම්.ඒ.(ලන්ඩන්)

එම්. එච්. එම්. නසිනම්මික්කාර් බී.ඒ.,එල්.එල්.බී. (කැන්ටැබ්.)
එස්. එස්. බස්නායක බී.ඒ.,බී.සී.එල්. (ඔක්ස්ෆර්ඩ්)
එන්. එස්. ඒ. ගුණතිලක එල්.එල්.බී. (ලංකා)

ජී. ඕ. ඇස්. ද සිල්වා බී.ඒ. (ලංකා)
ශ්‍රේෂ්ඨාධිකරණයේ අධිනීතිඥවරු
සහකාර කතෘවරු

1962

දයක මිල කාණ්ඩයකට (ඉංග්‍රීසි වාතීාත් සමග) රු: 11. 50
පිටපත් ලබාගත හැක්කේ නොා: 50/3, සිරිපා පාර, හැවිලොක් ටවුම—කොළඹ 5, යන ස්ථානයෙනි.

පාර්ශවකාරයින්ගේ නාම

ඇටෝර්නි-ජනරාල් එ. පියසේන 21

එඩිවින් එ. වෙල්වරාජා, වැලිගම පොලිස් උප-පරීක්ෂක 5

කුමාරිහාමි එ. අබේගුණසේකර සහ තව කෙනෙක් 2

තම්බිරාජා එ. සීමාසහිත සිලෝන් ඉන්සුවරන්ස් කොම්පැනිය 7

නිලවීර එ. ආදයම් බදු පිළිබඳ කොමසාරිස් 1

පීටර් එ. මීරිගම පොලිස් ඉන්ස්පෙක්ටර් 6

ප්‍රේමවතී එ. වේලිස් 17

රත්නම් එ. පෙරේරා 9

වඩුඩ එ. මාතර උපපොලිස් පරීක්ෂක 20

විලියම් සිංඤෙදා එ. මුදලිගේ 3

අපරාධ නඩු සංග්‍රහය.

මහෙස්ත්‍රාත් උසාවි—සුදුසු උසාවියෙන් කරන ලද නියෝග ක්‍රියාත්මක කිරීමේ යුතුකම්.

'ඒ' නම්කෙනාගේ 'බී' නම්කෙනාට විරුද්ධව අලියෙකු සොරකම් කිරීමේ චෝදනාවක් තබලේය. 'ඒ' නම්කෙනා රුපියල් 50,000 00 ක ඇපයක් තැබිය යුතු අතර, ඔහුට අලියා බාර දෙන ලෙස මහෙස්ත්‍රාත් විසින් 'බී' නම්කෙනාට නියෝග කරලේය මේ නියෝගය පරිශෝධනය කරන ලෙස 'බී' නම්කෙනා කළ ඉල්ලීම එම නියෝගය අවලංගු කර, අලියා 'බී' නම්කෙනාට බාර දෙන ලෙස නියෝග කරන ලදී. පාර්ශවය කරුවන්ට මේ නියෝගය දුන්වූ පසු මහෙස්ත්‍රාත් විසින් මැරෑ කරනු ලැබීය. චෝදනාව විභාග කිරීමට තමාට අධිකරණ බලයක් නැතැයි මහෙස්ත්‍රාත්වරයා කළ තීරණය නොසලකා ශ්‍රේෂ්ඨාධිකරණයේ නියෝගය ක්‍රියාවට පත්කිරීමට ඔහු බැඳී ඇති බව.

(2) ශ්‍රේෂ්ඨාධිකරණයේ එම නියෝගය පිළිපැදීමට 'ඒ' නම්කෙනා තවමත් බැඳී ඇති බව.

(3) පෙත්සම්කාරයා සතාගේ බාරය මේ වනාවිට අත්කරගෙන සිටි බැවින් ඉල්ලීම අවශ්‍ය නැති බව.

අලියා කෙළින්ම උසාවියට හෝ 'ඒ' නම්කෙනාට හෝ බාර දෙන ලෙස පෙත්සම්කාරියට අණ කරන ලදී.

කුමාරිහාමි එ. අබේගුණසේකර සහ තව කෙනෙක් 2

ඕත්ප්‍රුවා අක්වි (autrefois acquit)—(කලින් පැවරූ නඩුවකින් ඒ චරදට නිදහස ලබා තිබීම නිසා කරණ ආයාචනය)—සුරා බදු පිළිබඳව දඩුවම් ලැබිය හැකි චරද—අපරාධ නඩු විධාන සංග්‍රහයේ 187(1) වන ඡේදයෙහි කරුණු අනුව මෙවැනි චෝදනාවක් වීම—විත්තිකරු නිදහස් කරවීන් කරණ ලද නියෝගය—එම චරද සඳහා නැවත චාරයක් නඩු දැමීම—ඕත්ප්‍රුවා අක්වි නමැති ආයාචනය—එම ආයාචනයෙන් මෙහිදී ප්‍රයෝජන ගත හැකිද?—අපරාධ නඩු විධාන සංග්‍රහයේ අංක 187(1), 190, 191, 194, 195, 290, 330 වන ඡේද.

පැමිණිලි පක්ෂයේ සාක්ෂි ඉදිරිපත් කිරීම අවසාන වූ පසු එම නඩු විභාගය අපරාධ නඩු විධාන සංග්‍රහයේ 187 (1) වන ඡේදය අනුව කොට කරණ ලද බැවින් නීති විරෝධී බව විත්තිකරුගේ ආරාංචියා සැලකර සිටියේය.

ඉක්බිති එම නඩු විභාගය නීති විරෝධී බැව් පිළිගත් මහෙස්ත්‍රාත්තුමා, විත්තිකරු නිදහස් කරණ ලදැයි සැලකෙන නඩියට නියෝගයක් තබලේය.—මෙසේ සැලකෙන නඩියට කරණ ලද නියෝගයට විරුද්ධව ඇපෑලක් ඉදිරිපත් කොට නැත.

පසු අවස්ථාවක එම චරද පිළිබඳවම විත්තිකරුට විරුද්ධව දෙවන චරදක් නඩු පවරා ලදින් ඔහු ඕත්ප්‍රුවා අක්වි ආයාචනය ඉදිරිපත් කළේය. මෙම ආයාචනය පිළිගත් මහෙස්ත්‍රාත්තුමාගේ නියෝගයට විරුද්ධව ඇටෝර්නිජනරාල්තුමා ඇපෑල් පෙත්සමක් ඉදිරිපත් කෙළේය.

තීන්දුව :—ඒ. එච්. ටී. ගුණසේකර සහ ටී. ඇස්. ප්‍රනාන්දු විනිශ්චයකාරතුමන් විසින්. (බස්නායක ජනවිනිශ්චයකාරතුමා විපක්ෂව).

(1) මොහිදීන් එ. පිටකොටුවේ පොලිස් පරීක්ෂක නමැති නඩුවේ තීන්දුව අනුව මුලින් දැමූ නඩුවේ චෝදනාව නීති විරෝධී වේ—59 නව නීති වාර්තා 217.

(2) මුලින් දැමූ නඩුව නීති විරෝධ වූ නිසා ඒ පිළිබඳව කළ චෝදනාව ගැන නීත්‍යානුකූල නඩු විභාගයක් පැවැත්වීමට හෝ එහිදී නීත්‍යානුකූල ලෙස විත්තිකරුවකු නිදහස් කිරීමට හෝ වරදකරු කිරීමට නොහැක.

(3) කරුණු මෙසේ වීමේ හේතුවෙන් විත්තිකරුට ඕත්ප්‍රුවා අක්වි (autrefois acquit) නමැති ආයාචනයෙහි පිළිසරණ සෙවිය නොහැක. මුලින් නඩුවෙදී මහෙස්ත්‍රාත්තුමාගේ නියෝගය නඩුව නිෂ්ප්‍රභාකිරීමක් විය. විත්තිකරු නිදහස් කිරීමක් නොවීම මීට හේතුවයි.

ඇටෝර්නි-ජනරාල් එ. සියයේන 21

අපරාධ නඩු විධාන සංග්‍රහය.

අපරාධ නඩු විධාන සංග්‍රහය—චිත්තිකරුට විරුද්ධ චෝදනා විභාගයට පෙර දුන් සාක්ෂියක්—ඊට පසු චෝදනාව සංශෝධනය වීම සහ විභාග වීම—තමුන් ප්‍රථම සාක්ෂි දුන් සාක්ෂිකාරයා සාක්ෂියට නොකැඳවීම—ඒ නිසා ඔහුගෙන් හරස් ප්‍රශ්න අසන්නට ඉඩ නොලැබීම—චිත්තිකරු වැරදිකාසයකු වීම ඒ නිසා නීත්‍යානුකූල ද?

තීන්දුව: චිත්තිකරුවකුට විරුද්ධව පැමිණිල්ල වෙනුවෙන් ඉදිරිපත් කළ චෝදනාවක් විභාග කිරීමේ අවස්ථාවට පෙර සාක්ෂි දුන් සාක්ෂිකාරයෙකු පසුව එම චෝදනාව සංශෝධනය කර විභාග කිරීමෙහිදී සාක්ෂිදීමට නොකැඳවීම නිසා ඔහුගෙන් හරස් ප්‍රශ්න අසන්ට චිත්තියට ඉඩ නොතිබුන බැවින්, එම චිත්තිකරු වරද කරුවකු කළ තීන්දුව බලවත් ලෙස නීති විරෝධී බැවින් අවලංගු කළ යුතුය.

වඩුඩ එ. මාතර උපපොලිස් පරීක්ෂක... ... 20

අපරාධ නඩු විධාන සංග්‍රහය, 182 වෙනි ඡේදය—විභාගය ආරම්භයේදී ඉදිරිපත් කළ චෝදනාව හැර අන් චෝදනාවකට චිත්තිකරුවෙක් වරදකරු කළ හැකිද? එසේ කිරීමට හැකි වන්නේ කිනම් අවස්ථාවකදී ද?

තීන්දුව: අපරාධ නඩු විධාන සංග්‍රහයේ 182 වෙනි ඡේදයෙහි සඳහන් අවස්ථාවලදී හැර, අළුත් චෝදනාවකට කෙනෙක් වරදකරුවෙකු කිරීමට නොහැක.

පීටර් එ. මිරිගම පොලිස් ඉන්ස්පෙක්ටර් ... 6

අපරාධ නඩු විධාන සංග්‍රහය, 172 වෙනි සහ 413 වෙනි ඡේද—තුවක්කු ආඥාපණතේ 44 වැනි ඡේදය—ගම්බද උසාවි පනත, 11 වෙනි ඡේදය—දණ්ඩනීති සංග්‍රහය, 484 වෙනි ඡේදය—භය ගැන්වීමේ චෝදනාව—මදක් සාක්ෂි ඇසීමෙන් පසු ඒ චෝදනාව නින්ද කිරීමේ චෝදනාවකට වෙනස් කිරීම—එවැනි චෝදනාවක් විභාග කිරීමට මහෙස්ත්‍රාත්වරයාට ඇති අධිකරණ බලය—බල පත්‍රයක් යෙදීත තුවක්කුවක් රාජසන්තක කිරීමේ නියෝගයක්—එම නියෝගයේ නීත්‍යානුකූලත්වය.

සාපරාධී භයගැන්වීමක් සිදුකළා යයි ඇපැල්කරුට විරුද්ධව චෝදනාවක් ඉදිරිපත් කරන ලදී. මෙයක් සාක්ෂි විභාග කිරීමෙන් පසු මහෙස්ත්‍රාත්තුමා විසින් පැමිණිලිකරු තුවක්කුවක් සඳහන් කිරීම අසභ්‍යයක් යයි සටහන්කර යටොක්ත චෝදනාව භයගැන්වීමේ චෝදනාවකට පෙරලන ලදී. ඊට ඇපැල්කරු විසින් තමා වැරදිකාරයා යයි පිළිගැනීමෙන් පසු දඩුවම් නියම කරන ලදී. ඉන්පසු විත්නිකරුට තුවක්කුවක් පාවිච්චි කිරීම උවමනා නොමැති යයි සටහන් කර තුවකතුව රාජසන්තක කර, එය දිසාපතිතුමා වෙත යැවීමට අණ කෙළේය.

මීට විරුද්ධව ඉදිරිපත් කරන ලද ඇපැල් පෙත්සමේ කරුණු දෙකක් සඳහන් විය. (1) භයගැන්වීමේ චෝදනාවක් විභාග කිරීමේ තනි බලය ගම්බද උසාවියකට පමණක් තිබී බව: (2) තුවක්කුව රාජසන්තක කිරීමේ නියෝගය නීතිවිරෝධී බව.

තීන්දුව : (1) 1945 නො. 12 දරණ ගම්බද උසාවි පනතේ 11 වෙනි ඡේදය අනුව දණ්ඩනීති සංග්‍රහයේ 484 වෙනි ඡේදය යටතේ නින්ද කිරීමේ චෝදනාවක් පොලිස් නිලධාරියෙකු විසින් ඉදිරිපත්කල විටක දී එය විභාග කිරීමට මහෙස්ත්‍රාත් උසාවියට බලය තිබේ.

(2) යටෝක්ත රාජසන්තක කිරීමේ නියෝගය මේ නඩුවේ සිදින් අනුව හෝ ඊට අදල නීතියක් වූ අපරාධ නඩු විධාන සංග්‍රහයේ 413 වෙනි ඡේදය අනුව හෝ තුවක්කු ආඥා පනතේ 44 වෙනි ඡේදය අනුව හෝ නිදෙස් යයි පෙන්නුම් කල නොහැක.

ගරු වී. ඇස්. ප්‍රකාන්දු විනිශ්චයකාරතුමා විසින් "මෙහි දෙස් දක්වා නිබෙන (complained of) නියෝගය වැන්නක් කිරීමේදී තමාට එවැනි නියෝගයක් කිරීමට අභිමතවූවන් අධිකාරණ බලධාරියෙකු විසින් තමාගේ නීත්‍යානුකූල බල සීමාවන් ගැන කල්පනාකාරී විය යුතුයි."

එඩ්වින් එ. වෙල්වරාජා, වැලිගම පොලිස් උපපරීක්ෂක 5

ආදයම් බදු ආඥා පනත

ආදයම් බදු ආඥාපනත (1938 ව්‍යවස්ථා සංග්‍රහයේ 188 වෙනි පරිච්ඡේදය)—65 වෙනි, 80(1) වෙනි ඡේද—80(1) වෙනි ඡේදය යටතේ කොමසාරිස් වරයා දුන් සහතිකය—එහි ප්‍රතිඵලය—එම සහතිකය නිසා හරියාකාර ගණන් තක්සේරු නොකළේයයි බදු ගෙවීම පැහැරහැරියෙකුගේ කීම මහෙස්ත්‍රාත් වරයා විභාගකර තීන්දුවක් දීමට බලය තිබේද.

තීන්දුව : (1) එම ඡේදය සඳහන් කොමසාරිස්වරයාගේ සහතිකය ප්‍රමාණවත් (sufficient) සාක්ෂියක් යයි ප්‍රකාශ කිරීම මිස එහි අඩංගු කරුණු පිළිබඳව එය නිරාණාත්මක සාක්ෂියකැ යි (conclusive) ප්‍රකාශ නොවෙයි.

(2) ආදයම් බදු ආඥාපනතේ 80 (1) වෙනි ඡේදයෙන් ආදයම් බදු නොගෙවා පැහැර නැරි කෙණෙකු තමා විසින් ගෙවිය යුතු බද්ද හරියා කාර ගණන් බලා තක්සේරුකර නැති බව මහෙස්ත්‍රාත්වරයාට ඒත්තු ගැන්වීමට බාධාවක් නැත.

නිලවීර එ. ආදයම් බදු පිළිබඳ කොමසාරිස් ... 1

ගම්බද උසාවි පනත.

ගම්බද උසාවි පනතේ 11 වෙනි ඡේදය.

''අපරාධ නඩු විධාන සංග්‍රහය'' යට බලන්න.

තුවක්කු ආඥා පනත

තුවක්කු ආඥාපනතේ 44 වෙනි ඡේදය.

''අපරාධ නඩු විධාන සංග්‍රහය'' යට බලන්න.

දික්කසාදය.

දික්කසාදය—තම භාර්යාව 2 වන විත්තිකරු සමග අනාචාරයේ හැසිරීම යහ ද්වේෂසහගතව අත්හැර යාමකැයි කියහැකි අන්දමට කටයුතු කිරීම නිසා සැමියකු විසින් නඩු පවරනු ලැබීම—අනාචාරයේ හැසිරීම ගැන විසඳීමට ඇති එකම ප්‍රශ්නය එක් දවසක අනාචාරයට පමණක් සීමාවීම—ඉදිරිපත් කළ සාක්ෂිවලින් අනාචාරයේ හැසිරීමට සුදනම්වූ බව පමණක් පෙනීයාම—සාක්ෂිවලට ඇතුළත් වූයේ (ඒ) මෙම දිනයට පෙර විත්තිකරුවන්ගේ හැසිරීම පිළිබඳවූ සාක්ෂි (බී) දෙවන විත්තිකරු විසින් පළමුවන විත්තිකාරියට ලියනු ලැබ ඇගේ අල්මාරියේ තිබී සොයාගත් ලියුම් සහ (සී) පළමුවන විත්තිකාරිය විසින් දෙවන විත්තිකරුගේ නිවසේ පදිංචිවීම සඳහා පසුව දරණ ලද පරිශ්‍රමයක් තිබුනු බව පෙනීම—අනාචාරයේ හැසිරීම සහ ද්වේෂසහගත අත්හැර යාමකැයි ගිණිය හැකි ලෙස කටයුතු කිරීමේ ප්‍රශ්නය විසඳීමට මෙම සාක්ෂි ප්‍රමාණවත් වේද යන්න.

තමන් විසින් ඇපැල් පෙත්සමක් ඉදිරිපත්කර නැතත් ඇපැල් නඩුවක වගඋත්තරකරුවකුට තමාගේ වාසියට දී තිබෙන තීන්දුව ස්ථිරකර ගැනීමට නඩුව විනිශ්චය කළ විනිශ්චයකාරතුමාගේ නිගමනයකට විරුද්ධව ඇපැලේදී කරුණු දැක්විය හැකිද යන්න—සිවිල් නඩු විධාන සංග්‍රහයේ 772 වන ඡේදය.

පළමු වන චිත්තිකාරිය (භාර්යාව) වර්ෂ 1957 දෙසම්බර් මස 19 වැනි දින දෙවන චිත්තිකරු සමග අනාචාරයේ හැසිරුණාදැයි විසඳිය යුතු වූ ප්‍රශ්නය සඳහා එසේ හැසිරුණේයයි විනිශ්චයකාරතුමා පහත සඳහන් සාක්ෂි උඩ තීන්දු කර තිබිනි. එම සාක්ෂි නම්,

(ඒ) සාලින් චිත්තිකාරුවන්ගේ හැසිරීම ගැන සෝදිසියෙන් සිටි පැමිණිලිකරු (සැමි පුරුෂයා) පැමිණේයයි සැක කළ නොහැනි අවස්ථාවක පැමිණීම නිසා පළමු වන දෙවැනා චිත්තිකාරුවන් මේඵුන සේවනයෙහි යෙදීමට සැරසී සිටි සැමුන් එම ක්‍රියාව වැළකීය.

(බී) ඔවුන් අතර එයට සාලින් නිබු හැසිරීම් ගැන සාක්ෂිකාරුවකු සාක්ෂි දීම.

(සී) පළමු වන චිත්තිකාරියට දෙවන චිත්ගිකරු විසින් ලියනු ලැබ ඇගේ අල්මාරියේ තිබී සොයා ගත් ලියුම්වල ඇතුළත්ව නිබුණු සාක්ෂි.

ඇපැල් උසාවියේ තීන්දුව : (1) අනාචාරය පිළිබඳව මෙහිදී ඉදිරිපත් කරණ ලද හා පිළිගත්නා ලද සාක්ෂි ප්‍රමාණවත් නොවීම නිසා විසඳිය යුතු ලෙස මතු කොට තිබුනු ප්‍රශ්නයෙහි සඳහන් වන දින චිත්තිකරුවන් අනාචාරයේ හැසිරී තිබෙයයි විනිශ්චයකරු කළ තීරණය නියම පදනමක් උඩ රදා නැත.

(2) තමා මෙම කරුණට විරුද්ධව ඇපැල් පෙත්සමක් ඉදිරිපත නොකරණ ලද නමුත් පැමිණිලිකාර වගඋත්තරකරුට ඇපැල් නඩුවේදී පහල උසාවියේ විනිශ්චයකාරතුමා විසින් ද්වේෂ සහගත ව අත්හැර යාමක් ඔප්පුකර නැතැයි දුන් නිගමනයට විරුද්ධව කරුණු දැක්විය හැක.

(3) නඩුව විසඳු විනිශ්චයකාරතුමා විසින් පිළිගත් කරුණු සලකා බැලීමේදී එනම්: 19-12-57 වන දින සිදුවී ඇති සිඩිය ද, සාක්ෂිකරුවකු විසින් කියන ලද පරිදි එදිනට කලින් ඔවුන්ගේ හැසිරීම ද, දෙවන විත්තිකරුගෙන් ලැබී අල්මාරියේ තිබුනු ලියුම් ද, සැමිපුරුෂයාගෙන් ඈවත්ව ගිය පසු පළමුවන විත්තිකාරිය දෙවන විත්තිකරුගේ නිවසෙහි පදිංචිවීමට පරිශ්‍රම දැරීමද—යන කරුණු සලකා බැලීමේදී මෙම විවාහය සම්පූර්ණයෙන්ම

බිඳවැටී ඇතැයි යලකා ගැනීම ආරක්ෂා සහිත යයි හැගේ. පළමුවන චිත්තිකාරියට 19-12-57 වන දින පැමිණිලිකරු අත්හැර යාමේදී යදහටම අත්හැර යාමේ චේතනාවක් පැවරිය හැකි බව නොපෙනෙතත් මෙම පැමිණිල්ල ඉදිරිපත් කළ 4-6-58 වන දින ඇය සිට එබඳු චේතනාවක් පැවරිය හැකිවේ.

ප්‍රේමවතී ඒ. ඩෙලිස් 17

ගෙවල් හිමි සහ බදුකරු.

ඉඩම්හිමි සහ බදුකරු—සාමාන්‍ය ප්‍රයෝජනයකට යෙදවීම—ඉඩම් හිමි පැවරූ නඩුවක්—සැහෙන අවශ්‍යතාවය ප්‍රශ්නයට භාජනවූ ස්ථානය ඉඩම් හිමියාගේ උවමනාවලට අඩක් පමණක් ප්‍රමාණවත් වීම සහ ගොඩනැගිලි සඳහා සුදුසු ඉඩම් තිබීම නිසා පැහැනගින තත්ත්වය— පාර්ශකරුවන්ගේ උවමනාවන් සමාන කර බැලීම—බදුකරු නෙරපූ පමණින්ම ඔහුට නද අයුක්තියක් වී යැයි නිගමනය කළ යුතුද—ව්‍යාපාරික ස්ථානයක් සම්බන්ධයෙන් බදුකරු ඔප්පු කළ යුත්තේ කුමක්ද.

තීන්දුව : (i) තමාට බඩු ගබඩා කිරීම සඳහා ඉඩකඩ අවශ්‍ය යයි යන හේතුව උඩ වෙළඳ ව්‍යාපාරිකයෙකුවූ ඉඩම් හිමියකු විසින් බද්දට දෙනු ලැබූ ස්ථානයක් නැවත අත්කර ගැනීම සාධාරණද යන ප්‍රශ්නය නිරාකරණය කිරීමදී ඉඩම් හිමියාගේ උවමනාවන් සඳහා පාවිච්චි කළ හැකිව තිබෙන සුදුසු ඉඩමින් ප්‍රයෝජන ගත යුතු ද යන්න සලකා බැලීම නීත්‍යානුකූල විය යුතුය.

(ii) මෙ ප්‍රශ්නය සලකා බැලීමේදී, අළුත් ගොඩනැගිලි තැනීම සඳහා ඉඩම සුදුසු බව, ඒ සඳහා ප්‍රමාණවත් මුදල් ඉඩම් හිමි ළඟ තිබෙන බව සහ අළුත් ගොඩනැගිලි සඳහා ඉඩම් හිමිගේ මුදල් හිරකිරීම ව්‍යාපාරික ප්‍රතිපත්තිවලට අනුකූල බව ඔප්පු කිරීම බදුකරුට භාරය.

(iii) බදුකරු නෙරපූ පමණින්ම ඔහුට නද අයුක්තියක් වියයි නිගමනය කළ නොහැකිය. එය නිශ්චිත සාක්ෂිවලින් ඔප්පු කළ යුතුය. ව්‍යාපාරික ස්ථානයක් සම්බන්ධ ප්‍රශ්නයකදී තමාගේ ව්‍යාපාරය කරගෙන යෑමට නොහැකිවීම නිසා තමාට මුදල් අතින් පාඩු විඳීමට සිදුවන බව බදුකරු ඔප්පු කළ යුතුය.

විලියම් සිංඤෝ ඒ. මුදලිගේ 3

රක්ෂණ සහතිකය.

රක්ෂණ සහතිකය—සිට්ටනයට සම්බන්ධවූ රක්ෂිත මෝටර් වාහනයකට වන්දි ඉල්ලීම්—නඩුවක් පවරණ බව දැනගත් වහාම රක්ෂිත තැනැත්තා විසින් ඒ බව ලියා දැනුම් දිය යුතු යයි සහතිකයේ කොන්දේසියක් තිබීම—වාහනය පැදවූ තැනැත්තාට නඩු පැවරීම—මේ බව තමා නොදන්නේ යයි රක්ෂිත තැනැත්තා දුන් යාක්ෂිය විශ්වාස නොකරනු ලැබීම—මේ කරුණු ගැන වෙන යාක්ෂි නොතිබීම රක්ෂණ සමාගම් ඇති වගකීමෙන් නිදහස් විය යුතුද.

මෝටර් වෑන් රියක් සමඟ ඇතිවූ අවිවාදයකදී පැමිණිලිකරුගේ කාරයට අලාභහානි සිදුවී ඇත. රක්ෂණ සහතිකයේ සඳහන් කොන්දේසි වලින් එකකට ඔහු අනුකූල නොවී ඇතැයි යන කරුණු උඩ ඔහු ඉල්ලා සිටි වන්දි ගෙවීමට තමන් බැඳි නැති බව විත්තිකාරයා සමඟ කියා සිටියේය. සහතිකය යටතේ වන්දි ඉල්ලීමකට හේතුවන ඕනෑම සිද්ධියක් සම්බන්ධයෙන් නඩුවක් පවරන්ට යන විට රක්ෂිත තැනැත්තා දැනගත් වහාම සමාගමට ලියා දැන්වීමේ වගකීම මේ කොන්දේසිය අනුව රක්ෂිත තැනැත්තා වෙත පැවරී ඇත. සිට්ටනය වන අවස්ථාවේදී පැමිණිලිකරුගේ කාරය පැදවූ තැනැත්තාට නඩු පවරණ ලද නමුත්, මේ තැනැත්තා සමඟ තමා ඉන් පසු නරඹවූ නිසා නඩුව ගැන තමා නොදැන සිටියේ යැයි පැමිණිලිකරු සාක්ෂි දුන්නේය. පැමිණිලිකරුගේ සාක්ෂිය අවිශ්වාස කළ උගත් දිස්ත්‍රික් නඩුකාරතුමා සහතිකයේ සඳහන් අන්දමට දැනුම් දී නැති නෙයින් ඔහුට වන්දි ලැබීමට අයිතියක් නැතැයි තීන්දු කළේය.

තීන්දුව : ප්‍රසිද්ධ පාරකදී වාහන දෙකක් යට්ටනය වූ පමණින් ඉන් එක වාහනයක රියැදුරෙකුට හෝ නඩුපවරණු ඇතැයි නිගමනය නොකළ යුතු නිසාත් මේ සම්බන්ධයෙන් මේ නඩුවේ තිබුන එකම සාක්ෂිය නඩුවක් පවරන්ට යන බව පැමිණිලිකරු නොදැන සිටියේය යනු නිසාත්, නඩුවක් පවරන්ට යන බව දැන සිටියේ යැයි සාධාරණ ලෙස නිගමනය කළ හැකි වෙන කරුණු කිසිවක් නැති අතරතුර එම සාක්ෂිය අවිශ්වාස කිරීමෙන් නඩුවක් පවරන්ට යන බව ඔහු දැන සිටියේ යැයි ඔප්පු නොවේ. නඩුවක් පවරන්ට යන බව පැමිණිලිකරු දැනුම් නුදුන්නේයයි විත්ති පක්ෂය කළ තර්කය එම නිසා පිළිගත නොහැක.

නම්බිරාජා ඒ. සිමාසහිත සිලෝන් ඉන්සුවරන්ස් කොම්පැනිය 7

ස්වාමිපුරුෂයා හා භාර්යාව.

"දික්කසාදය" යට බලන්න.

ප්‍රේමවති එ. වේලිස් 17

සිවිල් නඩු විධාන සංග්‍රහය.

සිවිල් නඩු විධාන සංග්‍රහයේ 772 වන ඡෙදය.

"දික්කසාදය" යට බලන්න.

ප්‍රේමවති එ. වේලිස් 17

සිවිල් නඩුවිධාන සංග්‍රහයේ 508 වන ඡෙදය.

"හවුල් ව්‍යාපාරය" යට බලන්න.

රත්නම් එ. පෙරේරා 9

හවුල් ව්‍යාපාරය.

ගණන් පෙන්වීම සඳහා දැමූ නඩුවක්—ෂෙල් සමාගමේ පැට්රෝල්, භූමිතෙල්, ඩීසල්තෙල් සහ යාන්ත්‍රිය තෙල් ආදිය ගබඩා කිරීමට, අලෙවි කිරීමට, හා බෙදහැරීමට, කොටස් මුදලක් ලබන ඒජන්තවරු වීම සඳහා ඇතිකරගත් හවුල් ව්‍යාපාරයක්—පැට්‍රෝල්, භූමි තෙල් සහ ඩීසල් තෙල් වලට කොමිස් මුදල ගෙවෙන ප්‍රමාණය නියම කොට යාන්ත්‍රිය තෙල්වලට එය සමාගමින් ගත් මිල හා මහජනයාට විකුණන ලද මිල අතර ඇති වෙනස ගෙවෙනසේ සැලසීම—හවුල් ව්‍යාපාරයේ ලාභය පැට්‍රෝල් ආදියට පමණක් සීමාවූ අතර යාන්ත්‍රිය තෙල් ආදියෙන් ලැබෙන ලාභ තමාට අයත් යයි විත්තිකරු කළ තර්කය—හවුල් ව්‍යාපාර කොන්ත්‍රාත්තුවක් විසඳා බැලීම—"ඒජන්ත", "කොමිස් මුදල" යනාදී පොරොන්දු පත්‍රයේ ඇති වචනවල තේරුම—සිවිල් නඩු විධාන සංග්‍රහයේ 508 වන ඡෙදය—පැමිණිලි කරු විසින් කරණ ලද සම්පූර්ණ ඉල්ලීම විත්ති කරුට පළමු කොට ගණන් හිලව් පෙන්වීමට අණනොකර විනිශ්චය කාරතුමා විසින් විසඳීම.

තීන්දුවේ සාරාංශය : (1) ගණන් හිලව් පෙන්වීම සඳහා දැමූ මෙම නඩුවේදී උසාවිය විසින් අනුගමනය කළ යුතුව තිබුණු නියම මාර්ගය නම් විත්තිකරුට ගණන් හිලව් උසාවියට ඉදිරිපත් කිරීමට නියම කළ යුතු ද? එසේ නම් එය කළයුත්තේ කවර සීමාවකට අයත් කාලයක් තුළද? යන්න විසඳීමයි. ගණන් හිලව් පෙන්වීම සඳහා දැමූ නඩුවකදී විසඳිය යුතු ප්‍රශ්න කඩින් කඩ උසාවියට විසඳීමට හැකිවන පරිදි සිවිල් නඩු සංවිධාන සංග්‍රහයෙන් බලය දී තිබේ.

(2) හවුල් කරුවන් එක් එක්කෙනාට හවුල් ව්‍යාපාරයක ලාබයෙන් ගෙවිය යුතු මුදල පමණක් සඳහන් කර කලමනාකාර හවුල් කරුවකු විසින් නවත් හවුල් කරුවකුට යවන ලද ප්‍රකාශය ගණන් ශේෂ පත්‍රයක් හැටියට සැලකිය නොහේ. ගණන් ශේෂ පත්‍රයක් ගණන් හිලව් පිළිබඳ තව වෙනත් කරුණු ද ඇතුලත්විය යුතුය. නිදර්ශන වශයෙන්: ගබඩාබඩු පිළිබඳ විස්තරයක්, හවුල් කරුවන් විසින් ලබා ගත් මුදල් පිළිබඳ සටහනක්, ඒ එක් කෙනෙකුට හෝ එක් එක්කෙනාගෙන් ලැබිය යුතු මුදල පිළිබඳ විස්තරයක් යනාදියයි.

හවුල් ව්‍යාපාරයේ ලාභය පැට්‍රෝල්, භූමිතෙල් සහ ඩීසල් තෙල් වලට ගෙවූ පාරිතෝෂිකයට පමණක් සීමා වන අතර යාන්ත්‍රීය තෙල් ආදිය මීට අයු නොවේ යයි විත්තිකාරු විසින් ගෙන හැර දැක්වූ තර්කය ස්ථුට කිරීම පිණිස ඔහු කියා සිටියේ—

(ඒ) එම (යාන්ත්‍රිය තෙල්) විකිණීම ඔහුගේ ව්‍යාපාරයක් බවත් එබැවින් ඒ සඳහා ඔහු ෂෙල් සමාගමෙන් මිලට ගත් මුදලත් මහජනයාට අලෙවි කළ මුදලත් අතර ඇති අන්තරය තමාට ගෙවන ලද බවත්,

(බී) එකී යාන්ත්‍රික තෙල් සඳහා පැවතියේ පැට්‍රෝල් වෙළඳාමට වෙනස්වූ ඒජන්තවරයාට සමාගම විසින් විකුණූ පසු ඒජන්තවරයා මහජනයාට විකිණීමේ වෙනත් ක්‍රමයක් බවත්ය.

තීන්දුවෙහි වැඩිදුරටත් මෙසේ සඳහන් වේ;

(3) ෂෙල් සමාගම සමග ඇති කරගත් පොරොන්දු පත්‍රයේ සහ හවුල් ව්‍යාපාරයේ පොරොන්දු පත්‍රයේ මෙම හවුල් ව්‍යාපාරය "ඒජන්තවරයා" හැටියට සඳහන් වී තිබෙන තැන එය එසේ සඳහන් වී ඇත්තේ වෙළඳ ව්‍යාපාරයිය ක්‍රම අනුව මිස නීතියේ මෙහි අර්ථය නිරූපණය කෙරෙණ අන්දමට නොවේ.

(4) මේ විධියේ කොන්ත්‍රාත්තුවකදී එයට දී තිබෙන නාම මාත්‍රය පමණක් නොව එම ගණුදෙනුවේ සාරාංශය උසාවිය විසින් සලකාබලා සත්‍ය වශයෙන් හා එහි ඇති කරුණුවලට එකහව එයට සම්බන්ධ සියලු දේ අළලා ගත්කළ හැඟියන්නේ කුමක්ද යන්න විසඳිය යුතුය.

(5) මේ නඩුවේදී ඉදිරිපත්වූ ලිපි ලෙඛන හා සාක්ෂි ගැන කල්පනාකර බැලීමේදී හැඟී යන්නේ ෂෙල් සමාගම සමග ඇති කරගත් පොරොන්දු පත්‍රයේ සඳහන්ව ඇති "කොමිස් මුදල්" යන ආදිය සඳහා—නියම කරණ ලද පාරිතෝෂිකයට යෙදී ඇති අතර අනික් අතින්—එනම් යාන්ත්‍රිය තෙල් ආදිය ගත්කල—දෙවන වරට විකුණූ පසු නියම කළහැකි පාරිතෝෂිකයට යෙදී ඇති බව පෙනී යයි. මෙම වෙළඳ ව්‍යාපාරයේ සේවයට ගෙවිය යුතු මුදල සඳහා භාවිතා කළ හැකි සුදුසු වචනයන් හැටියට මෙය සලකා තිබෙන සේ පෙනේ. මුදල් ගෙවීමේ වෙනස්කම නිසා ව්‍යාපාරයේ ස්වාභාවය වෙනස් කළායයි ගිණිය නොහැක.

රත්නම් එ. පෙරේරා 9

ගරු ගුණසේකර වි. ඉදිරිපිටදී.

නිලවීර එ. ආදයම් බදු පිළිබඳ කොමසාරිස්*

නෝ: 188 දරණ ආයාචනය—බදුල්ලේ මහෙස්ත්‍රාත් උසවිය 25321

විවාද කළ දිනය : 28 ජූනි 1961
තීන්දු කළ දිනය : 8 ජනවාරි 1962

ආදයම් බදු ආඥාපනත (1938 ව්‍යවස්ථා සංග්‍රහයේ 188 වෙනි පරිච්ඡේදය)—65 වෙනි, 80 (1) වෙනි ඡේද—80 (1) වෙනි ඡේදය යටතේ කොමසාරිස් වරයා දුන් සහතිකය—එහි ප්‍රතිඵලය—එම සහතිකය නිසා හරියාකාර ගණන් තක්සේරු නොකළේයයි බදු ගෙවීම පැහැරහැරියකුගේ කීම මහෙස්ත්‍රාත් වරයා විභාගකර තීන්දුවක් දීමට බලය තිබේද.

තීන්දුව : (1) එම ඡේදයෙ සඳහන් කොමසාරිස්වරයාගේ සහතිකය ප්‍රමාණවත් (sufficient) සාක්ෂියක්යයි ප්‍රකාශ කිරීම මිස එහි අඩංගු කරුණු පිළිබඳව එය තීරණාත්මක සාක්ෂියකැයි (Conclusive) ප්‍රකාශ නොවෙයි.

(2) ආදයම් බදු ආඥාපනතේ 80 (1) වෙනි ඡේදයෙන් ආදයම් බදු නොගෙවා පැහැර හැරි යෙමෙකු තමා විසින් ගෙවිය යුතු බද්ද හරියා කාර ගණන් බලා තක්සේරුකර නැති බව මහෙස්ත්‍රාත්වරයාට ඒත්තු ගැන්වීමට බාධාවක් නැත.

රාජනීතිඥ ජී. ඊ. වීවි, ඊ. ඒ. ජී. ද සිල්වා, සමග පෙත්සම්කරු වෙනුවෙන්.

කනගසුඳරම්, රජයේ නීතිඥ, වග-උත්තර කරු වෙනුවෙන්.

ගරු ගුණසේකර විනිශ්චයකාර තුමා.

නොගෙවා පැහැර හරින ලද දඩයකැයි කියන රු: 1,051 ක මුදලක් පෙත්සම් කරුගෙන් දඩයන්ලෙස අයකර ගැනීමටත් එම දඩය නොගෙවුවොත් මාස 3 ක් වැඩ නැතුව සිරගෙයි සිටීමටත් ඔහුට අණ කරමින් බදුල්ලේ මහෙස්ත්‍රාත් වරයා විසින් ආදයම්බදු ආඥා පණත යටතේ දෙන ලද නියෝගයක් පරිශෝධනය කරණ ලෙස යදිමින් මේ ආයාචනය ඉදිරිපත් කර තිබේ.

ව්‍යවස්ථා සංග්‍රහයේ වෂී 1938 මුද්‍රණයේ 188 වන පරිච්ඡේදයට අයත් ආදයම් බදු ආඥාපනතේ 80 (1) දරණ ඡේදය යටතේ දෙගිය ආදයම් පිළිබඳ උප කොමසාරිස්වරයෙකු විසින් දෙනලද වෂී 1960 අප්‍රියෙල් මස 11 වෙනි දින දරණ සහතික පත්‍රයක් අනුව පවරණ ලද නඩු විභාගයකදී මෙම නියෝගය දෙන ලදී. (අවුල්වීම වළක්වනු පිණිස ව්‍යවස්ථා සංග්‍රහයේ මෙම මුද්‍රණයෙහි සඳහන්වී ඇති හැටියට මම ආඥා පණත ගැන සඳහන් කරමි.†)

තමාගෙන් අයවිය යුතු ආදයම් බද්ද වන රු: 1015 ක් පෙත්සම් කරු නෙගෙවා පැහැර හරිනලද බවත් ඒ පිළිබඳ විස්තරයකුත් සහතික පත්‍රයෙහි අඩංගුව තිබුනි. 1952–1953 වෂීයට අතිරේකව ආදයම් තක්සේරු කරන ලද බද්දක් සහ බදු නොගෙවා සිටීම සම්බන්ධයෙන් දඩ මුදලක්ද මෙම සහතිකයට අයත්ව තිබේ. මෙම තක්සේරු කිරීම් නියම කාලය ඉක්ම ගිය පසු කරණ ලද්දක් බවත් එබැවින් එය 65 වන ඡේදයට අනුකූලව කරණ ලද්දක් නොවන බවත් මේ නිසා නොගෙවා පැහැර හරින ලද බද්දක් විද්‍යමාන නොවන බවත් පෙත්සම් කරු කියා සිටියේය. උගත් මහේස්ත්‍රාත් වරයා පෙත්සම්කරු නිදහසට කී මේ කරුණු පිළිබඳව පරීක්ෂණයක් පැවැත්වීම තමාට අයත් කරුණක් නොවන බවත් කෙසේවුවද එම ආදයම් තක්සේරු කිරීම නියම කාලය ඉක්ම ගිය පසු කරණ ලද්දකැයි සිතීමට නොහැකි බවත් නිගමනය කෙළේය. ඔහු කියේ මෙසේය :

> ''මෙම බදු ඉල්ලීම් නියම කාලය ඉක්මගිය පසු කරණ ලද්දක්ද නැද්ද යන්න ගැන පරීක්ෂණයක් ආරම්භ කිරීමට මට අයිති නැත. මා මෙසේ කිරීමෙන් දෙගිය ආදයම් පිළිබඳ කොමසාරිස් වරයා කල්පනාවට භාජන කළ යුතු කරුණක් මා විසින් නැවතත් කල්පනාවට භාජන කල යුතුය. ඒ කෙසේ වුවද මා අභිමුඛව ඇති මෙම නඩුවෙහි බද්ද තක්සේරු කිරීම් අවුරුදු තුනක් ඇතුළත කරතිබෙන නිසා එය කාලය ඉක්ම ගිය පසු කරණ ලද්දක්සේ ගිණිය නොහේ. මෙම නිසා පෙත්සම්කරු තමාගෙන් මෙම බද්ද අයකර ගැනීමට වැඩි දුරටත් කටයුතු නොකිරීමට යැහෙන හේතුවක් පෙන්වා නැති බව මගේ නිගමනයයි''.

මෙම බදු ඉල්ලීම කාලය ඉක්ම ගිය පසු කරණ ලද්දක්ද නැද්ද යන්න විසඳීමට තමාට අයිති නැතැයි මහේස්ත්‍රාත් වරයා කීවේ 80 (1) ඡේදයේ අතුරු විධානය ගැන සැල කිමෙනි. ඒ ඡේදය යටතේ පැවරූ නඩුවකදී සහතික පත්‍රයේ ඇති කිනම් ප්‍රකාශයකවුවද නිවැරදිබව ගැන කල්පනා කිරීමට හෝ එය පරීක්ෂා කිරීමට හෝ කිසිම බලයක් හෝ අවශ්‍යතාවයක් මහේස්ත්‍රාත් වරයාට එම

† මෙය 1956 වෂීයේ මුද්‍රණයේ 242 වන පරිච්ඡේදයේ 85 (1) දරණ ඡේදය වේ.

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 61 වෙනි කා. 8 වෙනි පිට බලනු.

ඡේදයෙන් ලැබී නැත. මෙකී සහතික පත්‍රයෙහි අඩංගු වියයුතු විස්තරය නම් නොගෙවා පැහැර ගැරිය නියා අයකිරීමට අදහස් කරණ බද්ද ගැන කරුණුත්, එසේ පැහැර හැරි තැනැත්තාගේ නම සහ ඔහු අත්තිමවරට කරණ ලද වෘත්තියේ හෝ ව්‍යාපාරයේ ලිපිනයත්ය. මේ විස්තරයෙන් බදු නොගෙවා පැහැර හැරි තැනැත්තාගේ බද්ද යථාවිධියෙන් තක්සේරුකර ඇති බව සලකා ගැනීමට ඉඩ ඇතත් මෙසේ සලකා ගැනීම වැරදී බව පෙත්සම් කරුට ඔප්පුකිරීම කිසි ලෙසකින් වළක්වන කිසිවක් මෙම ප්‍රතිවිධානයෙහි සඳහන් නොවේ. **ද සිල්වා එ. ආදයම් බදු පිළිබඳ කොමසාරිස් වරයා*** අතර කියවුනු නඩුවේදී ශ්‍රේෂ්ඨ විනිශ්චය කාරතුමා පෙන්නුම් කර ඇති පරිදි මෙම ප්‍රතිවිධානය නියම පරමාර්ථය නම් නියම ලෙස බදු තක්සේරුවෙන් පසු බදු නොගෙවා සිටින්නෙකු විසින් ඔහු විසින් නියම ලෙස ගෙවිය යුතු බදු ඉල්ලා 80 (1) දරණ ඡේදය යටතේ නඩු පැවරූ විට එම ගණන් බැලීම වැරදි බව කියමින් කළ හැකි අයථා උද්ඝොෂණය වැලැක් වීමය. මෙම ඡේදයෙහි 2 වෙනි උපඡේදය එම 1 වෙනි ඡේදය යටතේ දැමූ නඩුවකදී එම බද්ද නියම විධියට ගණන් බලා ඇති බවටත් එය නොගෙවා පැහැර හරිනලද බවටත් කොමසාරිස් වරයාගේ සහතිකයප්‍රමාණවත් සාක්ෂියක් බව පළකරයි. එහෙත් එම සහතිකය මේ කරුණු පිළිබඳව ප්‍රමාණවත් (sufficient) සාක්ෂියක් මිස නිරණාත්මක (conclusive) සාක්ෂියක් නොවන බව සිතට ගත යුතුය. තවද මෙය සාක්ෂියක් බව කියන පැණවීම නිසාම මේ අනුව විසඳිය යුතු ප්‍රශ්නයක් ද මෙවැනි නඩුවකදී පැන නැගීමට පුළුවන් බව හැඟේ. මේ උපඡේදයන්හි සඳහන් පැණවීම්වල ප්‍රතිඵලය බදු නොගෙවා පැහැර හැරි කෙණෙකු තමාගේ බද්ද හරියාකාර ගණන් බලා නැති බව මහේස්ත්‍රාත්වරයාට ඒත්තු ගැන්වීම වැළැක් වීම නොවන බව පෙන්වාදී තිබෙන (කළින් සඳහන් කළ) ද සිල්වාගේ නඩුවේ තීරණයට මම්ද ගෞරව පෙරටුව එකඟ වෙමි.

කෙසේවුවත් මේ බද්ද තක්සේරු කාලය ඉක්ම ගිය පසු කරණ ලද්දක් නොවේය යි උගත් මහේස්ත්‍රාත්වරයා කළ ප්‍රකාශය කිසිම සාක්ෂියක් උඩ රැඳී ඇති දෙයක් නොව. තක්සේරුව 1955 මාර්තු 26 වනදා කළ බව කී කොමසාරිස් වරයාගේ නිගමණය නීතිවේදියාගේ විවනයමත රැඳී තිබෙන්නකි.

තමාගේ බද්ද නියම ලෙස තක්සේරුකර නැති බව පෙත්සම් කරුට මහේස්ත්‍රාත් වරයාට ඒත්තු ගැන්වීමට ඉඩ ප්‍රස්ථාවක් දිය යුතුය යන්න මගේ අදහසය. මහේස්ත්‍රාත් වරයා කළ නියෝගය මම ඉවත ලමි. මෙම නඩුව නැවතත් පෙත්සම් කරුට එසේ අවස්ථාවක් ලබාදීම පිණිස මහේස්ත්‍රාත් උසාවියටයවන ලෙස මම උපදෙස් දෙමි.

ආපසු යවන ලදී.

* (1951) 53 න. නී. වා. 280, 282 වන පිට

වී. ඇස්. ප්‍රනාන්දු, විනිශ්චයකාරතුමා ඉදිරිපිටදී

එල්. බී. ඒ. කුමාරිහාමි එ. අබේගුණසේකර සහ තව කෙනෙක්*

සු. උ. ඉල්ලීම් නො: 166—1961
මහනුවර ම. උ. නො: 12525 නඩුව පරිශෝධනය පිණිස ඉල්ලීම.

වාදකලේ : 1961 අගෝස්තු 22 වන දින
තීන්දු කලේ : 1961 ඔක්තෝබර් 4 වන දින

මහෙස්ත්‍රාත් උසාවි—සුප්‍රීම් උසාවියෙන් නිකුත් කරන ලද නියෝග ක්‍රියාත්මක කිරීමේ යුතුකම්.

'ඒ' නමැත්තා 'බී' නමැත්තාට විරුද්ධව අලියෙකු සොරකම් කිරීමේ චෝදනාවක් කළේය. 'ඒ' නමැත්තා රු: 5000 ක ඇපයක් තැබිය යුතු අතර, ඔහුට අලියා බාර දෙන ලෙස මහේස්ත්‍රාත් වරයා 'බී' නමැත්තාට නියෝග කළේය. මේ නියෝගය පරිශෝධන කරන ලෙස 'බී' නමැත්තා කළ ඉල්ලීම උඩ ශ්‍රේෂ්ඨාධිකරණය එම නියෝගය අවලංගු කර, අලියා 'බී' නමැත්තාට බාර දෙන ලෙස නියෝග කරන ලදී. පාර්ශවකරුවන්ට මේ නියෝගය දැන්වූ පසු මහේස්ත්‍රාත්වරයා මාරු කරනු ලැබිය. චෝදනාව විභාග කිරීමට තමාට අධිකරණ බලයක් නැතැයි ඔහුගේ අනුප්‍රාප්තිකයා තීන්දු කළේය. ඉන් පසුව, ශ්‍රේෂ්ඨාධිකරණයේ නියෝගය ක්‍රියාවට පත්නොකර තිබියදී, අලියාගේ බාරය ලබාගත් පෙත්සම්කාරිය, අලියා තමාට අයත්ය කියා, ඌ තමාගේ බාරයට පත්කරන්ට යැයි නියෝගයක් කරන ලෙස ශ්‍රේෂ්ඨාධිකරණයට ඉල්ලීමක් කළාය.

තීන්දුව : (1) සොරකම් කිරීමේ චෝදනාව විභාග කිරීමට තමාට අධිකරණ බලයක් නැතැයි මහේස්ත්‍රාත්වරයා කළ තීරණය නොසලකා ශ්‍රේෂ්ඨාධිකරණයේ නියෝගය ක්‍රියාවට පත්කිරීමට ඔහු බැඳී ඇති බව.

(2) ශ්‍රේෂ්ඨාධිකරණයේ එම නියෝගය පිළිපැදීමට 'ඒ' නමැත්තා නවමත් බැඳී ඇති බව.

(3) පෙත්සම්කාරයා සතාගේ බාරය මේ වනවිට අත්කරගෙන සිටි බැවින් ඉල්ලීම අවශ්‍ය නැති බව.

අලියා කෙළින්ම උසාවියට හෝ 'ඒ' නමැත්තාට හෝ බාර දෙන ලෙස පෙත්සම්කාරියට අණ කරන ලදී.

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 61 වෙනි කා. 16 වෙනි පිට බලනු.

ඊ. ආර්. ඇස්. ආර්. කුමාරස්වාමි මහතා, සිව රාජරත්නම් මහතා සමග පෙත්සම්කාරිය වෙනුවෙන්.

ඇම්. ඇම්. කුමාරකුලසිංහම් මහතා 1 වන වග-උත්තර කරු වෙනුවෙන්.

ගරු ටී. ඇස්. ප්‍රනාඳු විනිශ්චයකාර තුමා :

මේ නඩුවේ 2 වන වග උත්තර කරුවිසින් මේ නඩුවේ 1 වන වගඋත්තර කරුට යහ තවත් දෙදෙනෙකුට විරුඬව අලියෙකු සොරකම් කළායි මහනුවර මහේස්ත්‍රාත් උසාවියේ 12525 දරණ නඩුවෙන් පැමිණිළි කරන ලදී. 2 වන වගඋත්තර කරුට 1 වන වගඋත්තරකරු අලියා බාර දිය යුතු යයිද, අවශ්‍යවූ ඕනෑම විටකදී අලියා උසාවියට දක්වන බවට 2 වන වග-උත්තර කරු රුපියල් 5000 ක් ඇප තැබිය යුතු යයිද, චෝදනාව විභාග කිරීමට ප්‍රථමයෙන්, 1959 ජූනි 9 වනද උගත් මහේස්ත්‍රාත්වරයා නියෝගයක් කළේය. උගත් මහේස්ත්‍රාත්වරයා 1959 ජූනි 9 වනද කළ නියෝගය පරිශෝධනය කරන මෙන් 1 වන වග-උත්තරකරු මේ උසාවියට ඉල්ලීමක් කළේය. 1960 නොවැම්බර් 2 වන දා මේ ඉල්ලීම මා ඉදිරියේ විභාග කරනු ලැබූ විට වග-උත්තර කරුවන් දෙදෙනාගේම නීතිඥයින්ට සවන් දීමෙන් පසුව, 1959 ජූනි 9 වනද මහේස්ත්‍රාත් වරයා කළ නියෝගය අවලංගු කළ යුතු යයිද, 1 වන වග-උත්තරකරුගේ බාරයට අලියා පත්කළ යුතු යයිද, මම එදිනම නියෝග කළෙමි. මහේස්ත්‍රාත් උසාවිය මගින් 1960 නොවැම්බර් 19 වනද මගේ නියෝගය පාර්ශවකරුවන්ට දන්වා ඇති බවට ලකුණු තිබෙන නමුත් එම නියෝගය තවමත් ක්‍රියාවට පමුණුවා නැති බව දක්නට ලැබීම කණගාටු දයකය.

මවිසින් කරණ ලද නියෝගය ක්‍රියාවට පත් නොකර තිබුන අතර නඩුවේ වොදිතය ට එල්ල කරන ලද, චෝදනාව විභාග කිරීමට තමාට අධිකරණ බලයක් නැතැයි 1959 ජූනි 9 වනද නියෝගය කළ මහේස්ත්‍රාත්වරයාගේ අනුප්‍රාප්තිකයා නින්දු කර ඇත. කෙසේවුවද 1960 නොවැම්බර් 2 වනද මේ උසාවිය මගින් කරන නියෝගය ක්‍රියාවට පත් කිරීමට මහනුවර මහේස්ත්‍රාත් උසාවිය බැඳී සිටීද යන ප්‍රශ්නයට මේ නීන්දුව අදල නොවන්නේය. මහනුවර මහේස්ත්‍රාත් උසාවිය මගින් ක්‍රියාවට පත්කරනු යදහා පැහැදිළි විධානයක් මගේ නියෝගයෙහි නිබුනි. එම උසාවියේ විධායක (ministerial) සේවාවය අනුව එම විධානය ක්‍රියාවට පත් කළ යුතුව තිබුනි.

චෝදනාව විභාග කිරීමට ඊට බලයක් නැතැයි මහනුවර මහේස්ත්‍රාත් උසාවිය කළ නීන්දුවට පසුව ප්‍රශ්නයට අදලවූ අලියා 2 වන වග-උත්තරකරුගෙන් මේ පෙත්සම්කාරිය අයිනිකර ගත් බව පෙනී යයි. එසේ ඒ සතා අයිතිකර ගැනීමෙන් පසුව, උෆ ඇගේ බාරයට පත් කරන ලෙස විධානයක් කරනු වස් ඇ දැන් මේ උසාවියට ඉල්ලීමක් කරන්නීය. දැන් ඒ සතාගේ බාරය ඇ සතු නොයිත් මේ ඉල්ලීම අවශ්‍ය නැතැයි මට හැඟී යයි. සතා ඇත්ත වශයෙන්ම තමාට අයිති යැයි ඇ කියා සිටින්නීය. 1 වන වග-උත්තරකරුට සතා බාර දෙන ලෙස නියෝග ලැබූ 2 වන වගඋත්තරකරුගෙන් මේ පෙත්සම්කාරිය සතා බාරගෙන තිබෙන්නේ 1960 නොවැම්බර් 2 වනද මේ උසාවිය කළ නියෝගයේ පැවැත්ම හොඳින් දැනගෙන බව තර්ක කළ නොහැකිය. එසේ සතාගේ බාරය ලබා ගත් පසු, ඇට නීතියෙන් අයත් නැති දෙයක් ඇ කර ඇතැයි යන සැකය නියා, මේ උසාවියට මේ ඉල්ලීම ඇ කර ඇති බව පෙනේ.

මහනුවර මහේස්ත්‍රාත් උසාවියේ අධිකරණ බලය පිළිබඳ ප්‍රශ්නය මා ඉදිරියේ තර්ක නොකරණ ලද හෙයින් ඒ සම්බන්ධයෙන් යමක් ප්‍රකාශ කිරීමෙන් මම වළකිමි.

1960 නොවැම්බර් 2 වනද මේ උසාවිය කළ නියෝගය දැන් ක්‍රියාවට පත්කිරීම සඳහා මේ නඩුවේ සටහන මහනුවර මහේස්ත්‍රාත් උසාවියට යවන ලෙස මම අණ කරමි. කෙසේ වුවද, අලියාගේ බාරය තමා සතුයයි කියන මේ පෙත්සම් කාරිය ඒ සතා කෙළින්ම උසාවියට හෝ 2 වන වග-උත්තර කරුට හෝ බාර දිය යුතුය. එවිට 2 වන වග-උත්තර කරු මේ උසාවියේ නියෝගය පිළිපැදීමට බැඳී සිටී.

නොම්මර 166 දරණ ඉල්ලීම නිෂ්ප්‍රභා කරමි.

ඉල්ලීම නිෂ්ප්‍රභා කරන ලදී.

ගරු එච්. ඇන්. ජී. ප්‍රනාඳු වී. තුමා ඉදිරිපිටදී

විලියම් සිංඥෝ එ. මුදලිගේ*

ශ්‍රේ. ඳ. නො. 210—1957 කොළඹ රිත්වැස්ට උසාවි නො. 66214

වාද කළේ :—1958 ඔක්තෝබර් 22 වැනිද.
නීන්දු කළේ :—1958 ඔක්තෝබර් 28 වනද.

ඉඩම්හිමි සහ බදුකරු—සාමාන්‍ය ව්‍යාපාරික ප්‍රයෝජනයකට යෙදවීම—ඉඩම් හිමි පැවරු නඩුවක්—සෑහෙන අවශ්‍යතාවය ප්‍රශ්නයට භාජනවූ ස්ථානය ඉඩම් හිමියාගේ උවමනාවලට අඩක් පමණක් ප්‍රමාණවත් වීම සහ ගොඩනැගිලි යදහා සුදුසු ඉඩම් නිබීම නියා පැනනගින තඤය—පාර්ශකරුවන්ගේ උවමණාවන් සමාන කර බැලීම—බදුකරු නෙරපු පමණින්ම ඔහුට නද අයුක්තියක් වී යැයි නිගමණය කළ යුතුද—ව්‍යාපාරික ස්ථානයක් සම්බන්ධයෙන් බදුකරු ඔප්පු කළ යුත්තේ කුමක්ද.

---

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංගයෙහි 61 වෙනි කා. 14 වෙනි පිට බලනු.

තීන්දුව : (i) තමාට බඩු ගබඩා කිරීම සඳහා ඉඩකඩ අවශ්‍ය ය යි යන හේතුව උඩ වෙළඳ ව්‍යාපාරිකයෙකුවූ ඉඩම් හිමියකු විසින් බද්දට දෙනු ලැබූ ස්ථානයක් නැවත අත්කර ගැනීම සාධාරණද යන ප්‍රශ්නය නිරාකරණය කිරීමේදී ඉඩම් හිමියාගේ උවමණාවලට අඩක් සමණක් ප්‍රමාණවත්වන ස්ථානයෙන් බදුකරු නෙරපනවා වෙනුවට, එම උවමණාවන් සඳහා පාවිච්චි කළ හැකිව තිබෙන සුදුසු ඉඩමින් ප්‍රයෝජන ගත යුතු ද යන්න සලකා බැලීම නීත්‍යානුකූල විය හැකිය.

(ii) මේ ප්‍රශ්නය සලකා බැලීමේදී, අවුත් ගොඩනැගිලි තැනීම සඳහා ඉඩම සුදුසු බව, ඒ සඳහා ප්‍රමාණවත් මුදල් ඉඩම් හිමි ළඟ තිබෙන බව සහ අවුත් ගොඩනැගිලි සඳහා ඉඩම් හිමි ගේ මුදල් නිරකිරීම ව්‍යාපාරික ප්‍රතිපත්තිවලට අනුකූල බව ඔප්පු කිරීම බදුකරුට භාරය.

(iii) බදුකරු නෙරපු පමණින්ම ඔහුට තද අයුත්තියක් වියැයි නිගමණය කළ නොහැකිය. එය නිශ්චිත සාක්ෂිවලින් ඔප්පු කළ යුතුය. ව්‍යාපාරික ස්ථානයක් සම්බන්ධ ප්‍රශ්නයකදී තමාගේ ව්‍යාපාරය කරගෙන යෑමට නොහැකිවීම නිසා තමාට මුදල් අතින් පාඩු විඳීමට සිදුවන බව බදුකරු ඔප්පු කළ යුතුය.

රාජනීතිඥ සර් ලලිත රාජපක්ෂ, ඕ. ඇම්. ඩා සිල්වා සහ ඩී. සී. ඩබ්ලිව්. වික්‍රමසේකර සමග, චිත්තිකාර ඇපැල්කරු වෙනුවෙන්.

රාජනීතිඥ එච්. ඩබ්ලිව්. ජයවර්ධන, නෙවිල් සමරකෝන් සහ සී. ඒ. ප්‍රනාන්දු, සමග පැමිණිලිකාර වගඋත්තර කරු වෙනුවෙන්.

ගරු එච්. ඇන්. ජී. ප්‍රනාන්දු ව්. තුමා.

තමා යෙදී සිටින ඉතා සුළුපටු ආයතන ව්‍යාපාරයක් හේතු කොට ගෙන දේරට ගෙන්වනු ලබන බඩු ගබඩා කර තැබීමට ගොඩ නැගිලි උවමණාය යන හේතුව උඩ කොළඹ යුනියන් පෙදෙසේ නොම්මර 250 දරණ ස්ථානයෙන් තමාගේ බදුකරු නෙරපීම් සඳහා පැමිණිලිකරු නීන්දු ප්‍රකාශයක් ලබා ඇත. ඔහුගේ බඩු ගබඩා කර තැබීම සඳහා අවශ්‍ය ඉඩකඩ අනුව නොම්දර 250 දරණ ස්ථානය කිසියේත් නොසැහේ. නඩුවට භාජනවූස්ථානය පසුපසින් පිහිටි ඔහුට අයත් හිස් ඉඩම් තිරුවක සැහෙන ප්‍රමාණයක විශාල ගබඩාවක් තනා ගැනීම වඩා යුක්ති සහගත බව විත්ති පක්ෂය විසින් නඩු විභාගයේදී යෝජනා කරණ ලදී. ඉඩම් හිමියෙකුගේ උවමණාවන් ඔහුට අත්කර ගෙ හැකිව තිබෙන වෙන යම් ස්ථානයකින් පිරිමිසා ගැනීමට පුළුවන් නම්, බදුකරුවෙකුට දී ඇති ස්ථානයක් ඉඩම් හිමියකු විසින් යළින් අත්කර ගැනීම "යුක්ති සහගත" නොවන බව මීට කලින් තීන්දු කර තිබේ. ඒ අනුව, ඉඩම් හිමියාගේ උවමණාවන් අඩකින් පිරිමැසෙන ස්ථානයකින් බදුකරු නෙරපීමට තැත් නොකර තමාගේ ව්‍යාපාරයට ගබඩා ඉඩකඩ අවශ්‍යවූද ඉඩම් තිබෙන්නාවූද ව්‍යාපාරිකයෙකු එම ඉඩම් ප්‍රයෝජනයට ගත යුතුද යන්න යම් නඩුවකට අදල කරුණු අනුව සලකා බැලීම නීත්‍යානුකූල විය හැකි බව මම කල්පණා කරමි. නමුත් එවැනි ප්‍රශ්නයක් නියමඅන්දමට සලකා බැලීමට නම් අවුත් ගොඩනැගිලි තැනීම සඳහා ඉඩම් සුදුසු බව ඒ සඳහා ප්‍රමාණවත් මුදල් ඉඩම්හිමි ළඟ තිබෙන බව සහ අවුත් ගොඩනැගිලි සඳහා ඉඩම් හිමියන් මුදල් නිරකිරීම් ව්‍යාපාරික ප්‍රතිපත්තිවලට අනුකූල බව ඔප්පු කිරීමේ භාරය බදුකරු දෙන පැවරේ. නඩුවට අදල කරුණු විත්ති පක්ෂය විසින් සම්පූර්ණයෙන්ම පිරික්සා බැලුවේ නම් බදුකරුට තමාගේ තර්කය සනාථ කර ගැනීමට ඉඩ තිබුන බව පෙනීයන නමුත්, මේ නඩුවේදී ඔහු මේ වැකීම ඉටුකර නැත. එමනිසා, ඉඩම් හිමියාට ගේ සහ ඉඩම අත්කර ගනීමට ඇති "අවශ්‍යතාවය සැහෙන" බවට උගත් කොමසාරිස් වරයා කර ඇති තීරණයට මම විරුඬ විය නොහැක.

ඒ ඒ ආරංචකරුගේ උවමණාවන් සමානකර බැලීමේ ප්‍රශ්නයේදී බදුකරු තමාගේ ගණන් පොත් ඉදිරිපත් කිරීමට අසමත් වූ නිසා, මේ ස්ථානයේ පවත්වාගෙන ගිය ඇඳුම් මැහීමේ ව්‍යාපාරයෙන් ලැබුණ ලාභ පිළිබඳව බදුකරු දුන් සාක්ෂි කොමසාරිස්වරයා විසින් සැකකරණු ලැබීම සාධාරණ ය යි ජයවර්ධන මහතා සමග මම එකඟ වෙමි. නෙරපු පමණින්ම තද අයුක්තියක් වියැයි නිගමණය කළ නොහැකි අතර එය නිශ්චිත සාක්ෂිවලින් ඔප්පු කළ යුතුය. ව්‍යාපාරික ස්ථානයක් සම්බන්ධයෙන්, තමාගේ ව්‍යාපාරය ගෙන යෑමට නොහැකි නම් තමාට මුදල් අතින් පාඩුවන බව පෙන්විය යුතුය. විත්ති පක්ෂය මෙය කිරීමට අසමත්වී ඇත. ගෞරව සහිතව ඇපැල නිෂ්ප්‍රභා කරමි.

ඇපැල නිෂ්ප්‍රභා විය.

ගරු ටී. ඇස්. ප්‍රනාන්දු වී. තුමා ඉදිරිපිට දී.

එඩ්වින් එ. වෙල්වරාජා (වැලිගම පොලිස් උප පරීක්ෂක)*

ඌ. උ. නොං. 979-1961—ම. උ. මාතර නොං. 64925.

වාදකළේ : 1961-10-9.
තීන්දුකළේ : 1961-10-10.

අපරාධ නඩු විධාන සංග්‍රහය, 172 වෙනි සහ 413 වෙනි ඡේද—තුවක්කු ආඥාපණතේ 44 වැනි ඡේදය—ගම්බද උසාවි පනත, 11 වෙනි ඡේදය—දණ්ඩනීති සංග්‍රහය, 484 වෙනි ඡේදය—භය ගැන්වීමේ චෝදනාව—මඳක් සාක්ෂි ඇසීමෙන් පසු ඒ චෝදනාව නින්ද කිරීමේ චෝදනාවට වෙන්කිරීම—එවැනි චෝදනාවක් විභාග කිරීමට මහෙස්ත්‍රාත්වරයාට ඇති අධිකරණ බලය—බල පත්‍රයක් සහිත තුවක්කුවක් රාජසන්තක කිරීමේ නියෝගයක්—එම නියෝගයේ නීත්‍යානුකූලත්වය.

සාපරාධි බයගැන්වීමක් කලායයි ඇපැල්කරුට විරුඩව චෝදනාවක් ඉදිරිපත් කරනලදී. මඳක් සාක්ෂි විභාග කිරීමෙන් පසු මහෙස්ත්‍රාත්තුමා විසින් පැමිනිලිකරු තුවක්කුවක් සඳහන් කිරීම අසභ්‍යයක් යයි සටහන්කර යථොක්ත චෝදනාව බයගැන්වීමේ චෝදනාවකට පෙරලන ලදී. ඊට ඇපැල්කරු විසින් තමා වැරදිකාරයායි පිලිගැනීමෙන් පසු දඩුවම් නියම කරන ලදී. ඉන්පසු විත්තිකරුට තුවක්කුවක් පාවිච්චි කිරීම උවමනා නොමැති යයි සටහන්කර තුවක්කුව රාජසන්තක කර, එය දිසාපතිතුමා වෙත යැවීමට අණකළේය.

මීට විරුඩව ඉදිරිපත් කරන ලද ඇපැල් පෙත්සමේ කරුණු දෙකක් සඳහන් විය. (1) බය ගැන්වීමේ චෝදනාවක් විභාග කිරීමේ තනි බලය ගම්බද උසාවියකට පමණක් හිමි බව; (2) තුවක්කුව රාජසන්තක කිරීමේ නියෝගය නීතිවිරොධි බව.

තීන්දුව : (1) 1945 නොං. 12 දරණ ගම්බද උසාවි පනතේ 11 වෙනි ඡේදය අනුව දණ්ඩනීති සංග්‍රහයේ 484 වෙනි ඡේදය යටතේ නින්ද කිරීමේ චෝදනාවක් පොලිස් නිලධාරියෙකු විසින් ඉදිරිපත්කල විටක දී එය විභාග කිරීමට මහෙස්ත්‍රාත් උසාවියට බලය තිබේ.

(2) යථොක්ත රාජසන්තක කිරීමේ නියෝගය මේ නඩුවේ සිඩින් අනුව හෝ ඊට අදල නීතියක් වූ අපරාධ නඩු විධාන සංග්‍රහයේ 413 වෙනි ඡේදය අනුව හෝ තුවක්කු ආඥා පනතේ 44 වෙනි ඡේදය අනුව හෝ නිදෙස් යයි පෙන්නුම් කල නොහැක.

ගරු ටී. ඇස්. ප්‍රනාන්දු වී. තුමා විසින්: "මෙහි දෙස් දක්වා තිබෙන (complained of) නියෝගය වැන්නක් කිරීමේදී තමාට එවැනි නියෝගයක් කිරීමට අභිමතවූවන් අධිකරණ බලධාරියෙකු විසින් තමාගේ නීත්‍යානුකූල බල සීමාවන් ගැන කල්පනාකාරී විය යුතුයි."

ඇපැල් කරු වෙනුවෙන් කිසිවෙක් පෙනී සිටියේ නැත.

ටී. ඩී. බණ්ඩාරනායක, ආණ්ඩුවේ අයිනීතිඥ, ඇටෝර්නිජනරාල්තුමා වෙනුවෙන්.

ගරු ටී. ඇස්. ප්‍රනාන්දු වී. තුමා:

දනෝරිස් නමැත්තෙකුට තුවාල කරනවාය යි කළ තර්ජනය නිසා බය ගැන්වීමේ වරද පිට චොදනාවක් ඇපැල් කරුට විරුඩව ඉදිරිපත් කරනලදී. ඇපැල් කරු තුවක්කුවකුත් රැගෙන අවුත් තුන් දිනක් පසු වෙන්ට පෙර තමාට වෙඩි තබන බව දනෝරිස් සාක්ෂි දෙමින් කීවේය. දනෝරිස්ගේ සහ ඔහු පැමිණිල්ලක් කර තිබුන ගම් මුලාදැනි තැනගේ සාක්ෂි වලින් පසු මහෙස්ත්‍රාත් තුමා මෙසේ සටහන් කර ඇත. එනම්, මේ අවස්ථාවේ පෙනී යන අන්දමට පැමිණිලිකරු තුවක්කුවක් ගැන සඳහන් කිරීම අසභ්‍යයක් බව පැහැදිලිවී. මෙසේ තමා ගේ අදහස් දක්වා මහේස්ත්‍රාත්තුමා විසින් බයගැන්වීමේ චොදනාව දණ්ඩනීති සංග්‍රහයේ 484 වගන්තිය යටතේ

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 61 වෙනි කා. 29 වෙනි පිට බලනු.

නින්ද කිරීමේ චෝදනාවක් ලෙස යංශොදනය කරණ ලදී. යංශොදනයක් අරමුණු කලමුත් ඇත්ත වශයෙන් සිදුවූයේ අපරාධ නඩු විධාන සංග්‍රහයේ 172 වෙනි ඡේදය අනුව චොදනාව වෙනස් කිරීමකි. කෙෂස් නමුත් ඇපැල්කරු නින්ද කිරීමේ චෝදනාවට චරද කාරයා බව පිලිගත් පසු ඔහුට රුපියල් පණහක දඩයක් හා ඒය නොගෙවිවොත් සුමාන දෙකක් සිර අඩස්සියේ සිටීමට නියම කරණලදි. ඇපැල්කරු ගේ පෙරකදෝරු තැන විසින් දණ්ඩ නීති සංග්‍රහයේ 484 වෙනි ඡේදය යටතේ නගන ලද චෝදනාවක් විභාග කිරීමට තනි බලය තිබෙන්නේ ගම්බද උසාවියකට පමණක් යයි යන්න විසදීමට සුදුසු නීති ප්‍රශ්නයක් වශයෙන් සඟතික කර තිබේ. මේ තර්කය ඉදිරිපත්කර තිබෙන්නේ 1945 නො: 12 ගම්බද ආඥාපණතේ 11 වෙනි ඡේදය නිබෙන බව නොපෙනුන නිසායි—එම ඡේදය අනුව පොලිස් නිලධාරියෙකු දණ්ඩ නීතිසංග්‍රහයේ 484 වෙනි ඡේදය යටතේ චෝදනාවක් මහේස්ත්‍රාත් උසාවියට ඉදිරිපත්කළ විටකදී එය විභාග කිරීමට මහෙස්ත්‍රාත් තුමාට බලය නිබේ. එම නිසා වරදකරු යයි නිශ්චය කිරීම සහ නියම කරණ ලද දඩුවමට විරුඩව ගත් ඇපැල නිෂ්ප්‍රභාකරමී. ඇපැල් පෙත් සමේ දෙස් දක්වූ තවත් කරුණක් ඇත. එනම්, ඇපැල් කරු වරද කරු බව පිලිගෙන දඩුවම් නියම කලාට පසු උගත් මහෙස්ත්‍රාත් තුමා ''චිත්තිකරුට තුවක්කුවක් උවමනා නැත'' කියා නඩුපොතේ සඳහන් කර තුවක්කුව රාජ සන්තක කිරීමේ නියොගයක්ද කර ඒය දිසාපති තුමාට යවන්ට යයි නියම කරන ලදී. මේ නඩුවේ සිඩීන් අනුවහෝ ඊට අදල නීති අනුව හෝ මෙකී නියොගය නිදෙස් යයි ඔප්පු කිරීම කෙසේදුයි තේරුම් ගැනීම අපහසු කාරණයකි. ඇපැල් කරුවෙනුවෙන් කෙනෙක් නොපෙනී සිටීනමුත් උගත් ආණ්ඩුවේ නීතිඥ තුමා තුවක්කුව පිළිබඳ කරනිබෙන නියොගය අනුමත නොකරන බව පැවසීය. ඒ නියොගය අධිකරණ සිම්ාව ඉක්මවා කර තිබෙන බව ඉනා පැහැදිලිය. ඇපැල් කරු තුවක්කුවක් රැගෙන ආවේ යයි කීම අසත්‍යයක් නම් ඇපැල් කරුගේ තුවක්කුව බලපත්‍රයක් සහිතව නිබුනි නම්, තුවක්කුවක් පාවිච්චියට බල පත්‍රයක් දීමට සුදුස්සෙකැයි කියා නිගමනය කිරීමට බලය ඇති එකම බලධාරියා ඇපැල් කරුට දුන් බලපත්‍රය අනුව ලබාගත් තුවක්කුව ඔහුට අහිමිකිරීමේ නියොගය යුක්තිසහගත යයි මොන කරුණක් උඩ කියමිද ? අපරාධ නඩු විධාන සංග්‍රහයේ 413 වෙනි ඡේදය අනුව හෝ තුවක්කු පනතේ 44 වෙනි ඡේදය යටතේ හෝ එය නිදෙස් යයි නිගමනය කල නොහැක. පළමුකී ඡේදය, (එනම් 413 වෙනි ඡේදය) යටතේ බලනවිට මහෙස්ත්‍රාත් තුමාගේම නිගමනය අනුව මේ තුවක්කුව සම්බන්ධ කිසිම වරදක් සිදුවී නැත. දෙවනු කී ඡේදය සම්බන්ධව නම්, ඇපැල් කරු තුවක්කු පනතේ කිසිම ඡේදයක් යටතේ වරදකරුවෙක් බවට නිශ්චය කරත් නැත. එසේ කිරීමට ඔහුගෙන් කිසිවරදක් සිදුවීන් නැත. මේ කරුණු නිසා තුවක්කුව රාජසන්තක කිරීමේ නියොගය ඉවත්කර ඒය ඇපැල් කරුට භාරදීමට නියම කිරීමට මට සිදුවී තිබේ. නොබොද මගේ සැලකිල්ලට භාජනවූ විශෙෂයෙන් මෙම උසාවියේ මෙම මහෙස්ත්‍රාත්වරයා ගේම නියොග නිසා ප්‍රකාශයක් කිරීම යොග්‍ය යයි මම සිතමි—එනම්, මෙහි දෙස්දක්වා තිබෙන නියොගය වැන්නක් කිරීමේදී තමාට එසේ කිරීමට අභිමතවූවත් අධිකරණ බලධාරියෙකු විසින් තමාගේ නීත්‍යානුකූල බල සීමාවන් ගැන කල්පනා කාරිවිය යුතු යන්නයි.

මීටම අදල තව කිවයුතුයයි හැහෙන කරුණක් නම්: තුවක්කුවක් පාවිච්චි කිරීමට පුරවැසියෙකුගේ සුදුසු කම් පරීක්ෂා කර එසේ ඉඩදීමට නීතිය විසින් පාලක නිලධාරීන්ට බලය පවරා තිබේ. එනම්, තුවක්කුවක් පාවිච්චි කිරීමට අවසර ඉල්ලා සිටින ප්‍රදෙශයේ දිසාපති තැනයි. එසේ පත්කරනලද පාලක නිලධාරීන්ට නීතිය අනුව පැවරී ඇති යුතුකම් ඉෂ්ට කරන්ට ඉඩදී උසාවිය විසින් ඒ බලතල බලහාන් කාරයෙන් පවරා ගන්නාසේ ක්‍රියා කිරීමෙන් වැලකී සිටීම මනොඥ යයි කිව යුතුව තිබේ.

තුවක්කුව රාජසන්තක කිරීමේ නියෝගය ඉවත්කරන ලදී.

ගරු බස්නායක, අග්‍ර විනිශ්චයකාරතුමා ඉදිරිපිටදී

කේ. ඩී. පීටර් එ. මීරිගම පොලිස් ඉන්ස්පෙක්ටර්*

සු. උ. නො: 1045-59—දි. උ. ගම්පහ නො: 49055-බී.

වාදකලේ සහ තීන්දු කලේ : 1960 අප්‍රෙල් 11 වන දින.

අපරාධ නඩු විධාන සංග්‍රහය, 182 වෙනි ඡේදය—විභාගය ආරම්භයේදී ඉදිරිපත් කළ චෝදනාව හැර අන් චෝදනාවකට චිත්තිකරුවෙක් වරදකරු කළ හැකිද? එසේ කිරීමට හැකි වන්නේ කිනම් අවස්ථාවකදී ද?

තීන්දුව: අපරාධ නඩු විධාන සංග්‍රහයේ 182 වෙනි ඡේදයෙහි සඳහන් අවස්ථාවලදී හැර, අඵක් චෝදනාවකට කෙනෙක් වරදකරුවෙකු කිරීමට නොහැක.

---

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 61 වෙනි කා. 30 වෙනි පිට බලනු.

වුදින ඇපැල්කරු වෙනුවෙන් කිසිවෙක් පෙනී සිටියේ නැත.
ඇස්. සිවරාසා, ආණ්ඩුවේ අධිනීතිඥ, ඇටෝනි ජනරාල්තුමා වෙනුවෙන්.

ගරු බස්නායක, අ. වී. තුමා :

ලංකා දණ්ඩ නීති සංග්‍රහයේ 443 වැනි සහ 369 වැනි ඡේද යටතේ දඬුවම් ලැබිය හැකි අපරාධ කිරීම ගැන වුදින ඇපැල්කරු ඇතුළු වුදිතයන් හතර දෙනෙකුට විරුද්ධව නඩු පවරනලදී. ගෙවල් බිඳීම සහ සොරකම් කිරීම සම්බන්ධයෙන් 1 වන සහ 2 වන වුදිතයන් දෙදෙනාට විරුද්ධව සාක්ෂි නැතැයි, දිස්ත්‍රික් නඩුකාර පදවියේ කට යුතු කරමින් මේ නඩුව විභාග කළ මහේස්ත්‍රාත්-වරයා තීරණය කොට ඇත. සොරකම් කරන ලද බඩු වංචා සහගත අන්දමට ලභා ගැනීම සම්බන්ධයෙන් ඔහු විසින් ඔවුන් වරදකරුවන් කරණු ලැබීය. එයේ කරමින් ඔහු මෙසේ කීය :

"පළමු වැනි සහ දෙවැනි වුදිතයන් ගෙවල් බිඳීමට කෙළින්ම සම්බන්ධ කරන සාක්ෂි ඔවුන්ට විරුද්ධ නැත. නමුත් මේ බඩු ඔවුන් ලභා නිබුන අන්දම සලකා බලන විට ඔවුන් සොරුන් හෝ සොර බඩු ලභා ගත්තවුන් හෝ යන නිගමනයට පැමිණීමට උසාවියට අයිතියක් ඇත. සොරකම් කිරීම ගැන නොව සොරකම් කරන ලදුයි දන්නා බඩු වංචා සහගත අන්දමට ලභා ගැනීම ගැන පළමුවන සහ දෙවන වුදිතයන් මම වරදකරුවන් කරමි."

ඔහු විසින් සඳහන් කර ඇති සම්බන්ධ කාරණා අනුව 1 වන, 2 වන සහ 4 වන වුදිතයන් ගමන් කළ, 5 වන වුදිතයා විසින් පදවනු ලැබූ මොටෝරියක් පස්වරු 8-45 ට වරකාපොළදී පොලිසිය නවත්වා ඇත. මොටෝ රිය ඇතුලේද රියේ බඩු පටවන අංගයේද අඵත් රෙදි මිටි තිබී ඇත. බඩු පටවන අංගයේ තිබූ රෙදිමිටි පිහාමා රෙදිවල ඔතා තිබුනි. රිය නැවැත්වූ විට 1 වන වුදිතයා එයින් බැස පැන දිවීමට තැත් කළේය. මඩබාවිට සාජපු හිමියෙක් මේ රෙදිවලට අයිතිවාසිකම් කියා සිටියේය. 4 වන වුදිතයා විසින් 5 වන වුදිතයාගෙන් කුලියට ගත් මොටෝරියට 1 වන සහ 2 වන වුදිතයන් රෙදි මිටි පැටවූ බවට 4 වන සහ 5 වන වුදිතයන් සාක්ෂි දුන්හ. ඔවුන්ගේ සාක්ෂි පිළිගත් උගත් නඩුකාර තුමා ඔවුන් නිදහස් කළේය. සොරකම් කිරීම ගැන ඔහු 1 වන සහ 2 වන වුදිතයන් වරද කරුවන් නොකළ නමුත් ඉදිරිපත් කළ සාක්ෂි පිළිගත්තේ නම් එම චෝදනාව උඩ ඔවුන් වරදකරුවන් කිරීමට හැකිව තිබුනි. නමුත් වුදින ඇපැල්කරුවන් වරදකරුවන් කරනු ලැබ ඇත්තේ සොරකම් කරන ලදුයි දන්නා බඩු වංචා සහගත අැසීමට ලභා ගැනීම උඩය. එනම්, ඔවුන්ට විරුද්ධව චෝදනා කර නැති අපරාධයක් උඩය. අපරාධ නඩු විධාන සංග්‍රහයේ 182 වන ඡේදයට යටත්වන නඩුවකදී හැර අන් කිසිවිටකදී චෝදනා නොකරනු ලැබූ අපරාධයක් උඩ වුදින පුද්ගලයෙකු වරදකරු නොකළ හැකි බව ප්‍රධාන ධර්මයකි.

එබැවින් 1 වන වුදින ඇපැල්කරුගේ දඬුවම් නිශ්ප්‍රභා කරන අතර සූදුසු චෝදනාවක් උඩ ඔහුට විරුද්ධව නඩු පවරණ ලෙස නඩුව පහල උසාවියට ආපසු යැවීමට මම නියම කරමි.

ආපසු යවන ලදී.

ගරු බස්නායක, අග්‍ර විනිශ්චයකාර තුමා සහ සන්සොනි, විනිශ්චයකාර තුමා ඉදිරිපිටදී

තම්බිරාජා එ. සීමාසහිත සිලෝන් ඉන්ෂුවරන්ස් කොම්පැනිය*

සු. උ. නො: 298—දි. උ. කොළඹ නඩු නො. 42,113-ඇම්.

වාදකලේ : 1960 ජූලි 26, 27 සහ 28 දිනදී.
තීන්දු කලේ : 1960 ජූලි 28 දා.

රක්ෂණ සහතිකය—සිටිටනයට සම්බන්ධවූ රක්ෂිත මෝටර් වාහනයකට වන්දි ඉල්ලීම—නඩුවක් පවරණ බව දැනගත් වහාම රක්ෂිත තැනැත්තා විසින් ඒ බව ලියා දැනුම් දිය යුතු යයි සහතිකයේ කොන්දේසියක් තිබීම—වාහනය පැදවූ තැනැත්තාට නඩු පැවරීම—මේ බව තමා නොදන්නේ යයි රක්ෂිත තැනැත්තා දුන් සාක්ෂිය විශ්වාස නොකරනු ලැබීම—මේ කරුණ ගැන වෙන සාක්ෂි නොතිබීම—රක්ෂණ සමාගම බැඳී ඇති වගකීමෙන් නිදහස් විය යුතුද.

මෝටර් වැන් රියක් සමග ඇතිවූ සිටිටනයකදී පැමිණිලිකරු ගේ කාරයට අලාභහානි සිදුවී ඇත. රක්ෂණ සහතිකයේ සඳහන් කොන්දේසි වලින් එකකට ඔහු අනුකූල නොවී ඇතැයි යන කරුණු උඩ ඔහු ඉල්ලා සිටි වන්දි ගෙවීමට තමන් බැඳී නැති බව විත්තිකාර සමාගම කියා සිටියේය. සහතිකය යටතේ වන්දි ඉල්ලීමකට හේතුවන ඔනෑම සිද්ධියක් සම්බන්ධයෙන් නඩුවක් පවරන්ට යන වග රක්ෂිත තැනැත්තා දැනගත් වහාම සමාගමට ලියා දැන්වීමේ වගකීම මේ කොන්දේසිය අනුව රක්ෂිත තැනැත්තා වෙත පැවරී ඇත. සිටිටනය වන අවස්ථාවේදී පැමිණිලිකරුගේ කාරය පැදවූ තැනැත්තාට නඩු පවරණ ලද මුත්, මේ තැනැත්තා සමග තමා ඉන් පසු තරහවූ

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 61 වෙනි කා. 28 වෙනි පිට බලනු.

නිසා නඩුව ගැන තමා නොදන සිටියේ යැයි පැමිණිලිකරු සාක්ෂි දුන්නේය. පැමිණිලි කරුගේ සාක්ෂිය අවිශ්වාස කළ උගත් දිස්ත්‍රික් නඩුකාර තුමා යහතිකයේ සඳහන් අන්දමට දැනුම් දී නැති හෙයින් ඔහුට වන්දි ලැබීමට අයිතියක් නැතැයි තීන්දු කළේය.

තීන්දුව : ප්‍රසිද්ධ පාරකදී වාහන දෙකක් ගැටීමෙන් එක් වාහනයක රියැදුරෙකුට හෝ නඩු පවරණු ඇතැයි නිගමනය නොකළ යුතු නිසාත් මේ සම්බන්ධයෙන් මේ නඩුවේ තිබුන එකම සාක්ෂිය නඩුවක් පවරන්ට යන බව පැමිණිලිකරු නොදන සිටියේය යනු නිසාත්, නඩුවක් පවරන්ට යන බව දැන සිටියේ යැයි සාධාරන ලෙස නිගමනය කළ හැකි වෙන කරුණු කිසිවක් නැති අතරතුර, එම සාක්ෂිය අවිශ්වාස කිරීමෙන් නඩුවක් පවරන්ට යන බව ඔහු දැන සිටියේ යැයි ඔප්පු නොවේ. නඩුවක් පවරන්ට යන බව පැමිණිලිකරු දැනුම් නුදුන්නේයයි චිත්ති පත්ෂය කළ තර්කය එම නිසා පිළිගත නොහැක.

සී. රෙන්ගනාදන් මහතා, පැමිණිලිකාර ඇපැල්කරු වෙනුවෙන්.

ඇල්. ඩබ්ලිව්. ද සිල්වා මහතා, නෙවිල් විජේරත්න මහතා සමග, චින්තිකාර වගඋත්තර කරු වෙනුවෙන්.

ගරු බස්නායක, අ. වි. තුමා—

මේ ඇපැල් නඩුවේ දී පැන නගින එකම ප්‍රශ්නය, චිත්ති කරු විසින් නිකුත් කර ඇති රක්ෂණ යහතිකය යටතේ සමාගම බැඳීමට හේතුවන එක කොන්දේසියක් ඉටු කිරීමට පැමිණිලි කරු අතපසු කර ඇති ද යනුයි. අදහස කුමක්දැයි සොයා බැලිය යුත්තේ 1 වන කොන්දේසියේය.

එම කොන්දේසිය මෙසේය :—

'' යම් කිසි අනතුරක් හෝ හදිසියක් හෝ අලාභ හෝ සිදුවූ විටකදී සහ වන්දි ඉල්ලීමක් පැනනැඟුන විටකදී සමාගමට වහාම ලියා දන්විය යුතුය. සෑම ලියුමක්, වන්දි ඉල්ලීමක්, ආඥවක් හෝ කැඳවීම් නියෝගයක් ලැබුන වහාම රක්ෂිත තැනැත්තා ඒවා සමාගමට ඉදිරිපත් කළ යුතුය.

මේ සහතිකය යටතේ වන්දි ඉල්ලීමකට හේතුවන ඕනෑම සිද්ධියක් සම්බන්ධයෙන් නඩුවක් පවරන්ට යන වග රක්ෂිත තැනැත්තා දැනගත් වහාම සමාගමට ලියා දන්විය යුතුය.

මේ සහතිකය යටතේ වන්දි ඉල්ලීමකට හේතුවන සොරකමක් හෝ වෙනයම් සාපරාධී ක්‍රියාවක් සිදුවුන අවස්ථාවකදි රක්ෂිත තැනැත්තා වහාම ඒ ගැන පොලිසි යට දන්වා වරදකරුට දඩුවම් පැමිණවීම සඳහා සමාගමට සහයෝග විය යුතුය.''

මෝටර් වැන් රියක් සමග ඝට්ටනය වීමෙන් සිවකීය කාරයට සිදුවූ අලාභය සම්බන්ධයෙන් පැමිණිලිකරු වන්දි ඉල්ලූ විට 152 කොන්දේසියේ යටින් ඉරිගසා ඇති වගන්තිය අනුව දැනුම්දීම ඔහු අතපසු කර ඇතැයි යන කරුණ උඩ චිත්තිකාර සමාගම වන්දි ගෙවීමට බැඳි නැතැයි කියා සිටියේය. පැමිණිලිකරුගේ නඩුව නම් අනතුර සිදුවූ දිනයේ ඔහු තව දෙදෙනෙකු සමග සිවකීය කාරයේ ගමන් කළ බවය. ඉනින් දෙදෙනාගෙන්, එකෙකු චින්සන්ට් නමැති ඔහුගේ මිත්‍රයෙකි. රිය පැදවීමේ බලපත්‍රයක් ලැබ සිටි මේ අය කාරය පදවන අතර, පාරේ වංගුවකදී, මෝටර් වැන් රියක් සමග ඝට්ටනය වීමෙන් ඊට අලාභ සිදුවිය. වංගුවකදී නවත් වාහනයක් ඉස්සර කිරීමට තැත්කිරීමෙන් රියැදුරු චින්සන්ට නුවමණා තරමේ අන්තරාවකට මුහුණ පෑ බව අනතුර සිදුවූ වේලාවේදී තමා කල්පනා කළේයැයි පැමිණිලිකරු සිය සාක්ෂියේදී කීවේය. 1954 නොවැම්බර් 19 වනද අනතුර සිදුවූ අතර, 1955 ජනවාරි 19 වනද පොලිසිය චින්සන්ට්ට නඩු පවරා දැන. චින්සන්ට් සමග තමා තරහවී සිටි නිසා චින්සන්ට තමාට නඩුව ගැන නොදන්වූ හෙයින් ඒ ගැන තමා දන සිටියේ නැතැයි පැමිණිලිකරු කියා සිටී. පැමිණිලිකරුගේ පදිංචි ස්ථානයවූ, මාතලේට 1955 ජනවාරි 18 වනද චින්සන්ට් පැමිණි විට මේ ගැන නොදන්වන ලදැයි යනු උගත් දිස්ත්‍රික් නඩුකාර තුමා විශ්වාස කළේ නැත. ''අඩුම ගණනේ චින්සන්ට් උසාවියට පැමිණ වැරදිකරු යයි කියා සිටි දිනයේවත්, පැමිණිලිකරු නඩුව ගැන දැන සිටියේ යැයි මම විශ්වාස කරමි,'' යයි ඔහු පවසයි. '' චින්සන්ට් ට නඩු පැවරීම පිළිබඳ පුවත සැලකිරීම පැමිණිලිකරු අතපසුකර ඇත යනු මගේ තීරණය වේ. ඒ අනුව බලනවිට සහතිකය යටතේ ලැබිය යුතු වන්දියට පැමිණිලිකරු අහිමි වේ '' ය යනු ඔහු ගේ තීන්දුව වෙයි.

රක්ෂිත තැනැත්තා බැඳිසිටියේ ''වන්දි ඉල්ලීමකට හේතු වෙන ඕනෑම සිද්ධියක් සම්බන්ධයෙන් නඩුවක් පවරන්ට යන වග රක්ෂිත තැනැත්තා දැනගත් වහාම'' ලියා දැන්වීමටය. මේ සිද්ධිය වන්දි ඉල්ලීමකට හේතුවීමට ඉඩ තිබුන එකක් බව සැකයක් නැත. යම් නඩුවක් පවරන්ට යන බව පැමිණිලි කරු දන සිටියේද ? ප්‍රසිද්ධ පාරකදී වාහන දෙකක් ඝට්ටනය වූ පමණින් ඉන් එක වාහනයක රියැදුරෙකුට හෝ නඩු පවරණු ඇතැයි නිගමනය කළ නොහැකිය. මේ සම්බන්ධයෙන් මේ නඩුවේ තිබුන එකම සාක්ෂිය නඩුවක් පවරන්ට යන බව පැමිණිලිකරු නොදන සිටියේය යනුයි. නඩුවක් පවරන්ට යන බව සාධාරණ ලෙස නිගමනය කළ හැකි වෙන කරුණු කිසිවක් නැති අතරතුර, එම සාක්ෂිය විශ්වාස නොකිරීමෙන්, උගත් නඩුකාර තුමා කල්පනා කරන අන්දමට, නඩුවක් පවරන්ට යන බව ඔහු දැන සිටියේ යැයි ඔප්පු නොවේ. ඝට්ටනය සම්බන්ධයෙන් නඩුවක් පවරන්ට යන බව පැමිණිලි කරු දැන සිටියේ යැයි සනාථ කිරීමට නඩුවේ සාක්ෂි ඇත. නඩුවක් පවරන්ට යන බව දැනුම් දීම් පැමිණිලි කරු අතපසු කළේ යැයි චින්තිකරු නිදහසට කළ ප්‍රකාශය පිළිගත නොහැකි බව අපේ අදහසයි. එම නිසා, උගත් දිස්ත්‍රික් නඩුකාර තුමාගේ තීන්දුව ඉවත්කර ඇපැලට ඉඩ දෙන අතර, පැමිණිල්ලෙන් ඉල්ලා සිටි පරිදි පහළ උසාවියේ මෙන්ම මේ උසාවියේ ගාස්තුද පැමිණිලි කරුට ලැබිය යුතු යයි අපි නඩුව තීන්දු කරමු.

ඇපැලට ඉඩ දෙන ලදී.

ගරු වී. ඇස්. ප්‍රනාන්දු විනිශ්චයකාරතුමා සහ සින්නතම්බි විනිශ්චයකාරතුමා ඉදිරිපිට.

රත්නම් එ. පෙරේරා*

ශ්‍රේ. අ. 67/59 (F)—කුරුණෑගල දි. උ. අංක 11433.

විවාද කළ දිනය : 1961 ජූනි 26, 28, 29, 30
නීන්දු කළ දිනය : 1961 නොවැම්බර් 3

ගණන් පෙන්වීම සඳහා දඬුවම් නඩුවක්—පෙළ් සමාගමේ පැට්‍රෝල්, භූමිතෙල්, ඩීසල්තෙල් සහ යාන්ත්‍රිය තෙල් ආදිය ගබඩා කිරීමට, අලෙවි කිරීමට, හා බෙදහැරීමට, කොටස් මුදලක් ලබන ඒජන්තවරු වීම සඳහා ඇතිකරගත් හවුල් ව්‍යාපාරයක්—පැට්‍රෝල්, භූමිතෙල් සහ ඩීසල් තෙල් වලට කොමිස් මුදල ගෙවෙන ප්‍රමාණය නියම කොට යාන්ත්‍රිය තෙල්වලට එය සමාගමින් ගත් මිල හා මහජනයාට විකුණන ලද මිල අතර ඇති වෙනස ගෙවෙතසේ සැලසීම—හවුල් ව්‍යාපාරයේ ලාභය පැට්‍රෝල් ආදියට පමණක් සීමාවූ අතර යාන්ත්‍රිය තෙල් ආදියෙන් ලැබෙන තමාට අයත් යයි විත්තිකරු කළ තර්කය—හවුල් ව්‍යාපාර කොන්ත්‍රාත්තුවක් විසඳා බැලීම——" ඒජන්ත," " කොමිස් මුදල " යනාදි පොරොත්තු පත්‍රයේ ඇති වචනවල තේරුම්—සිවිල් නඩු විධාන සංග්‍රහයේ 508 වන ඡේදය—පැමිණිලි කරු විසින් කරණලද සම්පූණී ඉල්ලීම විත්ති කරුට පළමු කොට ගණන් හිලව් පෙන්වීමට අණනොකර විනිශ්චය කාරතුමා විසින් විසඳීම.

නීන්දුවේ සාරාංශය :

(1) ගණන් හිලව් පෙන්වීම සඳහා දඬුම මෙම නඩුවේදී උසාවිය විසින් අනුගමනය කළ යුතුව තිබුණු නියම මාර්ග නම් විත්තිකරුට ගණන් හිලව් උසාවියට ඉදිරිපත් කිරීමට නියම කළ යුතුද ? එසේ නම් එය කළයුත්තේ කවර සීමාවකට අයත් කාලයක් තුලද ? යන්න විසඳීමයි. ගණන් හිලව් පෙන්වීම සඳහා දඬුම නඩුවකදී විසඳිය යුතු ප්‍රශ්න කඩින් කඩ උසාවියට විසඳීමට හැකිවන පරිදි සිවිල් නඩු සංවිධාන සංග්‍රහයෙන් බලය දී තිබේ.

(2) හවුල් කරුවන් එක් එක්කෙනාට හවුල් ව්‍යාපාරයක ලාභයෙන් ගෙවිය යුතු මුදල පමණක් සඳහන් කර කළමනාකාර හවුල් කරුවකු විසින් තවත් හවුල් කරුවකුට යවන ලද ප්‍රකාශය ගණන් ශෙෂ පත්‍රයක් හැටියට සැලකිය නොහේ. ගණන් ශෙෂ පත්‍රයක් ගණන් හිලව් පිළිබඳ තව වෙනත් කරුණුද ඇතුළත්විය යුතුය. නිදර්ශන වශයෙන් : ගබඩාබඩු පිළිබඳ විස්තරයක්, හවුල් කරුවන් විසින් ලබා ගත් මුදල් පිළිබඳ සටහනත්, ඒ එක්කෙනෙකුට හෝ එක් එක්කෙනාගෙන් ලැබිය යුතු මුදල පිළිබඳ විස්තරයක් යනාදියයි.

හවුල් ව්‍යාපාරයේ ලාභය පැට්‍රෝල්, භූමිතෙල් සහ ඩීසල් තෙල් වලට ගෙවූ පාරිතොෂිකයට සමණක් සීමා වන අතර යාන්ත්‍රිය තෙල් ආදිය මීට අසු නොවෙයයි විත්තිකරු විසින් ගෙන හැර දක්වූ තර්කය ස්ථාපිත කිරීම පිණිස ඔහු කියා සිටියේ—

(ඒ) එම (යාන්ත්‍රිය තෙල්) විකිණීම ඔහුගේ වෙනත් ව්‍යාපාරයක් බවත් එබැවින් ඒ සඳහා පෙළ් සමාජය විසින් ඔහු සමාජයෙන් මිලට ගත් මුදලත් මහජනයාට අලෙවිකළ මුදලත් අතර ඇති අන්තරය තමාට ගෙවන ලද බවත්,

(බී) එකී යාන්ත්‍රික තෙල් සඳහා පැවතියේ පැට්‍රෝල් වෙළඳාමට වෙනස්වූ ඒජන්තවරයාට සමාජය විසින් විකුණූ පසු ඒජන්තවරයා මහජනයාට විකිණීමේ වෙනත් ක්‍රමයක් බවත්ය.

නීන්දුවෙහි වැඩිදුරටත් මෙසේ සඳහන් වේ :

(3) පෙළ් සමාගම සමග ඇති කරගත් පොරොන්දු පත්‍රයේ සහ හවුල් ව්‍යාපාරයේ පොරොන්දු පත්‍රයේ මෙම හවුල් ව්‍යාපාරය "ඒජන්තවරයා" හැටියට සඳහන් වී තිබෙන නැන එය එසේ සඳහන් වී ඇත්තේ වෙළඳ ව්‍යාපාරයීය ක්‍රම අනුව මිස නීතියේ මෙහි අර්ථය නිරූපණය කෙරෙණ අන්දමට නොවේ.

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 61 වෙනි කා. 42 වෙනි පිට බලනු.

(4) මේ විධියේ කොන්ත්‍රාත්තුවකදී එයට දී තිබෙන නාම මාත්‍රය පමණක් නොව එම ගණුදෙනුවේ සාරාංශය උසාවිය විසින් යලකාබලා යන්‍ය වශයෙන් හා එහි ඇති කරුණුවලට එකඟව එයට සම්බන්ධ සියලු දේ අළලා ගත්කළ හැඟියන්නේ කුමක්ද යන්න විසඳිය යුතුය.

(5) මේ නඩුවේදී ඉදිරිපත්වූ ලිපි ලෙඛන හා සාක්ෂි ගැන කල්පනාකර බැලීමේදී හැඟි යන්ෙන් ෂෙල් සමාගම සමග ඇති කරගත් පොරාන්දු පත්‍රයේ සඳහන්ව ඇති ''කොමිස් මුදල'' යන වචනය එක් අතකින්—එනම් පැට්‍රෝල් ආදිය යඳහා— නියම කරණ ලද පාරිතොෂිකයට යෙදී ඇති අතර අනික් අතින්—එනම් යාන්ත්‍රිය තෙල් ආදිය ගත්කල— දෙවන වරට විකුණූ පසු නියම කලහැකි පාරිතොෂිකයට යෙදී ඇති බව පෙනී යයි. මෙම වෙළඳ ව්‍යාපාරයේ සේවයට ගෙවිය යුතු මුදල් යඳහා භාවිතා කළ හැකි සුදුසු වචනයක් හැටියට මෙය සලකා තිබෙන සේ පෙනේ. මුදල් ගෙවීමේ මේ වෙනස්කම ව්‍යාපාරයේ ස්වභාවය වෙනස් කළායයි ගිණිය නොහැක.

සින්නතම්බි විනිශ්චයකාරතුමා :— ''කොමිස් මුදල යම්කිසි නියම මුදල් ප්‍රමාණයකටම සීමාවීම කිසියේත් අවශ්‍ය නොවේ. මෙය වෙනස් වී යාමට හැකිවන අතරම එහි ප්‍රමාණය කෙතෙක්දැයි නිශ්චය කිරීමට හැකි විය යුතුය.''

නීතිඥවරු : සී. රෙන්ගනාතන් මහතා, විත්තිකාර ඇපැල් කරු වෙනුවට.
රාජනීතිඥ සී ත්‍යාගලිංගම් මහතා, සී. ද සිල්වා මහතා සමග පැමිණිලිකාර-වගඋත්තරකරු වෙනුවට.

සින්නතම්බි විනිශ්චයකාරතුමා :

මෙම නඩුව එක් හවුල් කරුවකු විසින් තව හවුල් කරුවකුට විරුද්ධව දූනට විසුරුවා හැර ඇති එම හවුල් ව්‍යාපාරයේ ගණුන් හිලව් පෙන්වීමට සහ එහි වත්කම බෙදා හැරීමට අයැදිමින් පවරණ ලද්දකි. කුරුණෑගල පිහිටා ඇති ෂෙල් සමාගමේ පැට්‍රෝල් වෙළඳ පොලේ ව්‍යාපාරික කටයුතු ගෙන යාම පිණිස ෂෙල් සමාගමේ රක්ෂාවෙහි නියුක්තවූ සිබල් නැමැත්තෙකු විසින් පැමිණිලිකරු සහ විත්තිකරු සම්බන්ධ කොට ඇති බවක් මෙහිදී පෙනියන්නාක් මෙන් ඇති බව මෙහිලා කියයුතුය. මෙබඳු පැට්‍රෝල් ගබඩාවක් මීට කලින් විත්තිකරු විසින් මැන්ඩිස් නමැත්තෙකු සමග පාලනය කර ඇති බැවින් ඔහුට මේ විදියේ පාලනයක් ගැන මනා අත්දැකීමක් ඇතිව සිටි බවද සඳහන් කළ යුතුය. ෂෙල් කොම්පැනිය මැන්ඩිස් සමග කළ මේ ව්‍යාපාරය නිමකළ වහාම එය විත්තිකරු සමග හවුලේ ගෙන යාමට සුදුසු වගකියහැකි පුද්ගලයෙකු සෙවීමෙහි සිබල් නිරතවී නිබේ. විත්තිකරු ළඟ මේ සඳහා අවශ්‍ය මූල ධනය (Capital) නොතිබුනු නිසා සිබල් කළ යෝජනාව පරිදි ප්‍රදේශයේ විශාල ලෙස පැට්‍රෝල් මිලට ගත් තැනැත්තකුවන පැමිණිලි කරු මේ ව්‍යාපාරයේ හවුල් කරුවකු ලෙස බඳවා ගැනීමටයයි සම්මුතියක් ඇතිවී තිබේ. මෙසේ හවුල් කරුවන් ලෙස ව්‍යාපාර ඔප්පුවකට ඇතුල්වුනු ඔවුහු වෂි 1943 නොවැම්බර් මස 29 වන දින යථානුකූලව මේ හවුල් ව්‍යාපාරය **ව්‍යාපාර නාම ලියා පදිංචි කිරීමේ ආඥ පණත** (Business Names Registration Ordinance) යටතේ ලියා පදිංචි කළහ. මෙසේ ලියා පදිංචි කිරීමේ සහතික පත්‍රය D 170 හැටියට සලකුණු කර ඉදිරිපත් කර තිබේ. ඒ අනුව ව්‍යාපාරය ඇරඹිය යුතුවූයේ වෂි 1944 ජනවාරි මස 1 වෙනි දින දීය. එහෙත් P 1 දමා සලකුණු කර ඇති හවුල් ව්‍යාපාර ඔප්පුව සකස් වී ඇත්තේ ඊට පසුව එනම් වෂි 1944 මැයි මස 13 වෙනි දිනදීය.

මෙම ඔප්පුවේ සඳහන් කොන්දේසි අනුව මේ දෙදෙනා කුරුණෑගල සහ අනික් ප්‍රදේශවල සීමාසහිත ෂෙල් සමාගමේ ''ඒජන්තවරු'' හැටියට පත්වීමට කැමතිවූහ. මෙම හවුල් ව්‍යාපාරය ''රත්නම් සහ පෙරේරා'' යන නමින් පවත්වාගෙන යායුතුය. මේ සඳහා යෙදෙන ඉතාම අඩු මූල ධනය රුපියල් 20,000 ක් වූ අතර එයින් රුපියල් 5,000 ක් රත්නම් විසින්ද රුපියල් 15,000 ක් පෙරේරා විසින්ද යොදන ලදී. මේ සඳහා නියම අන්දමින් ගණුන් පොත් තැබිය යුතුයයිද සියලුම ගනුදෙනු පිළිබඳව එම පොත්වල සටහන් වියයුතුයයිද එහි ඇතුළත් විය. සෑම මාසයක අවසානයේදී පරීක්ෂණාත්මක ශෙෂ ගණුන් පත්‍රයක් (Balance Sheet) ඉදිරිපත් විය යුතු බව හා මාර්තු මස 31 වන දින වාර්ෂික ශෙෂ ගණුන් පත්‍රය ඉදිරිපත් විය යුතු බවද එහිවැඩි දුරටත් ඇතුළත් විය. පරිපාලක හවුල් කරුවා විත්තිකරුවන රත්නම් වියයුතුය. ලාභය සම්බන්ධයෙන් එහි 14 වන කොන්දේසියෙන් කියවුනේ ෂෙල් සමාගමෙන් සෑම මාසයකම අවසානයේදී ගෙවන ''ඒජන්ත කොමිස් මුදල'' එයින් 1/3 ක් රත්නම්ට ලැබෙන ලෙසත් 2/3 ක් පෙරේරාට ලැබෙන ලෙසත් බෙදියයුතු බවකි. හවුල්කරුවන් දෙදෙනාගෙන් එක් කෙනෙකුවත් ''හවුල් ව්‍යාපාරයේ අරමුදලින් අත්තිකාරම් මුදලක් වශයෙන් හෝ වෙන අන් විධියකින් හෝ මුදලක් නොලැබිය යුතුය''

යනුද එහි වැඩි දුරටත් සඳහන් විය. එසේම 18 වැනි කොන්දේසිය අනුව යම් හෙයකින් හවුල් ව්‍යාපාරය විසුරුවා හරිනු ලැබී නම් එහි වත්කම් රත්නමට 1/4 ක් ද පෙරේරාට 3/4 ක් ද ලැබෙන යේ බෙදිය යුතු බව කියවේ.

මෙකී හවුල් ව්‍යාපාරය මෙල් සමාගම විසින් වර්ෂ 1953 ඔක්තෝබර් මස 30 වෙනිදින විසුරුවා හරිනු ලැබ මෙම විත්තිකරු විසින් නියම ලෙස යන්‍ය ගණන් හිලව් නොපෙන්වා පැහැර හරින ලද්දේයයිද මෙහි පැමිණිලි කරුට ගෙවිය යුතු මූලික ධනය වත්කම් ලාබ හා "ඒජන්ත කොමිස් මුදල" නොගෙවන ලද්දේයයිද කියමින් පැමිණිලි කරු මේ අප ඉදිරියේ ඇති නඩුව පවරා තිබේ. තමාට ලැබිය යුතු මුදල රුපියල් 224,677 කැයි ගණන් බලා ඇති පැමිණිලිකරු එයින් රුපියල් 86,314 ගෙවා ඇති බව පිළිගනී. විත්තිකරුට රුපියල් 4,476.13 ක් යායුතු බව කියන ඔහු තමාට ඉතිරි මුදල් අයවිය යුතු බව කියා සිටී. විත්තිකරුට යායුතු රුපියල් 4,476.13 යා යුත්තේ පැමිණිලි කරු විසින් වර්ෂ 1951 නොවැම්බර් මස 1 වෙනි දින සිට මල්පිටියේ කරගෙන යනු ලබන මේ සමාගමේ වෙනත් ව්‍යාපාරයකින් විත්තිකරුට ලැබිය යුතු කොටස හැටියට බව ඔහු වැඩිදුරටත් සැලකර සිටී. පැමිණිලි කරුගේ යාඥාවෙන් ඉල්වා සිටින්නේ මෙම හවුල් ව්‍යාපාරය ඇරඹුනු දා සිට විසුරුවා හැරිය දින දක්වා නියම සන්‍ය ගණන් හිලව් පෙන්වන ලෙස විත්තිකරුට අණ කරණ නියෝගයක් සහ ඒ අනුව උසාවියට පෙනීයන පරිදි තමාට හිමි මුදල ගෙවන ලෙස විත්තිකරුට නියෝගයක් නිකුත් කරණ ලෙසය.

මීට උත්තර බඳිනලද විත්තිකරු කියා සිටින්නේ පැමිණිලි කරුට මේ සම්බන්ධයෙන් කිසිම නඩු නිමිත්තක් නොමැති බව හා මේම හවුල් ව්‍යාපාරයේ ගණන් ශෙෂ පත්‍රය අවුරුද්දක් පාසා ඉදිරිපත් වී ඇති බවත් පැමිණිලි කරු එම ශෙෂපත්‍ර පරීක්ෂාකොට නිවැරදි බවට පිළිගෙන ඒ අනුව ක්‍රියා කොට ඇති බවත් එසේම පැමිණිලි කරු එහි අඩංගු ගණන් හිලව් පිළිබඳව වර්ෂ 1952 මාර්තු මස 31 වෙනිදු දක්වා නෘජුතියට පත්වී සිටින බව තමාට හඟවා ඇති බවත්ය. වැඩිදුරටත් පිළිතුරුදෙමින් කරුණු සැලකරණ විත්තිකරු වර්ෂ 1952 මාර්තු 31 වෙනිදු සිට ගණන් පරීක්ෂා කොට ඇති බවත් ඒ අනුව පැමිණිලි කරුගෙන් විත්තිකරුට රුපියල් 7182. 22 ක් අය විය යුතු බවත් කියා ඒ මුදල අය කර දෙන ලෙස ප්‍රතිවිරුඩ ඉල්ලීමක් ද ඉදිරිපත් කර ඇත.

මල්පිටියේ ව්‍යාපාරය ගැන තමාට ලැබිය යුතු මුදල රුපියල් 10,000 කැ යි කියන විත්තිකරු පැමිණිලි කරුගේ අයිතිය ඉල්ලීමේ කාල සීමාව ඉක්ම ගොස් ඇතැයිද පැමිණිලි කරු තමාගේ ක්‍රියා කලාපය නිසා ප්‍රතිබන්ධනය කට (estoppel) ගොදුරු වී ඇතැයිද මෙම ගණන් හිලව් ඉදිරිපත් කොට බෙරා ඇතැයිද සැලකර සිටියි.

මින් පසු ඊට ප්‍රති උත්තරයක් බඳින පැමිණිලිකරුවා හවුල් ව්‍යාපාරයේ ගණන් හිලව් පිළිබඳව විත්තිකරුගේ ක්‍රියා මාහිය වංචන සිලි (fraudulent) යයිද විත්තිකරුට තමාම වංචාව සහවා කෙණෙකුගේ අයිතියක් ඉල්ලීමේ කාල සීමාව ඉක්ම ගිය බව හෝ කෙණෙකු ප්‍රතිබන්ධනය කට ගොදුරු වී ඇති බව හෝ කියා පෑමට නොහැකියයි කරුණු සැලකර සිටී.

මෙහි ගණන් හිලව් ඇමිණීමටයයි විත්තිකරුට කිසිම නියෝගයක් නොකළ උගත් විනිශ්චයකාර මහතා පැමිණිලි කරුට ඔහුගේ මූලධනය, වත්කම් හා ලාභ සඳහා රුපියල් 79,000 ක් ලැබිය යුතුයයි නිගමනය කෙළේය. විත්ති කරුගේ ප්‍රති විරෝධ ඉල්ලීම ගැන යැලකූ විනිශ්චය කාර මහතා මල්පිටියේ ව්‍යාපාරය නිසා ඔහුට රුපියල් 5,000 ක් ලැබිය යුතු බව ද තීරණය කළේය. විත්තිකරු මෙම ඇපැල් පෙත්සම ඉදිරිපත් කර ඇත්තේ මේ නඩු තීන්දුවට විරුඩවය. තමාට ලැබිය යුතු මුදල තීන්දුවූ මුදලට වඩා වැඩි බව කියමින් පැමිණිලි කරුවාද හරස් විරුඩ තාවයක් පළකෙරෙණ ඇපැල් පෙත්සමක් ඉදිරිපත් කෙළේය.

නඩුව විසඳූ උගත් විනිශ්චයකාරතුමා පිට පැවරී තිබූ මුල් කරුණ විත්තිකරුට මෙහි ගණන් හිලව් ඇමිණීමට යයි තමා විසින් නියෝග කළ යුතුද නැද්ද යන්න බවත්, එසේම 1952 මාර්තු දක්වා ගණන් හිලව් පෙන්වා තිබෙයයි විත්තිකරු තර්ක කරණ නිසා කෙතරම් සීමාවක් ඇතුළත ගණන් හිලව් පෙන්විය යුතුද යන්න බවත් ඉදුරා පැහැදිලි ය. වර්ෂ 1952 අප්‍රියෙල් මස 1 වන දින සිට හවුල් ව්‍යාපාර විසුරුවා හරිනලද දිනය දක්වා ගණන් හිලව් පෙන්වා නැති බව විත්තිකරුගේම උත්තරයෙන් පැහැදිලිව පෙනී යන නිසා අඩු වශයෙන් ඒ කාල සීමාව තුලවත් ගණන් හිලව් පෙන්වීමට මෙහිදී විත්තිකරු බැඳී සිටියි. මීට කලින් වූ කාල සීමාව පිළිබඳව උගත් විනිශ්චයකාර මහතා කළ යුතුව තිබුනේ විත්තියෙන් කියන පරිදි ගණන් හිලව් ඉදිරිපත්කර තිබේද යන බව විසඳා ඊට අනතුරුව ඒ ඉදිරිපත් කළ ගණන් හිලව් පැමිණිලි කරුට කෙතරම් දුරට නැවත හාරා අවුස්සා බැලිය හැකිද නැතහොත් ඒවා කොතරම් දුරට බොරු කළ හැකිද නැතහොත් එහි අඩුපාඩු ඇත් නම් ඒ අඩුපාඩු ලබාගත හැකිද යන්න විසඳීමය. මා විසින් මීට කලින් විසඳූ නඩුවක (ඇස්.සී. 351/58 ඇ[ප්) කුරුණෑගල දිස්ත්‍රික් උසාවිය නොා 5810 ඇම්. **ආරියපතිරණ එ. රොබට් වත්තෙ පතිරණ** -1961 ජූලි මස 25 වනදින දරණ ශ්‍රේෂ්ඨාධිකරණ තීර්තාව) හවුල් කරුවන්ගේ ගණන් හිලව් පිළිබඳ නඩු වලදී ගතයුතු ක්‍රියා

මාඝිය පෙන්වාදී තිබේ. උගත් විනිශ්චයකාර මහතා එම ක්‍රියා පිළිවෙල අනුගමනය කළේ නම් ඔහුට මෙසේ කාලය ඕඩංගු වීම සහ කරදර වීම වලක්වා ගත හැකිව තිබුනු අතරම මෙම නඩුවේ කරුණුද හසුරුවා ගත හැකි සීමාවක් ඇතුළත රඳවා ගැනීමටද හැකිව තිබුනි. ඒ නඩුවේ මාගේ නඩු තීන්දුවේ පෙන්වා දී ඇති පරිදි ගණන් හිලව් පිළිබඳ නඩුවලදී විසඳිය යුතු ප්‍රශ්න (issues) කොටස් වශයෙන් ගෙන විසඳීම උසාවියට පුළුවන් බව සිවිල් නඩු විධාන සංග්‍රහයේ 508 වන ඡේදයෙන් පැහැදී තිබේ. මෙම නඩුවෙහිදී උසාවිය විසින් ගත යුතුව තිබුනු නියම ක්‍රියා මාඝිය නම් පළමුව විත්තිකරුට ගණන් හිලව් උසාවියට ඉදිරිපත් කිරීමට කියයුතුද යන්නත් එසේ නම් කොයි කාල සීමාව තුල ගණන් හිලව් ඉදිරිපත් කළයුතුද යන්නත් විසඳා එම නියෝගය විත්තිකරුට දී ඒ නයින් එම ගණන් හිලව් බොරු කිරීමට හෝ එහි අඩුපාඩු පෙන්වීමට හෝ අවස්ථාව පැමිණිලි කරුට ලබාදී ඉක්බිති පැමිණිලි කරුට හෝ විත්තිකරුට උසාවියට කරුණු පෙනීයන හැටියට කෙතරම් මුදලක් අයවිය යුතුද යන්න තීරණය කිරීමය. මෙම කරුණු වෙනුවට උගත් විනිශ්චයකාර තුමා විත්තිකරුට ගණන් හිලව් පෙන්වීමට අණකළ යුතුද යන ප්‍රශ්නය පමණක් නොව පැමිණිලි කරුගේ හා විත්තිකරුගේ සම්පුණ ඉල්ලීම් පවා ඇතුළත් කොට විසඳිය යුතු ප්‍රශ්න මාලාවක් (issues) සකස් කොට පිළිගත් කරුණු පවා මේ ප්‍රශ්න මාලාවට ඇතුළත් කෙළේය. මෙහි ප්‍රතිඵලය වූයේ විසඳිය යුතු ප්‍රශ්න මාලාවට විනිශ්චයකරු විසින් පිළිතුරු දිය යුතු කාලය එළඹුනු විට ඔහු විත්තිකරු විසින් ගණන් හිලව් පෙන්විය යුතු බව පිළිගත් නමුත් එවිට විත්තිකරුට එසේ නියෝග කිරීමෙන් වැඩක් නැතැයි ඔහු ප්‍රකාශකෙළේය

පැමිණිලි කරුගේ තර්කය වූයේ නියම ගණන් හිලව් නොපෙන්වූ බවයි. මාස්පතා ලැබෙන කොමිස් මුදල ගැන ප්‍රකාශ එවූ බවත්, එක්තරා කාල සීමාවක් තුළදී කටයුතු කිරීමට වියදම්වූ මුදල අඩුකොට වෂියකට ලැබුනු එම කොමිස් මුදල ඇතුළත් ප්‍රකාශ එවූබවත් ඔහු පිළිගනී. ඔහු කියා සිටින්නේ ශුද්ධ ලාභය ගණන් ගත්තෙත් 2/3 ක් සහ 1/3 ක් යන අන්දමට එය බෙදෙන්නේත් ඒ අනුවය යන බවය. එහෙත් මේ ප්‍රකාශ වලින් කියවෙන මූළු මුදල ගෙවූ බවක් හැඟී යන ලෙස කරුණු ඉදිරිපත්වී නැත. මේ ප්‍රකාශ වලින් පෙනීයන්නේ එක් එක් කොටස්කරුවකුට ඒ ලැබුනු කොමිස් මුදලින් ගෙවියයුතු මුදල පමණකි. මේය හවුල් ව්‍යාපාරයේ ඔප්පුවේ 15 වෙනි කොන්දේසියෙන් කියවෙන ශෂ ගණන් පත්‍රය නොවන බව සහතික ලෙස පෙනීයේ, විසඳිය යුතු ප්‍රශ්න (issues) මාලාවේ අංක 12 දරණ ප්‍රශ්නය මෙසේය :—

"ඔප්පුවේ සඳහන් පරිදි හවුල් ව්‍යාපාරයේ මාසික හා වාර්ෂික ගණන් හිලව් විත්තිකරු විසින් පැමිණිලි කරුට ඉදිරිපත් කර තිබේද ?"

මේ ප්‍රශ්නයට සැණෙකින් පිළිතුරුදිය යුතුව තිබුනේ "එසේ නැත" කියාය. මෙම ඇපැල විභාග වෙද්දී ඇත්ත වශයෙන් ඇපැල්කරු වෙනුවෙන් පෙනී සිටි උගත් නීතිවේදියා මෙහිදී යවා තිබෙනබව පෙනීයන මාසික ප්‍රකාශ නියම විසියට ඉදිරිපත් කරණ ලද ගණන් හිලව් බව පිළිගන්නා බට කියමිත් තර්ක කළේ නැත. එමෙන්ම එම වාර්ෂික ගණන් හිලව් ඉහත සඳහන් විසඳිය යුතු ප්‍රශ්නයේ හැටියට හවුල්ව්‍යාපාර ඔප්පුවේ කියවෙන අන්දමට ශෂ ගණන් පත්‍රයකින් ද යුක්ත විය යුතු නියම ගණන් හිලව් යයි තර්ක කිරීමට ඔහුට පුළුවන් කමක් ඇත්තේ ද නැත. ශෂ ගණන් පත්‍රයක කලින් ඉදිරිපත් කරණ ලද ප්‍රකාශයක සඳහන් නොවූ වෙනත් ගණුදෙනු පිළිබඳ ගණන් හිලව්ද තිබිය යුතුය. සාධක වශයෙන් කිවහොත් ප්‍රකාශ පත්‍රයක නොග බඩු පිළිබඳව හෝ හවුල්කරුවන් ලබාගත් මුදල් පිළිබඳව හෝ ඔවුන්ට හෝ ඔවුන්ගෙන් අයවිය යුතු ඉතිරි මුදල් පිළිබඳව හෝ සටහන් වී නිබිය නොහැක. විසඳිය යුතු ප්‍රශ්න 13 සහ 14 මෙසේ ය :—

13. පැමිණිලි කරුවා තමාට 31-10-51 දින දක්වා ඉදිරිපත් කරණ ලද ගණන් හිලව්,

(a) පරීක්ෂා කෙළේද,

(b) පිළිගත්තේද,

(c) ඒ අනුව ක්‍රියා කෙළේද

14. එසේ නම්, එම දින දක්වා ගණන් හිලව් ඉල්ලීමට පැමිණිලි කරුට ඇති අයිතිය ඒ නිසා නැවත්-විනිද ?

ඉහතකී කරුණු හේතුවෙන්ම මෙම ප්‍රශ්න දෙකටද නැත කියා පිළිතුරු දිය යුතුව තිබුනි. එබැවින් ව්‍යාපාරය පටන් ගත් ද සිටම ගණන් හිලව් තමාට පෙන්විය යුතුයයි විත්තිකරුට අණ කෙරෙණ නියෝගයක් ලබා ගැනීමට පැමිණිලිකරුට සුදුසු කම් තිබුනු බව කිය හැක. මෙම නඩුවේ දෙපක්ෂය අතර විරෝධයට හෙතුවූ ප්‍රධාන කරුණ වූයේ ෂෙල් සමාගමින් පැට්රෝල්, භූමිතෙල් හා ඩීසල් තෙල් වලට අතිරේකව නිපැයෙන අනිත් භාණ්ඩ වලින් ලැබෙන ලාභයත් හවුල් ව්‍යාපාරයේ ගණන් හිලව් වලට ඇතුළත් විය යුතුද යන්නය. විත්තිකරුගේ තර්කය වූයේ ඒ බඩු විකිණීම තමාගේ පුද්ගලික වෙළඳ ව්‍යාපාරයක් නිසා ඒ ගණන් හිලව් හවුල් ව්‍යාපාරයට ඇතුළත් කිරීමට තමා බැඳී නැති බවයි. එහෙත් මෙම විවිධ බඩු—එනම් ප්‍රධාන වශයෙන් ෂෙල් තෙල් වර්ග සහ ග්‍රීස්

වතී රත්නම් යහ පෙරේරා නැමැති වෙළඳ ව්‍යාපාරයට භාර කළ බවටත් ඒ සඳහා ලබන ලද මිල මුදල් වලට ෂෙල් සමාගම නය දුන්නේ රත්නම් යහ පෙරේරා වෙළඳ ව්‍යාපාරයට බවටත් මෙම විවිධ බඩු වතී තනිව රත්නම්ට නොදෙන බවටත් ඉතාම යැලකිය යුතු තරම් සාක්ෂි තිබේ. එසේම මේ බඩුවලට ගෙවීම් කරණ ලද්දේද භවුල් ව්‍යාපාරයේ මුදල් හදල් වලින් බවට ද සාක්ෂි තිබේ. වෙළඳ ව්‍යාපාරය පටන් ගත් කාලයේදී ෂෙල් සමාගමින් නිපැයෙන භූමිතෙල්, පැට්රෝල් හා ඩීසල් තෙල් එම (ප්‍රාදේශීය) ගබඩාවේ තැන්පත් කොට ෂෙල් සමාගම විසින් නියම කරණ ලද මිලට ඒ බඩුගන්නා අයට විකිණීම පිණිස ''ඒජන්ත'' වරුන්ට භාරදී තිබේ. මේ සඳහා භවුල් වෙළඳ ව්‍යාපාරයට යම් කිසි කොමිස් මුදලක් හෝ ප්‍රතිදනයක් (rebate) විකිණීමේ ප්‍රමාණයේ හැටියට ගෙවීමටද තීරණය වී තිබේ. බඩු බාර ගැනීමේදී පැට්රෝල් ආදියට ''ඒජන්තවරු'' විසින් මුදලක් ගෙවනු නොලැබිය. නමුත් යාන්ත්‍රිය තෙල් පාදිය සඳහා ෂෙල් සමාගමට භවුල් ව්‍යාපාරය විසින් විශෙෂ මිල කිරීමකට අනුව කලින් මුදලක් බඩු බාර ගැනීමේදී ගෙවිය යුතුව තිබුනි. එහෙත් ඒ බඩු තම ගබඩාවේදී අලෙවි කළයුතු බවත් නියම් කරණ ලද ඉහලම මිල ප්‍රමාණය ඉක්මවා ඒ බඩු නොවිකිණිය යුතු බවත් මෙහි එක කොන්දේසියක් විය. විත්තිකරු වෙනුවෙන් තර්ක කළේ යාන්ත්‍රිය තෙල්, ග්‍රීස් යනාදියෙන් ලැබෙන ලාභය විත්තිකරු යතු යැයිද එම මුදල භවුල් ව්‍යාපාරයට අසම්බන්ධව ඔහු විසින් උපයා ගත් මුදලකැයිද මෙය භවුල් ව්‍යාපාරය ඕප්පුවේ සඳහන් නොවූව කැයිද කියමිනි. මෙම භවුල් ව්‍යාපාරයේ ලාභය ෂෙල් සමාගමේ බඩු හැටියටම ගබඩාවේ තැබූනු සඳහා කොමිස් මුදලක් ගෙවුනු බඩුවලට පමණක් සීමාවියයි ද එබැවින් ෂෙල් සමාගමින් කෙළින් මිලදී ගෙනා බඩු බාරගැනීමේදී මුදල් ගෙඩා ''ඒජන්ත'' තැනගේ බඩු බවට පත්වූ බඩුවලට අදල නොවෙයයිද මෙහිදී විවාද කෙරිණ.

පැමිණිලි කරුගේ මෙන්ම විත්තිකරුගේද සාක්ෂි පිළිබඳව විශ්වාස කිරීමේදී බාහිර සාක්ෂිවලින් එම සාක්ෂි නො සැසඳී තිබෙනම් තමාට එතරම් එම සාක්ෂි විශ්වාස කළ නොහැකි බව උගත් විනිශ්චයකාරවරයා තරයේම කියා තිබේ. එබැවින් මේ ප්‍රශ්නය විසඳිය යුතුව තිබෙන්නේ ලියකියවිලි වලින් හා දෙපක්ෂය මේ සඳහා ක්‍රියාකර තිබෙන අන්දම ගැන සලකා බැලීමෙනි. එම නියා භවුල් ව්‍යාපාරය සහ ෂෙල් සමාගම අතර ඇතිවී ඇති ගිවිසුම් ගැන පළමුව විමසා බැලීමවටි. මෙම ගිවිසුම් P 2 දරා සලකුණුකොට ඉදිරිපත් කර ඇත. එහි රත්නම් යහ පෙරේරා, වෙළඳ ව්‍යාපාරය ''ඒජන්ත'' තැන හැටියටද ෂෙල් කොම්පැනිය ''සමාගම'' හැටියටද සඳහන් වී තිබේ. එහි පළමුවන ඡෙදයේ සඳහන්වී ඇත්තේ ''ඒජන්ත'' තැන සමාගමට තමාගේ සේවය අතින් කළමනා කටයුතු අතර සමාගමේ බඩු ''විකිණිමෙන්, තැන්පත් කිරීමෙන් හා බෙද හැරීමෙන්ද දියයුතු බවය. ''සමාගමේ බඩු'' යන වාක්‍ය ඛණ්ඩය විග්‍රහ කර ඇත්තේ පැට්රෝල්, භූමිතෙල්, ඩීසල් තෙල් යාන්ත්‍රිය තෙල් සමාගම මගින් ඒජන්ත තැනට යම් යම් අවස්ථාවලදී මේ ගිවිසුම අනුව විකිණීමට, තැන්පත් කිරීමට හා බෙද හැරීමට දෙන බඩු ඇතුලත් වන අන්දමටය. එම නිසා, යාන්ත්‍රිය තෙල් ''ඒජන්ත'' තැනට ගබඩා කිරීමට, විකිණීමට හා බෙදහැරීමට භාරදෙන උද්දේ නම් ඒ බඩු මෙම ගිවිසුමේ සීමාවට අසුවන බව පැහැදිලිය. යාන්ත්‍රිය තෙල් ආදී දේ වෙළඳ ව්‍යාපාරයට භාරදීම හෝ සමාගමේ ගබඩාවේ තැන්පත් කිරීම හෝ නියමිත ඉහලම මිලට අඩුවෙන් විකිණිය යුතුබව හෝ සිදුවී නැතැයි කියා නැත. ඒජන්ත තැන (ෂෙල්) සමාගමේ නිෂ්පාදන භාණ්ඩ හැර වෙනත් පැට්රෝල් පිළිබඳව නිපැයෙන බඩු නොවිකිණිය යුතුයයිද වැඩිදුරටත් ගිවිසුමේ සඳහන්වී තිබේ. එමෙන්ම සමාගමට ඒජන්ත තැන විසින් කරණු ලබන මෙම සේවයට සමාගම මගින් ඒජන්ත වරයාට ලියා නියම කරණ ලද යම්කිසි කොමිස් මුදලක් ගෙවියයුතු බවත් එය මාස් පනා ගෙවිය යුතු බවත්'' සඳහන් වී තිබීම සත්‍යයකි. තවද 'ඒජන්ත' තැනට විකිණීම පිණිස භාරදුන් බඩු විකිණෙන තුරු ඒවා සමාගමේ බඩු හැටියට යැලකෙන බවත් 6 වන ඡෙදයෙහි ඇතුළත්වී තිබීමද ඇත්තකි. එසේම 8 වන ඡෙදයෙහි ඒජන්තවරයා බඩු විකිණිය යුත්තේ සමාගම මගින් නියම කරණ ලද මුදලකට බව සඳහන් කර තිබීමද සත්‍යයකි. මෙම ගිවිසුම බලපවත්වන්නේ කලින් සමාගම විසින් වෙළඳ ව්‍යාපාරයට එවන ලදුව D 95 දරා සලකුණු කර ඇති වම් 1943 දෙසැම්බර් 3 වන දිනය දරණ ලියමනක් අනුව කොමිස් මුදලක් දීමට නියමවී ඇති ෂෙල් පැට්රෝල්, ඩීසල් තෙල් සහ භූමිතෙල් වලට පමණකැයිද විත්ති කරුවෙනුවෙන් තර්ක කරණ ලදී. පැට්රෝල් පිළිබඳව නිපැයෙන දේවල් වන පැට්රෝල් සහ භූමිතෙල් සම්බන්ධයෙන් ගෙවෙන කොමිස් මුදල සඳහන් වී ඇතත් යාන්ත්‍රිය තෙල් ගැන කිසිම සඳහන් කිරීමක් හෝ ඩීසල් තෙල් සම්බන්ධ යම් කිසි සටහනක් හෝ එහි නොමැත. පැට්රෝල් භූමිතෙල් සහ ඩීසල් තෙල් පිළිබඳව එම බඩු ඒජන්ත තැනට භාරදීමේදී සමාගම විසින් ඒජන්ත තැනට කිසි ගෙවීමක් නොකරණ ලදී. පැට්රෝල්, භූමිතෙල් සහ ඩීසල් තෙල් සමාගමේම බඩු වශයෙන් තිබුනු අතර ඒජන්ත තැන ඒ බඩුනියම් මිලකට විකිණිය යුතුව තිබුනේය. සනිපතා විකිණී ගිය ප්‍රමාණය ඉදිරිපත් කළ ඒජන්ත තැනට ඒ අනුව එක් ගැලුමකට නියමිත මුදලක් වැටෙන ලෙස කොමිස් මුදලක් සමාගම විසින් ගෙවන ලදී. කලින් සඳහන් කළ පරිදි යාන්ත්‍රිය තෙල් පිළිබඳව ඒජන්ත තැනට ගෙවන පාරිතෝෂිකය වෙනත් මගක්

ගෙන තිබේ. එමනිසා ගිවිසුමේ ප්‍රකාර පැවරෝල්, භූමිතෙල් සහ ඩීසල් තෙල් පිළිබඳ නියමිත මිල ප්‍රමාණයක් අනුව කොමිස් මුදලක් ඔහුට ගෙවී ඇති අතර යාන්ත්‍රිය තෙල් සහ අනිත් විවිධ බඩු පිළිබඳව ගෙවී ඇත්තේ ඒ බඩු සමාගමෙන් ගත් මිල සහ ඒවා මහජනයාට විකුණූ මිල අතර ඇති අන්තරය බව පෙනියයි. වෙළඳ ව්‍යාපාරයට යවා ඇති ගණන් ගිලව් පරීක්ෂා කිරීමේදී එම ව්‍යාපාරයට දුන් ග්‍රීස් සහ තෙල් වර්ග නයට ද දී ඇති බව පෙනේ. සමාගමේ නියෝජිතයාගේ සාක්ෂියෙන් කියවෙන්නේ ග්‍රීස් වර්ග සහ තෙල් වර්ග පුද්ගලිකව රත්නමට නවදවත් සමාගම විකිණීමට කැමති නොවන බවකි. තව දුරටත් ඔහු කියේ ඒවා වෙළඳව්‍යාපාරයට විකුණූ බවත්, ඒවා කුරුණෑගල පිහිටි සමාගමට අයත් සීමාවක නැබිය යුතු බවත් එහි පෝම්ප සහ ටැංකි ඉදිකොට ඇති බැවින් එහිදී ඒවා විකිණිය යුතු බවත්ය. තෙල්වර්ග ආදිය යම්බන්ධයෙන් නිබුණු වැඩි පිළිවෙල ඒජන්ත වරයාට විකිණීම කැයිද, ඒජන්තවරයා විසින් ඒ බඩු නැවත විකිණීමක් කරතිබේයයිද තර්ක කරණ ලද නමුත් පැහැදිලිව පෙනියන්නේ නියම ලෙස ක්‍රියාවෙහි යෙදීමේදී මේ වැඩ පිළිවෙල පැවරෝල්, භූමිතෙල් සහ ඩීසල් තෙල් සම්බන්ධයෙන් කෙරී ඇති වැඩ පිළිවෙලටම බෙහෙවින් සමානවන අතර වෙනසකට දැක්කේ පසුව සඳහන් කළ පැවරෝල්, භූමිතෙල් සහ ඩීසල් තෙල් පිළිබඳව නියම වශයෙන් ස්ථිර ලාභයක් නිබුණු නමුත් කලින් කී තෙල් වර්ග පිළිබඳව එසේ නොව ලාභය රදා පැවතුනේ ඒජන්ත තැන විසින් සීමා කරණ ලද ඉහලම මිලකට පමණක් යටත් නැවත විකුණූ මිල ප්‍රමාණය අනුව වීම පමණකි.

මේ වැනි කොන්ත්‍රාත්තුවකදී උසාවිය විසින් කල්පනාවට ගත යුත්තේ එය දී තිබෙන නාම මාත්‍රය පමණක් නොව කර ඇති ගණුදෙනුවේ සාරාංශයය. මෙය සිතා මතා ඒ පිළිබඳව ඇති සියලුම අංශයන් විමසා බලා සත්‍ය ලෙසක් කරුණු හැටියටත් සිදුවී ඇති දේ අනුව විනිශ්චයක් උසාවිය මගින් දියයුතුය. ප්‍රත්‍යාන්ද ඒ. කුරේ (න. නී. වා. 59 කා. 179 වෙනි පිටුව) නම්වැනි නඩුව බලන්න. විනර් එ. හැරිස් (ලෝ ටයිම්ස්, 101 කා. 647 පිට) අතර කියවුනු නඩුවේදී උසාවියට තේරුම් ගැනීමට නිබුනු කොන්ත්‍රාත්තුව "විකිණීම් හෝ ආපසුදීම්" යන වචන වලින් විස්තර කර තිබුනි. වෙළඳ ඒජන්තවරයෙකුට "විකිණීමට හෝ ආපසුදීමට" ට බඩු බාර දෙන ලදුව එම ගිවිසුමෙහි නිබුණු "විකිණීම හෝ ආපසු දීම" යන වචන වලින් ඒජන්ත වරයා මිලදී ගන්නකු බවට නොපෙරළේ යයි උසාවිය තීරණය කරණ ලදී. ඔහුට මෙහිදී පාරිතොෂිකය ගෙවන ලද්දේ තමා මිලදී ගත් මිලට වඩා විකුණූ මිල අතර ඇති අන්තරයෙන් කොටසක් ඔහුට දීමෙනි. මෙම නඩුවේදී මාස්ටර් ඔෆ් ද රෝල්ස් (Master of the Rolls) පදවිය දරූ රෝල්ස් කොමන්ස් හාර්ඩි මහතා මෙසේ කීවේය :—

"ඉදින් මෙහිදී බඩු විකිණීමට හෝ ආපසු බාරදීමට ගැනීම නියාම මෙම කොන්ත්‍රාත්තුවේ නියම ස්වභාවය කොයි අන්දමකින්වත් තීරණාත්මක නොවේ. කොන්ත්‍රාත්තුව මුළුමනින්ම බලා උසාවිය එහි තේරුම ඇත්ත වශයෙන් එයද එහි නියම ප්‍රතිඵලය වී ඇත්තේ එයද යන්න වටහා ගත යුතුය."

එසේම මොල්ටන් විනිශ්චයකාර සාමිඇතුමා (Moulton L. J.) මෙසේ කීය :

"මාස්ටර් ඔෆ් රෝල්ස් පදවිය දරණ විනිශ්චය කාරතුමා කී දෙයට මම සම්පූර්ණයෙන් එකඟ වෙමි. එනම් යම් කිසි වාක්‍ය ඡේදයක් නිසා පුද්ගලයකුට කොන්ත්‍රාත්තුවක් වරදවා විස්තර කළ නො හැක. එහෙත් යම් කොන්ත්‍රාත්තුවක් වෙනොත් එය කුමක්ද කියා බැලිය යුතුවා මිස ඒ පිළිබඳව ඊට ඇතුළත් වී ඇති පක්ෂ කුමක් කියන්නේදැයි බැලිය යුතු නොවේ."

P 2 දමා සලකුණූ කර ඇති කොන්ත්‍රාත්තුවේ සඳහන් "ඒජන්ත" යන වචනය නිසා විත්තිකාර වෙළඳ ව්‍යාපාරය නීත්‍යානුකූල ලෙස ෂෙල් සමාගමේ "ඒජන්ත" වරයෙකු වී නැත. මන්ද ? එසේ වී නම් ඒ ඒජන්ත වරයාගේ ක්‍රියා මාර්ගයන් නිසා හෝ බඳු මිලට ගන්නන් යම්ඟ ඔහු ඇතිකරගත් කොන්ත්‍රාත්තු නිසා හෝ ෂෙල් සමාගම බැඳීමකට යටත්වනු ඇත. එහෙත් විශේෂයෙන්ම මෙම ගිවිසුම මෙවැනි තත්වයකින් ෂෙල් සමාගම බේරා ඇතියේ පෙනේ. මා විසින් දැනටමත් සමහරක් සඳහන් කරණ ලද පරිදි වෙළඳ ඒජන්ත වරුන් පිළිබඳ නීතියේ ප්‍රඥප්තීන්ට පටහැනි කොන්දේසි නවත් කිහිපයක් මෙම ගිවිසුමේ තිබේ. "ඒජන්තවරයා" යන පදය මෙහි යෙදී ඇත්තේ වෙළඳාම පිළිබඳව හෝ ප්‍රශංසා පුවීකව හෝ මිස නීත්‍යානුකූල ව්‍යවහාරය අනුව නොවේ. **ඩබ්ලිව්. ටී. ලැම්බ සහ පුත්‍රයෝ එ. ගෝරිංග් බ්‍රික් සමාගම** (ලෝ ටයිම්ස් 146 කා. 318 පිට) අතර කියවුනු නඩුවෙහි ස්ක්‍රුටන් විනිශ්චයකාර සාමි කීයේ මෙසේය :—

"ඒජන්තවරයා" යන වචනය සමහර වෙළඳ ව්‍යාපාරයන්හි දී එයට නීතියේදී ඇති තේරුමට කිසිම විධියකින් සම්බන්ධ කමක් නොමැතිසේ භාවිතා වන බව වෙළඳාම පිළිබඳ කෘතහස්තභාවයක් ඇති කවරෙක් හෝ දනිති."

එම නඩුවෙහිදීම ග්‍රියර් විනිශ්චයකාර සාමි මෙසේ කීයේ ය :—

"බඩු මිලදී ගන්නකු හා වෙළඳ ඒජන්තවරයකු අතර ඇති තත්වය පිළිබඳ වෙනස ප්‍රකාශිත එමෙන්ම එහි අසීමිත නිරූපිත වෙළඳ නඩු රාශියක් ඇතත් මේනාත් ගිණිය නොහැකි තරම් වෙළඳාම කටයුතු වල නිරතවූ

රාශියක් බඩු මිලදී ගත්තකු හා විකිණීමේ වෙළඳ ඒජන්ත කෙණෙකු අතර ඇති තර්කානුකූල වෙනස නොදැන සිටීම ඉතාම සැලකිය යුතු කරුණකි. මේ අය එම වචන දෙක සමාන අර්ථඇති පද මෙන් එකක් වෙනුවට අනික හාවිතා කෙරෙති.''

මෙම වෙළඳ ව්‍යාපාරයෙහි ලාභ පිළිබඳව ඒවා සමාගම යම්ගය ඇති කර ගත් ගිවිසුමේ 18 වන කොන්දේසියට අනුව පැටරෝල්, භූමිතෙල් හා ඩීසල් තෙල්වලට ගෙවන ලද කොමිස් මුදලට පමණක් සීමා වේයයි කියමින් කරණ ලද තර්කය ගැන කිය යුත්තේ එය එසේනම් එම ගිවිසුමේ 14 වන කොන්දේසියේ පහත සඳහන් පරිදි ඇතුළත් වී තිබෙන්නේ මන්දැයි තේරුම් ගැනීමට අපහසු බවය.

එනම් :—

''නමුත් කොයි හවුල් කරුවාට වුවත් අත්තිකාරම් මුදලක් ලෙස හෝ වෙන අන්දමකින් හෝ හවුල් ව්‍යාපාරයේ මුදල්වලින් යම් කිසි මුදලක් ගැනීමට නො හැක.''

විත්තිකරු මෙය තේරීමට උත්සාහ දරද්දී කියේ එම පැණවීම යෙදී ඇත්තේ හවුල් කරුවන් ව්‍යාපාරය සඳහා ප්‍රදානය කළ යම් කිසි මූලික අරමුදලක් ඇත්නම් එය ගැනීම වැළැක් වීමටය කියායි. නමුත් එක් හවුල් කරුවකුට අනිත් හවුල් කරුවාගේ කැමැත්ත නොමැතිව හවුල් ව්‍යාපාරයකට දැමූ මූලික අරමුදල ගත නොහැකිවීම සාමාන්‍යයෙන් පැහැදිලි නීතියයි. එබැවින් හවුල් ව්‍යාපාර ඔප්පුවක මෙබඳු පැණවීමක් ඇතිකිරීමට අවශ්‍ය නැත. එසේම මෙහි යෙදී ඇති පරිදි වචන ඕයාදු අරමුදල් ඉවත් කිරීම ගැන සඳහන් කිරීමද සාමාන්‍යයෙන් සිදු නොවේ. මෙම වෙළඳ ව්‍යාපාරයට භූමිතෙල් ආදියට ගෙවන කොමිස් මුදල හැර වෙනත් ලාභ ලැබිය හැකි බව 14 වෙනි ඡේදයෙන් හැඟී යයි. වෙළඳ ව්‍යාපාරයේ එකම ආදයම පැටරෝල්වලට, භූමිතෙල් වලට සහ ඩීසල් තෙල් වලට ලැබෙන ඒජන්ත වරුන්ගේ කොමිස් මුදල පමණක් නම් 18 වෙනි කොන්දේසියෙන් පෙනී යන පරිදි බඩු මිලදී ගන්නන්ට ණයට දීමට අදහස් කර තිබියදී එක් එක් හවුල් කරුවකුට එක් එක් මාසය අවසානයේදී ලාභය ගෙවිය හැකිවූයේ කෙසේද ? මේ ගැන පැමිණිලි කරු දීමට තැන් කරණ ලද අවබෝධය මගේ අදහසේ හැටියට එතරම් ඇදැඟිය හැකි නොවේ. යාන්ත්‍රීය තෙල් වලින් ලැබෙන ලාභයෙන් කොටසක් ඔහුට නොගෙවන බව ඔහු සමහර විට දැන සිටියා විය හැක. නමුත් මේහිදී පෙනීයන පරිදි ඔහු වසී 1951 මල් පිටියේ ඒජන්සිය පටන් ගන්නාතුරු මෙම ලාභයේ ප්‍රමාණය කෙතරම් දැයි නොදැන සිටියා විය හැක. ඔහු පළමුවන වරට යාන්ත්‍රීය තෙල් වල ලාභය ගණන් හිලව්වල නොදැම්ම ගැන පැමිණිලි කළේ 13-2-53 දරණ P 49 දරණ සලකුණු කරණ ලද ඔහුගේ ලිපියෙහි උගත් විනිශ්චයකාර මහතා කියන පරිදි ඔහු ඒ ගැන මීට කලින් කටින් කියා තිබීමට ප්‍රළුවනැයි සිතීමට බොහෝ ඉඩ තිබේ. P 49 දරණ ලිපියට විත්තිකරු පිළිතුරු නුදුන්නේය. ඇත්ත වශයෙන්ම ඔහු කියා සිටින්නේ හවුල් කරුවන් අතර නිබුණු සම්මුතිය අනුව යාන්ත්‍රීය තෙල් විකිණීමෙන් වන ලාභය තමාට සම්පූර්ණයෙන් හිමිවිය යුතු බවකි. එසේ නම් P 49 දරණ ලිපියට ඔහු එසේ පිළිතුරු යැවිය යුතුව තිබුනි. ෂෙල් සමාගමේ නියෝජිතයා යම්කිසි සමගි සම්පන්න තීරණයක් ඇතිකිරීම සඳහා හවුල් කරුවන් සමග ඇතිකළ සාකච්ඡාවේදී පවා ඔහු මෙබඳු තත්වයක් කෙළින්ම ගෙන නැත. ෂෙල් සමාගම සමග ඇතිකරගත් ගිවිසුමේ යාන්ත්‍රීය තෙල් ආදී දේ වලින් හවුල් කරුවන්ට ලැබෙන ලාභය ගැන ''කොමිස් මුදල'' යයි විශෙෂයෙන් සඳහන්වී නැතත් මෙය සමාගම් විසින් යාන්ත්‍රීය තෙල් ආදී ෂෙල් බඩු අලෙවිකිරීම පිණිස හවුල් කරුවන්ට ගෙවියයුතු පාරිතොෂිකය බවත් ''කොමිස් මුදල'' යන්නෙන් කොන්ත්‍රාත්තුවට මෙයද ඇතුළත් වී ඇති බවටත් කිසිම සැකයක් නැත. D 100 දරණ ලිපිය සකශ් කළාට පසු හවුල් කරුවන් විසින් ගිවිසුම ගැන කෙසේ සළකන ලද්දයි මෙහිදී සලකා බැලීම උචිතයයි සිතේ. D 100 දරණ ලිපිය මොටෝකාර්වලට යොදවන තෙල් සාර වහී පිළිබඳව අලුත් ගිවිසුමකි. එය කලින් තිබූ P 2 දරණ ලිපිය අවලංගු කෙළේය. D 100 දරණ ලිපිය සකස් කළාට පසු මේ වෙළඳ ව්‍යාපාරය පැටරෝල් ලබා නිබෙන්නේ කලින් යාන්ත්‍රීය තෙල් ආදිය ලබා ගත් කොන්දේසි උඩය. මේසඳහා බඩු බාර ගන්නා අවස්ථාවේදී මුදල් ගෙවා සමාගම මගින් නියම කරණ ලද නියමිත මුදලකට ඒවා සමාගමේ ටැංකිවල හා භාජනවල තබා නැවතවරක් වෙළඳ ව්‍යාපාරය විසින් විකිණිය යුතුය. 6-2-1950 දිනමින් ඇති මේ ගිවිසුමේ මොටෝ කාර්වලට දමන තෙල් වහී පිළිබඳව P 2 දරණ ලිපියෙහි ඇති සිමාකිරීම් සියල්ලම පාගේ තිබේ. ''මිලදිගන්නා'' නමින් එහි සඳහන්වී ඇති ඒජන්තවරයා යම් කිසි මිල ප්‍රමාණයකට මිලට ගෙන සමාගම විසින් නියමකර තමාට දුන්වූ කිසියම් නියම මිලකට ඒ බඩු නැවත විකිණිය යුතුය. විකුණන්නාගේ අදහසේ හැටියට සම්පූර්ණ සේවයකට අවශ්‍ය සියලුම මෝටර් රථවලට අවශ්‍ය තෙල් වහී හා යාන්ත්‍රීය තෙල් මිලට ගැනීමටත් විකිණීමටත් අවකාශ ඒ ගිවිසුමෙහිද සැලසී තිබේ. D 100 දරණ ගිවිසුම සකස් කළාට පසු සමාගම විසින් වෙළඳ ව්‍යාපාරයට යවන ලද ලියකියවිලි සමාගමින් එසෙම වෙළඳ ව්‍යාපාරය විසින් P 17 සහ P 18 දරණ, පැමිණිලි කරුට ර්ට පසු යවන ලදී. කොමිස් මුදල පිළබඳ ප්‍රකාශ වලදී මෙම ව්‍යාපාරය විසින්ද පැටරෝල් වෙළඳාම සම්බන්ධයෙන් ගත් මිලෙහි සහ විකුණූ මිලෙහි ඇති වෙනස ''කොමිස් මුදල'' හැටියට සඳහන් වී ඇති බව සැලකිය යුතුය. යාන්ත්‍රීය තෙල් ගැන විත්තිකරු ගෙනහැර දක්වූ ප්‍රකාශය නිවැරදිනම් D 100 දරණ ගිවිසුම සකස් වූවාට පසු තමා මිලදී ගත් මුදලත් තමා විකුණූ මුදලත් අතර ඇති අන්තරය ගැන සඳහන් කිරීමට විත්තිකරු බැඳී නැත. මන්ද ? ඉන්පසු විකුණූ මුදල සහමුලින් ගණන් බලා නියම කළ ප්‍රමාණයට සියයට ගණනක් ගෙවීම ඉන්පසු සිදුවී නැති නියාන් ඒ වෙනුවට නියම කරණ ලද වැඩි මිලකට මහජනයාට

විකුණා එම වැඩි ගණන තමා ළඟ තබා ගැනීමට අවසර ලත් නියාත්ය.

D 100 දමා සලකුණු කරණලද ගිවිසුම් ඔල් කොම්පැනිය විසින් හාරගන්නා ලද්දේ කුමන හේතුවක් නියා දැයි සිතා ගැනීමට අපහසුය. සම්හරවිට යම් අවදානමක් ඇත්නම් මිලදී ගැනීමේදී එය මිලදී ගන්නා තැනැත්තා පිට වැටීම ඔවුන්ට උවමනා කළ නිසා විය හැක. එසේ නම් ඔවුන් එය නියම ලෙස ක්‍රියාකාරී වන අන්දමට එසේ කර නිබෙදැයි විනිශ්චය කිරීම පසුවට තැබීම හොඳය. D 100 දරණ ලිපියේ යඳහන් ''මිලදී ගන්නාට'' නමාට විකුණු බඩුවල නියම අයිතිකරු හැටියට තමාගේ අයිතිය ක්‍රියාවෙහි යෙදීමට ඉඩනැත. තමාගේ අයිතියේ ඇති අතින් බඩු මෙන් තමාට උවමනා මිලට මේ බඩු විකිණීමට ඔහුට සුළුවන් කමක් නැත. ඔහුට මේ බඩු තමාට කැමති තැනක ගබඩා කිරීමට නො හැකිය. තමාට කැමති මිලකට විකිණිමටද නො හැකිය. ඔහුට ඇති බලය සීමාවී තිබෙන නියා මේ අලුත් ගණුදෙනුවේ සාරය වශයෙන් බලන විට පරණ ගණුදෙනුවට සමානය.

යම්කිසි කොම්ස් මුදලක් නියමිත මිල ප්‍රමාණයකටම තිබීම අවශ්‍ය නොවේ. මෙය වෙනස් විය හැකි නමුත් එය කොතරම් දැයි සොයාගැනීමට සුළුවන් කම තිබිය යුතුය. **බ්‍රයිට් සහ ස්මිත්** (ලෝ ටයිම්ස් 39 කා. 651 පිට) අතර ඇතිවී ඒකපාක්ෂිකව තීරණය වූ නඩුවේදී මාස්ටර් ඔෆ් රෝල්ස් පදවිය දරණ ජෙසල් විනිශ්චයකාර තුමා කී අන්දමට—

> ''විකුණන තැනැත්තා ලබන මුදලට අනුව වෙනස් වන කොමිස් මුදලක් ප්‍රධානයකු විසින් තම වෙළඳ ඒජන්ත වරයකුට පාරිතොෂිකය වශයෙන් ගෙවීම් වැළැක්වීමට හැකි කිසිවක් නැත. එසේම තමා (ප්‍රධානයා) කෘත්‍රියට පත්වන මුදලට වැඩිපුර මුදලක් ලබාගත් ඒජන්ත වරයෙකුට එම් වැඩි මුදල අනුව කොමිසමක් ගෙවීම වැළැක්වීමටද හැකි කිසිවක්ද නැත. කොමිස් මුදලේ ප්‍රමාණය අනුව ඒජන්තවරයා මිලදී ගන්නකු බවට නොපෙරළේ. මෙහිදී ප්‍රධානයා තම ඒජන්තවරයාට කියන්නේ ''මගේ බඩු විකුණන්න. ඒ සඳහා මා ලැබීමට කැමති මිලට වඩා ඔබ ලබන ගණන ඔබේ කොමිස් මුදලවේ'' යන්නයි.

එමනිසා මාගේ අදහසේ හැටියට P 2 දරණ ගිවිසුමේ සඳහන් වී ඇති කොමිස් මුදල යන වචනය පැටරෝල් සම්බන්ධයෙන් සලකා බැලීමේදී නියම මුදලක් වන අතර අනික් අතින් යාන්ත්‍රික තෙල් සම්බන්ධයෙන් ගණන් ගැනීමේදී නියම කළ හැකි වන්නේ නැවත විකිණීමෙන් පසුවය. එය (ඔල්) සමාගම විසින් වෙළඳ ව්‍යාපාරයට ගෙවන ලද මුදල්වලට භාවිතා කළ හැකි යුදුසු වචනයක් පමණක් විය.

මා විසින් සඳහන් කරණලද නඩුවල ගැබ්වී ඇති ප්‍රඥප්තීන් ගැන සලකා බැලීමෙන්ද මෙම කොන්ත්‍රාත්තුවේ ඇති සියලුම කොන්දේසි ගැන කල්පනාවට ගැනීමෙන්ද එසේම දෙපක්ෂය අතර පැවති ඇති ක්‍රියා කලාපයෙන්ද මෙහිදී ඒජන්තවරු යාන්ත්‍රිය තෙල් ආදී දේ පිළිබඳව මිලදී ගන්නන් බවට පත්වී නැති බව මගේ අදහසයි. නමුත් මට වචනයක් හෝ දෙකක් ලබාගත හැකිනම් මා කියන්නේ ඔවිහු විකිණීමේ ඒජන්තවරු යනුයි. ඒජන්තවරුන් විසින් බඩු බාර ගැනීමේදී මුදල් ගෙවීම නිසා හෝ සමාගමේ පොත් පත්වල යාන්ත්‍රිය තෙල් ආදී දේ පිළිබඳ නය ගනු දෙනු සටහන්වීම නිසා හෝ මගේ අදහසේ හැටියට මෙම ගනුදෙනුවේ සාරාභාවය කිසිසේත් වෙනස් නොවේ.

වින්නිකරු මෙම හවුල් ව්‍යාපාරයේ හවුල්කරුවකු වශයෙන් හවුල් ව්‍යාපාරයේ නම සහ බඩු මිටිවල භාවිතා කිරීමෙන්ද, හවුල් ව්‍යාපාරය ඔල් සමාගම් සමග ඇති කරගත් ගිවිසුම් අනුව කටයුතු කිරීමෙන් රහසේ ලාභයක් ලබන ලදැයි පැමිණිලි කරු සැලකර සිටියේනම් වින්නිකරුට මෙහිදී කිසිම නිදහසට කරුණක් නොලැබෙනු ඇත. එබැවින් ඒ රහසේ ලත් ලාභ ගැන ගණන් හිලව් පෙන්වීමට ඔහු බැඳෙනු ඇත. දැපැල් කරු වෙනුවෙන් පෙනී සිටි උගත් නීති වේදියා තර්ක කළේ පැමිණිලි කරු උසාවියට පැමිණියේ එබඳු ප්‍රතිඥාවක් මත නොවේය කියමිනි. මෙය විගඳන්නර කරුගේ උගත් නීතිඥයාද පිළිගත්තේය.

වින්නිකරු ගණන් පොත් පත් ඉදිරිපත් නොකළ බව මෙහිලා සැලකිය යුතුය. ඔහු කියා සිටියේ තමා මෙම පොත් පත් නඩුව දමන කාලයේ ජීවතුන් අතර සිටි ඩැරි නමැති මිනිහෙකුට දුන් බවත් සාක්ෂියට ඔහු (ඩැරි) කැඳවීමට පෙර මියගිය බවත්ය. පොත් පත් ඩැරිට දුන් නිසා ලබාගත නොහැකිවූ බව කියන ලදි. වින්නිකරුගේ සාක්ෂිය වූයේ පොත් පත් නැතිවූ බවකි. විශ්වාස කිරීමට අපහසු මේ ප්‍රවාන්තිය උගත් විනිශ්චය කාර මහතා ඉවත දමා තිබීම නිවැරදිය. යාන්ත්‍රිය තෙල් ආදියෙන් වින්නිකරු ලැබූ මුදලේ ප්‍රමාණය දැනගත හැක්කේ මෙම පොත් පත් වලින් පමණකි. මේ පොත් ඈතැ කමින්ම වින්නිකරු උසාවියට ඉදිරිපත් නොකළ නියා ඔහුට විරුඬව උසාවියට කැමති හැටියට සලකා ගැනීමට හැක. එමනියා ඒකාන්තයෙන් උසාවිය පැමිණිලි කරු ගණන් බලා තිබුනු හැටියට යාන්ත්‍රිය තෙල් වලින් ලැබූ හැටියට එම මුදල හාර ගැනීම ඒකාන්තයෙන්ම යුක්ති යුක්තය. මේ සඳහා ඔල් සමාගමින් සම්පාදනය කරණ ලද ප්‍රකාශයන් ඇත. ඒ අනුව ලාභය කොපමණදැයි සොයා ගත හැක. උගත් විනිශ්චයකාර තුමා මෙය රු: 60,000 කැයි නියම කර තිබේ. එසේම විනිශ්චයකාර තුමා ගෙවීමට යයි නියම කළ මුදල ගැනද විවාදයක් නොකරණ ලදී. හරස් ඇපැලක් ඉදිරිපත් කළ වග උත්තරකරුගේ නිතිවේදියා යාන්ත්‍රිය තෙල් හැර අනිත් බඩුවලින් ලත් ලාභය පිළිබඳව වූ මේ ඇපැල ගැන වාදයකට එළඹුනේ නැත. මල්පිටියේ ඒජන්සියෙහි වින්නිකරුට ගෙවිය යුතු මුදල රු: 5,000 කැයි උගත් විනිශ්චයකාර තැන නියම කර තිබේ. ඒ නිගමනයට හරස් කැපීමට කිසි හේතුවක් නැත.

එම නියා මෙහි ප්‍රතිඵලය වශයෙන් වින්නිකාර ඇපැල් කරුගේ ඇපැල ගාස්තුවටත් යටත් කොට නිෂ්ප්‍රභාකිරීම හා එසේම පැමිණිලිකාර වග උත්තර කරුගේ හරස් ඇපැලද ගාස්තුවට යටත් කොට නිෂ්ප්‍රභා කිරීමයි.

ටී. ඇස්. ප්‍රනාන්දු, විනිශ්චයකාරතුමා.

මම එකඟ වෙමි.

ඇපැල් නිෂ්ප්‍රභා වෙයි

ගරු සත්‌යෝනි විනිශ්චයකාරතුමා සහ ගරු ටී. ඇස්. ප්‍රනාන්දු විනිශ්චයකාරතුමා ඉදිරිපිට දී.

එච්. බී. ප්‍රේමවතී එ. එච්. ජී. වේලිස්*
බී. ජී. සුගතදාස එ. එච්. ජී. වේලිස්

ශ්‍රේෂ්ඨාධිකරණයේ වර්ෂ 1959 නො: 492 සහ 519 (අවසාන)—ගාල්ලේ දිස්ත්‍රික් උසාවියේ නො: X 2376.

වාද කළ දිනය: 1961 ඔක්තෝබර් 18 සහ 19 දිනයන්හි
තීන්දු කළ දිනය: 1961 නොවැම්බර් 6 දින

දික්කසාදය—තම භාර්‍යාව 2 වන විත්තිකරු සමග අනාචාරයේ හැසිරීම සහ ද්වේෂසහගතව අත්හැර යාමකැයි කිය හැකි අන්දමට කටයුතු කිරීම නිසා සවාමියකු විසින් නඩු පවරනු ලැබීම—අනාචාරයේ හැසිරීම ගැන විසඳීමට ඇති එකම ප්‍රශ්නය එක් දවසක අනාචාරයට පමණක් සීමාවීම—ඉදිරිපත් කළ සාක්ෂිවලින් අනාචාරයේ හැසිරීමට සූදනම්වූ බව පමණක් පෙනීයාම—සාක්ෂිවලට ඇතුළත් වූයේ (ඒ) මෙම දිනයට පෙර විත්තිකරුවන්ගේ හැසිරීම පිළිබඳවූ සාක්ෂි (බී) දෙවන විත්තිකරු විසින් පළමුවන විත්තිකාරියට ලියනු ලැබ ඇගේ අල්මාරියේ තිබී සොයාගත් ලියුම්, සහ (සී) පළමුවන විත්තිකාරිය විසින් දෙවන විත්තිකරුගේ නිවසේ පදිංචිවීම සඳහා පසුව දරණ ලද පරිශ්‍රමයක් තිබුනු බව පෙනීම—අනාචාරයේ හැසිරීම සහ ද්වේෂසහගත අත්හැර යාමකැයි ගිණිය හැකි ලෙස කටයුතු කිරීමේ ප්‍රශ්නය විසඳීමට මෙම සාක්ෂි ප්‍රමාණවත් වේද යන්න.

තමන් විසින් ඇපැල් පෙත්සමක් ඉදිරිපත්කර නැතත් ඇපැල් නඩුවක වගඋත්තරකරුවකුට තමාගේ වාසියට දිනිබෙන තීන්දුව ස්ථිරකර ගැනීමට නඩුව විනිශ්චය කළ විනිශ්චයකාරතුමාගේ නිගමනයකට විරුඬව ඇපැලේදී කරුණු දක්විය හැකිද යන්න—සිවිල් නඩු විභාග සංග්‍රහයේ 772 වන ඡේදය.

පළමුවන විත්තිකාරිය (භාර්‍යාව) වර්ෂ 1957 දෙසැම්බර් 19 වෙනි දින දෙවන විත්තිකරු සමග අනාචාරයේ හැසුරුණාදැයි විසඳිය යුතුවූ ප්‍රශ්නයකදී එසේ හැසුරුණියයි විනිශ්චයකාරතුමා පහත සඳහන් සාක්ෂි උඩ තීන්දුකර තිබිනි. එම සාක්ෂි නම්,

(ඒ) කලින් විත්තිකරුවන්ගේ හැසිරීම ගැන යෝදිසියෙන් සිටි පැමිණිලි කරු (සවාමිපුරුෂයා) පැමිණේයයි සැක කළ නොහැකි අවස්ථාවක පැමිණීම නිසා පළමුවන දෙවන විත්තිකරුවන් මෛථුන සේවනයෙහි යෙදීමට සැරසි සිටි නමුත් එම ක්‍රියාව වැළකීම.

(බී) ඔවුන් අතර එයට කලින් තිබූ හැසිරීම ගැන සාක්ෂිකරුවකු සාක්ෂි දීම,

(සී) පළමුවන විත්තිකාරියට දෙවන විත්තිකරු විසින් ලියනු ලැබ ඇගේ අල්මාරියේ තිබී සොයාගත් ලියුම්වල ඇතුළත්ව තිබුනු සාක්ෂි.

ඇපැල් උසාවියේ තීන්දුව :

(1) අනාචාරය පිළිබඳව මෙහිදී ඉදිරිපත් කරණ ලද හා පිළිගන්නා ලද සාක්ෂි ප්‍රමාණවත් නොවීම නිසා විසඳිය යුතු ලෙස මතු කොට තිබුනු ප්‍රශ්නයෙහි සඳහන්වන දින විත්තිකරුවන් අනාචාරයේ හැසිරී තිබෙයයි විනිශ්චයකරු කළ තීරණය නියම පදනමක් උඩ රඳා නැත.

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 61 වෙනි කා. 67 වෙනි පිට බලනු.

(2) නමුත් මෙම කරුණට විරුද්ධව ඇපැල් පෙත්සමක් ඉදිරිපත් නොකරණ ලද නමුත් පැමිණිලිකාර වග උත්තරකරුට ඇපැල් නඩුවෙදී පහළ උසාවියේ විනිශ්චයකාරතුමා විසින් ද්වේෂ සහගතව අත්හැර යාමක් ඔප්පු කර නැතැයි දුන් නිගමනයට විරුද්ධව කරුණු දැක්විය හැක.

(3) නඩුව විසඳූ විනිශ්චයකාරතුමා විසින් පිළිගත් කරුණු සලකා බැලීමේදී එනම්: 19-12-57 වන දින සිදුවී ඇති සිධිය ද, සාක්ෂිකරුවකු විසින් කියන ලද පරිදි එදිනට කලින් ඔවුන්ගේ හැසිරීම ද, දෙවන විත්තිකරුගෙන් ලැබී අල්මාරියේ තිබුනු ලියුම් ද, සවාමිපුරුෂයාගෙන් ඉවත්ව ගිය පසු පළමුවන විත්තිකාරිය දෙවන විත්තිකරුගේ නිවසෙහි පදිංචිවීමට පරිශ්‍රම දරීම ද—යන කරුණු සලකා බැලීමේදී මෙම විවාහය සම්පූර්ණයෙන්ම බිඳවැටී ඇතැයි සලකා ගැනීම ආරක්ෂා සහිත යයි හැගේ. පළමුවන විත්තිකාරියට 19-12-57 වන දින පැමිණිලිකරු අත්හැර යාමේදී සඳහටම අත්හැර යාමේ චේතනාවක් පැවරිය හැකි බව නොපෙනෙතත් මෙම පැමිණිල්ල ඉදිරිපත් කළ 4-6-58 වන දින ඇය පිට එබඳු චේතනාවක් පැවරිය හැකිවේ.

නීතිඥවරු : ප්‍රින්ස් ගුණසේකර ජී. පී. ඇස්. ද සිල්වා සමග නෝ: 492 දරණ නඩුවේ ඇපැල්කරු වෙනුවෙන්.

කොල්වින් ආර්. ද සිල්වා, මංගල මුනසිංහ සමග නෝ: 519 දරණ නඩුවේ ඇපැල්කරු වෙනුවෙන්.

රාජනීතිඥ එච්. ඩබ්ලියු. ජයවර්ධන, ඇම්. ටී. ඇම්. සිවාර්දීන් සමග පැමිණිලිකාර වගඋත්තරකරු වෙනුවෙන්.

ගරු ටී. ඇස්. ප්‍රනාන්දු විනිශ්චය කාරතුමා:

මෙම නඩුවේ විත්තිකාරිය වන භාර්‍යාවගෙන් පැමිණිලිකරු දික්කසාදවීමට අවකාශ ඉල්ලා මේ නඩුව පවරා තිබේ. දික්කසාදවීමට හේතුවශයෙන් කරුණු දෙකක් ඉදිරිපත් කරන ලදී.

(1) වර්ෂ 1957 දෙසැම්බර මස 19 දින හෝ ඊට ආසන්න දිනයක ඇ දෙවන විත්තිකරු සමග අනාචාරයේ හැසිරීම.

(2) ද්වේෂ සහගත ලෙස අත්හැර යාම වශයෙන් සැලකියහැකි ආකාරයට කටයුතු කිරීම.

දෙවන විත්තිකරුද ඉහතකී අනාචාරයෙහි හැසිරීමේ හේතුවෙන් ඔහුගෙන් අලාභයක් ගැනීම සඳහා හවුල් වග උත්තර කරුවෙකු හැටියට යොදු ඔහුට විරුද්ධවද නඩුපවරා තිබේ. පළමුවන විත්තිකාරිය තමාට විරුද්ධව එල්ල කොට ඇති අනාචාරයේ හැසිරීම හා ද්වේෂ සහගත ලෙස අත්හැර යාම පිළිනොගත් අතර පැමිණිලිකරු අමාවතී නැමති කාන්තාවක් සමග අනාචාරයෙහි හැසිරෙන බව සැලකර සිටියාය. එහෙත් මේ කරුණු නිසා තම සවාමිපුරුෂයාගෙන් දික්කසාද වීමට ඉල්ලීමක් නොකළ ඇ තමාට විරුද්ධව ඇති නඩුව නිෂ්ප්‍රභා කරන ලෙසත් තමාට වන්දි මුදලක් හා මෙම කසාදයෙන් බිඳිවූ දරු දෙදෙනාට නඩත්තු මුදලක්ද ඉල්ලා සිටියාය. නඩුව විසඳූ උගත් දිස්ත්‍රික් විනිශ්චයකාරතුමා මෙසේ තීන්දු කර ඇත.

(ඒ) පළමුවන විත්තිකාරිය දෙවන විත්තිකරු සමග වර්ෂ 1957 දෙසැම්බර් 19 වනද පමණ අනාචාරයේ හැසිරී තිබේ.

(බී) පැමිණිලිකරු අමාවතී නමැත්තිය සමග අනාචාරයෙහි හැසුරුණායයි කියා සිටීම ගොතා කියනලද මිථ්‍යාවකි.

(සී.) පළමුවන විත්තිකාරිය පැමිණිලිකරු අත්හැර ගියායයි නිගමනය කිරීමට ඇති සාක්ෂි ප්‍රමාණවත් නොවේ.

මේ අනුව පැමිණිලිකරු සහ විත්තිකාරිය අතර ඇති විවාහය අවලංගු වන නයියයි ආඥාවක් නිකුත් කළ උගත් විනිශ්චයකාරතුමා දෙවන විත්තිකරු විසින් පැමිණිලිකරුට අලාභය වශයෙන් රුපියල් 4,000/- ගෙවිය

යුතුයයි නිත්දුකර තිබේ. මේ නිත්දුවට විරුඬව විත්තිකරුවන් දෙදෙනාම මෙම උසාවියට ඇපැල් පෙත්සම් ඉදිරිපත් කොට තිබේ.

දෙවන විත්තිකරුගේ ඇපැල වෙනුවෙන් (නො : 516 දරණ ඇපැල) දිස්ත්‍රික් නඩුකාරවරයා විසින් දෙනලද අනාවාරයෙහි හැසිරීම පිලිබඳ තීරණය සනාථ කළ නොහැකියයි හේතු යුක්තිසහිතව මෙහිදී පෙන්නා දෙන ලදී. මෙම නඩුවෙහිදී සැලකර සිටි පරිදි දෙවන විත්තිකරු අනාචාරයෙහි හැසිරෙන ලදුයි යන කරුණ සඳහා විසඳිය යුතු ප්‍රශ්නය හැටියට පෙන්නා ඇත්තේ පහත පෙනෙන පරිදිය.

1957 දෙසැම්බර් 19 වනද හෝ ඊට ආසන්න දිනයක දෙවන විත්තිකරු පලමුවන විත්තිකාරිය සමග අනාචාරයෙහි හැසුරුණේද ?

මෙම ප්‍රශ්නය පිලිබඳව සම්පූර්ණ සාක්ෂිවලින් අනාවරණය වූයේත් උගත් දිස්ත්‍රික් විනිශ්චයකාර වරයාගේ නිගමනය වූයේත් ඉහත කී දිනයෙහි පලමුවන විත්තිකාරිය සහ දෙවන විත්තිකරු "මෛථුන සේවනයෙහි යෙදීමට සුදුනම් වූ බවත් බලාපොරොත්තු නැති එම අවස්ථාවෙහි පැමිණිලිකරුගේ පැමිණීමෙන් එය වැලකුණ බවත්ය." 1957 දෙසැම්බර් 19 වන දින ශාරීරිකව සංසර්ගය ඇතිවීමට පෙර විත්තිකරුවන්ගේ හැසිරීම හා ඉරියව් ගැන සෝදිසියෙන් සිටි පැමිණිලිකරු ඔවුන් මවින කල බව සාක්කිවලින් සක්සුදක්සේ පෙනී යයි. නමුත් මේ දිනයට කලින් මෛථුන සේවනයෙහි යෙදීමට විත්තිකරුවන්ට බොහෝ ඉඩ ප්‍රස්තා තිබුණ බවත් සරනේලිස් නැමත්තෙකුගේ සාක්ෂියෙන් හා දෙවන විත්තිකරු විසින් පලමුවන විත්තිකාරියට ලියන ලද යම් යම් ලියුම්වලින්ද මෙම විත්තිකරුවන් විසින් කලින් මෛථුන සේවනයෙහි නිරත වී ඇති බවත් උගත් දිස්ත්‍රික් විනිශ්චය කාරවරයා, තමාට හැඟී යන බව ප්‍රකාශ කරයි. මේ හැර පැමිණිලිකරු වෙනුවෙන් අප ඉදිරියේ පෙනී සිටි උගත් අධිනිතිඥවරයා සරනේලිස් නමැත්තාගේ සාක්ෂියෙන් හා ඉහත සඳහන් ලියුම්වලින් අනාචාරය ඔප්පුවිනිබේ යයි තර්ක කිරීමට සැරසුණේ නැත. නඩුවෙදී විසඳිය යුතු ප්‍රශ්නය හැටියට සඳහන් වූ ප්‍රශ්නයෙහි අනාචාරයේ හැසිරීම පිලිබඳ සිද්ධිය 1957 දෙසැම්බර් 19 වන දිනට පමණක් සීමාවී නිබීම ගැන නොසලකා තිබෙන සේ පෙනේ. දෙවන විත්තිකරුගේ ඇපැලට විරුඬවීමට තමාට පුළුවන්කමක් නැති බව ජයවර්ධන මහතා පිළිගත්තේය. එමනිසා ඒ ඇපැලට ඉඩදිය යුතුය.

එහෙත් වෙෂයභූතව තමා අත්හැර යනු ලැබීම නිසා පැමිණිලිකරු දික්කසාද වීමේ අවසරය ලැබීමට සුදුස්සෙකු යි ජයවර්ධන මහතා තර්ක කෙළේය. පැමිණිලිකරු තමා වෙනුවෙන් ඇපැල් පෙත්සමක් ඉදිරිපත් නොකළ නිසා අතහැරයාම මෙම නඩුවෙහිදී ස්ථාපිත නොකරන ලදුයි පහල උසාවියේ විනිශ්චයකාර වරයාගේ නිත්දුවට විරුඬවීමට ඔහුට ඉඩ නැතැයි පලමුවන විත්තිකාරිය වෙනුවෙන් පෙනී සිටි ගුණසේකර මහතා විවාද කෙළේය. නමුත් පලමුවන විත්තිකාරියගේ ඇපැල පිලිබඳව, වග උත්තරකරුවෙක් වන පැමිණිලි කරුට තමාට විරුඬව නිත්දුවී ඇති කිනම් කරුණක් උඩ වුවද තර්ක කොට පහල උසාවියෙන් දුන් ආඥාව තහවුරු කිරීමට අවකාශ තිබේය යනු මගේ අදහසයි. සිවිල් නඩු විධාන සංග්‍රහයේ 772 වන ඡේදය මෙහිලා බැලීම වටනේය. නඩුව විභාග කළ විනිශ්චයකාරවරයා පිලිගත් සාක්ෂිවලින් එය කොයි විදියෙන් යලකා බැලුවත් අනාවරණය වී ඇත්තේ අනාචාරයෙහි හැසිරීමට දරු පරිශ්‍රමයක් වුවද 1957 දෙසැම්බර් 19 වන දින සිද්ධියෙන්ද ඊට කලින් සරනේලිස් සාක්ෂිකරුවා කී අපදමට ඔවුන් දෙදෙනාගේ හැසිරීමෙන්ද දෙවන විත්තිකරුගෙන් පලමුවන විත්තිකාරිය විසින් ලබා ලදුව ඇයගේ අල්මාරියේ තිබී යම්භවූ ලියුම්වලින්ද පෙනී යන කරුණු අනුව පැමිණිලිකරු විසින් පලමුවන විත්තිකාරිය නිවසින් පිටමං කිරීම හෝ තමා එම නිවස අත්හැරයාම හෝ යුක්තිසහගතයයි ගිණිය හැක. තවද සභාපතිපුරුෂයාගේ නිවස අත්හැර ගියපසු පලමුවන විත්තිකාරිය දෙවන විත්තිකරුගේ නිවසෙහි පදිංචිවීමට උත්සාහ කලබ වසාක්ෂිවලින් ඔප්පුවී ඇතැයි විනිශ්චයකාරවරයා පිලිගෙන තිබේ. විනිශ්චයකාරවරයා ඔප්පු වී ඇතැයි පිලිගත් ඒ කරුණු අනුව සලකාබලන කල මෙම විවාහය සම්පූර්ණයෙන් බිඳ වැටී ඇති බවත් එසේම පලමුවන විත්තිකාරියට අය පැමිණිලිකරුගේ නිවස 1957 දෙසැම්බර 19 වන දින අත්හැර යාමේදී නීතියේ සඳහන් පරිදි **අත්හැර යාමේ චේතනාවක්** පැවරිය නොහැකි වුවද එබඳු චේතනාවක් 1958 ජූනි මස 4 වන දින මෙම නඩුවේ පැමිණිල්ල ඉදිරිපත් කල දින ඇයට එල්ල කිරීමට පුළුවන් කම් තිබේ. සම්භර විට අනාචාරයේ හැසිරීම පිලිබඳව ප්‍රබල ලෙස කරුණු ඔප්පු වී ඇතැයි සිතීම නියා විනිශ්චයකාරවරයා අත්හැර යාමේ හේතුව උඩ ඇති සාක්ෂි ගැන සාමාන්‍ය වශයෙන් මෙහිදී ආලෙස්සම් වී (Cursorily) ඇතැයි සිතිය හැක. අත්හැරයාම පිලිබඳ

ප්‍රශ්නය පහල උසාවියෙහිදී විසඳිය යුතුව තිබුණේ පලමුවන විත්තිකාරියට විරුඬවයයි මගේ අදහසයි. එබැවින් ඒ ප්‍රශ්නය ගැන පහල උසාවිය ගත් තීරණය මෙයින් වෙනස් කැරෙනු ලැබේ.

මෙහි ප්‍රතිඵලය වන්නේ නෝ: 519 දරණ ඇපැලට ඉඩදෙන අතර දෙවන විත්තිකරුට විරුඬව පැමිණිලිකරු විසින් පවරන ලද නඩුව මෙහිදී නිෂ්ප්‍රභා වීමයි. උසාවි දෙකේම දෙවන විත්තිකරුට ගිය වියදම පැමිණිලිකරු විසින් ගෙවිය යුතුය. නෝ : 492 දරණ ඇපැල ගැස්තුවටත් යටත්වී නිෂ්ප්‍රභා වන නමුත් වර්ෂ 1959 ඔක්තෝබර් මස 7 දින නිකුත් කළ නයිසයි ආඥාවද පලමුවන විත්තිකාරිය විසින් වේෂ සහගත ලෙස සැමියා අත්හැර යන ලද බව කියවෙන අයුරු මෙම උසාවියෙහි තීරණය ගැඹ්ඹන ලෙස වෙනස් විය යුතුය. ලමයින්ගේ භාරකාරත්වය පිලිබඳ උසාවිය මගින් දෙනලද නියෝගයද ඒ හැටියටම බලපවත්වනු ඇත.

සන්සෝනි විනිශ්චයකාරතුමා.

මම එකඟවෙමි.

නෝ: 492 දරණ ඇපැල නිෂ්ප්‍රභාවෙයි.

නෝ: 519 දරණ ඇපැලට ඉඩ දෙන ලදී.

ගරු සන්සෝනි විනිශ්චයකාරතුමා ඉදිරිපිට

අබ්දුල් වඩුඩ් එ. උප පොලිස් පරීක්ෂක (මාතර)*

සු. උ. නෝ. 312—ම. උ. මාතර 52322.

වාදකලේ සහ තීන්දු කලේ : 1958-10-9.

අපරාධ නඩු නීති සංවිධාන සංග්‍රහය—විත්තිකරුට විරුඬ චෝදනා විභාගයට පෙර දුන් සාක්ෂියක්—ඊට පසු චෝදනාව සංශෝධනය වීම සහ විභාග වීම—නමුත් ප්‍රථම සාක්ෂි දුන් සාක්ෂි කාරයා සාක්ෂියට නො කැඳවීම—ඒ නිසා ඔහුගෙන් හරස් ප්‍රශ්න ඇසීමට ඉඩ නො ලැබීම—විත්තිකරු වැරදි කාරයකු වීම ඒනිසා නීත්‍යානුකූල ද ?

තීන්දුව : විත්තිකරුවකුට පැමිණිල්ල වෙනුවෙන් ඉදිරිපත් කළ චෝදනාවක් විභාග කිරීමේ අවස්ථාවට පෙර සාක්ෂි දුන් සාක්ෂිකාරයෙකු පසුව එම චෝදනාව සංශෝධනය කර විභාග කිරීමෙහිදී සාක්ෂි දීමට නො කැඳවීම නිසා ඔහුගෙන් හරස් ප්‍රශ්න අසන්ට විත්තියට ඉඩ නො තිබුන බැවින්, එම විත්තිකරු වරද කරුඬකු කළ තීන්දුව බලවත් ලෙස නීති විරෝධි බැවින් අවලංගු කළ යුතුය.

ගරු සන්සෝනි විනිශ්චයකාරතුමා :

විත්තිකරුට විරුඬව ඉදිරිපත් කළ චෝදනාව ඔහුට කියා දීමට ප්‍රථම උප පොලිස් පරීක්ෂකයෙක් සාක්ෂි දුන්නේය. යන්න ඇපැලයෙහිදී පෙන්නා දී තිබේ. පසුව එම චෝදනාව සංශෝධනය කර පැමිණිල්ල ඉදිරි පත් කරන්නට ද යෙදුනේය. එහෙත් ඒ අවස්ථාවේ හෝ එය විත්තිකරුට කියවා දෙන විට හෝ යටකී උප පොලිස් පරීක්ෂක තැන ගේ හෝ වෙන අන් සාක්ෂියක් ඉදිරිපත් කර නැත. මෙය ඉතා බැරෑරුම් අක්‍රමිකතාවයකි. මේ චෝදනාව ඉදිරිපත් කළ දිනය කුමන මතයක් ගත්තේ වී නමුත් මේ ගැන ඇති වූ නඩු විභාගය නීත්‍යානුකූල නො වේ. එබැවින් තීන්දුව හා දඬුවම ඉවත දමනු ලැබේ. නඩුව නැවත විභාග කිරීමට ආපසු යවමි.

ඉවත දමා ආපසු යවන ලදී.

---

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 61 වෙනි කා. 71 වෙනි පිට බලනු.

ගරු බස්නායක අග්‍රවිනිශ්චයකාරතුමා, ගුණසේකර විනිශ්චයකාරතුමා හා ටී. ඇස්. ප්‍රනාන්දු විනිශ්චයකාරතුමා ඉදිරිපිට

ඇටෝර්නී-ජනරාල් එ. පියදාස්න*

ෂූ. උ. නො : 545/1959—මෑ. උ. හලාවත නො : 25279.

විවාද කළ දින: වර්ෂ 1961 ජූනි 20, 21
තීන්දු කළ දිනය: වර්ෂ 1962 ජනවාරි 24

ඕතුපුවා අක්වි (autrefois acquit)—(කලින් පැවරූ නඩුවකින් ඒ වරදට නිදහස ලබා තිබීම නිසා කරණ ආඥා චනය)—සූරා බදු පිළිබඳව දඩුවම් ලැබිය හැකි වරද—අපරාධ නඩු විධාන සංග්‍රහයේ 187(1) වන ඡේදයෙහි කරුණු අනුව මෙවැනි චෝදනාවක් නීතිවිරෝධී වීම—විත්තිකරු නිදහස් කරමින් කරණ ලද නියෝගය—එම වරද කිරීම සඳහා නැවත චාරයක් නඩු දැමීම—ඕතුපුවා අක්වි නමැති ආඥාවනය—එම ආඥාවනයෙන් මෙහිදී ප්‍රයෝජන ගත හැකිද ?—අපරාධ නඩු විධාන සංග්‍රහයේ අංක 187(1), 190, 191, 194, 195, 290, 330 වන ඡේද.

පැමිණිලි පක්ෂයේ සාක්ෂි ඉදිරිපත් කිරීම අවසාන වූ පසු එම නඩු විභාගය අපරාධ නඩු විධාන සංග්‍රහයේ 187 (1) වන ඡේදය අනුව නොකරණ ලද බැවින් නීති විරෝධී බව විත්තිකරුගේ ආඥාවකයා සැලකර සිටියේය.

ඉක්බිති එම නඩු විභාගය නීති විරෝධී බැව් පිළිගත් මහෙස්ත්‍රාත්තුමා, විත්තිකරු නිදහස් කරණ ලදැයි සැලකෙන හැටියට නියෝගයක් කළේය—මෙසේ සැලකෙන හැටියට කරණ ලද නියෝගයට විරුද්ධව ඇපෑලක් ඉදිරිපත් කොට නැත.

යම් අවස්ථාවක එම වරද පිළිබඳවම විත්තිකරුට විරුද්ධව දෙවන වරටත් නඩුපවරන ලදින් ඔහු ඕතුපුවා අක්වි ආඥාවනය ඉදිරිපත් කළේය. මෙම ආඥාවනය පිළිගත් මහෙස්ත්‍රාත්තුමාගේ නියෝගයට විරුද්ධව ඇටෝර්නිජනරාල්තුමා ඇපෑල් පෙත්සමක් ඉදිරිපත් කෙළේය.

තීන්දුව :—ඒ. එච්. ටී. ගුණසේකර සහ ටී. ඇස්. ප්‍රනාන්දු විනිශ්චයකාරතුමන් විසින්.
(බස්නායක අග්‍රවිනිශ්චයකාරතුමා විපක්ෂව)

(1) මොහිදීන් එ. පිටකොටුවේ පොලිස් පරීක්ෂක නමැති නඩුට අනුව මුලින් දැමූ නඩුවේ චෝදනාව නීති විරෝධ වේ—59 නව නීති ඩාර්නා 217.

(2) මුලින් දැමූ මෙම නඩුව නීති විරෝධ වූ නිසා ඒ පිළිබඳව කළ චෝදනාව ගැන නීත්‍යානුකූල නඩු විභාගයක් පැවැත්වීමට හෝ එහිදී නීත්‍යානුකූල ලෙස විත්තිකරුවකු නිදහස් කිරීමට හෝ වරදකරු කිරීමට නොහැක.

(3) කරුණු මෙසේ වීමේ හේතුවෙන් විත්තිකරුට ඕතුපුවා අක්වි (autrefois acquit) නමැති ආඥාවනයෙහි පිළිසරණ යෙවිය නොහැක. මුලින් නඩුවේදී මහෙස්ත්‍රාත්තුමාගේ නියෝගය නඩුව නිෂ්ප්‍රභාකිරීමක් විය. විත්තිකරු නිදහස් කිරීමක් නොවීම ඊට හේතුවයි.

ටී. ඇස්. ප්‍රනාන්දු විනිශ්චයකාරතුමා :—"මට වැටහී යන අන්දමට අපරාධ නඩුවක නියම අත්තිවාරම එම නඩුවේ චෝදනාවයි. එසේම චෝදනාවෙහි නීත්‍යානුකූල කමේ අඩු ලුහුඬු කමක් ඇතිවීම නිසා එය නීත්‍යානුකූල නොවූ කලක හෝ ඒ නයින්ම නියම චෝදනාවක් සංස්කරණය වී නොමැති කලක හෝ විත්තිකරුවකු වරදකරුවකු

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 61 වෙනි කා. 79 වෙනි පිට බලනු.

බවට පත්කිරීමේ නිගමනයක් නගාසිටුවිය නොහැකිය යන මතය අපේ අධිකරණය අනවරතයෙන්ම කර ඇති බව පෙනී යයි. නීති විරෝධී චෝදනාවකින් ගලා එන චිත්තිකරුවකු නිදහස් කිරීමේ නියෝගයක් ක්‍රියාකාරීවේද එසේම නීත්‍යානුකූල කිසිම චෝදනාවක් නොමැති නඩුවකින් දෙන එබඳු නියෝගයක් ක්‍රියාකාරීවේද යන ප්‍රශ්න දෙක අතර කිසියම් වෙනසක් ඇද්දැයි මට කිසිසේත් නොපෙනේ. මා අදහස් කරණ හැටියට චිත්තිකරුවකු වරදකරුවකු බවට පත්කරණ ලද නියෝගයක නීත්‍යානුකූලභාවය ගැන සලකන විට ප්‍රශ්නය එක් අංශයකින් විසඳීමත්, චිත්තිකරුවකු නිදහස් කිරීමේ නියෝගයක නීත්‍යානුකූලභාවය සලකනවිට ප්‍රශ්නය තවත් අංශයකින් විසඳීමත් කිසිසේත් කළ නොහැකි ක්‍රියාවකි.''

ප්‍රනාන්දු එ. වෙන්නප්පුවේ සුරාබදු පරීක්ෂක—60 න. නී. වාර්තා 227 නමැති නඩුව අනුගමනය නොකරණ ලදී.

සොලිසිටර් ජනරාල් එ. අරදියෙල්. 50—න. නී. වාර්තා යන නඩුවද අනුගමනය නොකරණ ලදී.

සඳහන් කළ නඩු:

මොහිදීන් එ. පිටකොටුවේ පොලිස් පරීක්ෂක. 59 න. නී. වා. 217; 55 ස. ල. නී. 19, වාර්ගිස් එ. පෙරේරා, 43 න. නී. වා. 564. ප්‍රනාන්දු එ. වෙන්නප්පුවේ සුරාබදු පරීක්ෂක, 57 ස. ල. නී. 19. 60 න. නී. වා. 227. අබේසේකර එ. ගුණවර්ධන, 39 න. නී. වා. 525; රෝස්මලි කොකෙ එ. කලුවා, 38 න. නී. වා. 373; මැන්දිස් එ. කයිතන් අප්පුහාමි, 37 න. නී. වා. 285; මාරම්බේ එ. කිරි අප්පු, 2 ස. ල. නී. 122; වනිගසේකර එ. සයිමන්, 57 න. නී. වා. 377–381 වන පිටුව.

සේනාරත්න එ. ලෙනෝහාමි, 20 න. නී. වා. 44; පෙරේරා එ. ජොහොරන්, 47 න. නී. වා. 568; ගුණරත්න එ. හෙන්ද්‍රික් අප්පුහාමි, 52 න. නී. වා. 43; හැල්ස්ටෙඩ් එ. ක්ලාර්ක්, 1944 (1) සමස්ත ඉංග්‍රීසි වාර්තා 270.

සොලිසිටර් ජනරාල් එ. අරදියෙල්, 50 න. නී. වා. 233; ඇටෝර්නි ජනරාල් එ. සිල්වා, 61 න. නී. වා. 454. ප්‍රනාන්දු එ. රාජසූරිය පොලිස් පරීක්ෂක, 47 න. නී. වා. 399; ඇටෝර්නිජනරාල් එ. කිරිබණ්ඩා, 61 න. නී. වා. 227. 57 ස. ල. නී. 27.

නීතිඥවරු: රාජනීතිඥ ඩී. සෙන්ට් ඩී. බී. ජැන්සෙ, ඇටෝර්නිජනරාල්තුමා, රජයේ ජ්‍යෙෂ්ඨ අධිනීතිඥ ආනන්ද පෙරේරා සහ රජයේ අධිනීතිඥ ඩී. එස්. ඒ. පුල්ලෙනායගම්, ඇටෝර්නිජනරාල්තුමා වෙනුවෙන්.

රාජනීතිඥ ඊ. බී. වික්‍රමනායක, ඇම්. ඇම්. කුමාරකුලසිංහම් සහ ඒ. කේ. ප්‍රේමදස සමඟ චිත්තිකාර වගඋත්තරකරු වෙනුවෙන්.

ගරු ටී. ඇස්. ප්‍රනාන්දු විනිශ්චයකාරතුමා:

මෙම ඇපෑලෙහි (අභියාචනයෙහි) පැන නැඟී ඇති ප්‍රශ්නය නම් මහෙස්ත්‍රාත් උසාවියක කෙරුණු ලඝු නඩු විභාගයකදී පැමිණිලි පක්ෂය විසින් නඩුව මෙහෙයවීම අවසානයේදී එම චෝදනාව නීතිවිරෝධී ලෙස සටහන් කිරීමේ හේතුවෙන් චිත්තිකරුවකු නිදහස් කරමින් කරණ ලද නියෝගයක් නීතිය අනුව චිත්තිකරු නිදහස් කිරීමේ නියෝගයක්ද එසේ නැතහොත් එය චිත්තිකරුට විරුඬව ඇති නඩුව නිෂ්ප්‍රභාකිරීමේ නියෝගයක්ද යන්නයි.

මෙම ප්‍රශ්නය සලකා බැලීම පිණිස අදළවන කරුණු සංක්ෂිප්තයක් මෙහි බහාලීම අවශ්‍යය.

වර්ෂ 1957 මැයි මස 25 වෙනි දින හෝ ඊට ආසන්න දිනයක ජී. ඇස්. පියසේන නමැති චිත්තිකරු එක යමානවුත් එකමයැයි හිණියහැකිවූත් කිසියම් ක්‍රියා මාර්ග යක් කරගෙන යාමේදී සුරාබදු ආඥාපනතේ නෝ: 43, 43 සහ 44 දරණ ඡේදයන් අනුව දඬුවම් ලැබිය හැකි වරද කුනක් කරණ ලදැයි වර්ෂ 1957 ජූනි 5 වෙනි දින අපරාධ නඩු සංවිධාන සංග්‍රහයේ (Criminal Procedure Code) 148 (1) (බී) ඡේදය යටතේ සුරාබදු පරීක්ෂක ටී. අප්පපිල්ලේ මහෙස්ත්‍රාත් උසාවියට දැනුම් දුන්නේය. මෙම වාර්තාව අනුව ඇතිවූ පරීක්ෂණ ලිපි ලේඛනවලට 21419 නොමේරය හිමි විය. පැමිණිල්ලේ සාක්ෂි ඉදිරි පත්කිරීම නිමවූ පසු චිත්තිකරු වෙනුවෙන් පෙනී සිටින ආයාචක (Pleader) තැන මෙම නඩු විභාගය

නීත්‍යනුකූල නොවන බව සැලකර සිටියේය. වරෙක්තුවක් හෝ ඕනෑයක් නිකුත් නොකොට උසාවියට පළමු වන වරට ඉදිරිපත්කළ එම චිත්තිකරුට විරුඬව චෝදනා ඉදිරිපත් කෙළේ අපරාධනඩු විධාන සංග්‍රහයේ 187 (1) දරණ ඡේදයෙන් අවශ්‍යව ඇති පරිදි ඔහුට විරුඬව කිසිම සාක්ෂියක් ඉදිරිපත් නොකර බව මීට හේතුව වශයෙන් ඔහු දැක් විය. වෂී 1958 පෙබ්‍රවාරි මස 5 වන දින **මොහිදීන් එ. පිටකොටුවේ පොලිස් පරීක්ෂකයා**, (1957) 59 නවනීති වාර්තා 217 ; අතර කියවුනු නඩුවේ ශ්‍රේෂ්ඨාධිකරණය විසින් දෙන ලද තීන්දුවෙන් තමා බැඳී ඇති බව කියමින් මහෙස්ත්‍රාත්වරයා මෙම නඩු විභාගය නීත්‍යානුකූල නොවන බව ගිළිගනිමින් චිත්තිකරු නිදහස්කරුවකු ලෙස සැලකෙන හැටියට නිගමනයක් කෙරෙණ නියෝගයක් දුන්නේය :—**චිත්තිකරු නිදෙස් යයි සැලකෙන මෙම නිදහස් කිරීමට විරුඬව ඇපැලක් ඉදිරිපත් කර නැත.** නමුත් මේ වෙනුවට අප්පිල්ලේ ඉන්ස්පැක්ටර් මහතා කළේ එම නඩුවිධාන සංග්‍රහයේ 148 (1) (බී) ඡේදය යටතේම එම මහෙස්ත්‍රාත් උසාවියටම, කලින් තමා විසින් ඉදිරිපත් කරණ ලද නොඃ 21419 දරණ වාර්තාවේම සඳහන්ව ඇති වරද තුන චිත්තිකරු විසින් කරණ ලදයි නැවත වරක් වර්ෂ 1958 පෙබ්‍රවාරි මස 26 වෙනි දින වාර්තාවක් ඉදිරිපත් කිරීමය. පසුව ඉදිරිපත් කරණ වාර්තාවේ පරීක්ෂණ ලිපි ලේඛනවලට හිමිවූ නොම්මරය 25279 විය.

මේ පිළිබඳව සිතාසි නිකුත්වී එම සිතාසි අනුව උසාවියට ඉදිරිපත්වූ චිත්තිකරු මහෙස්ත්‍රාත් වරයා විසින් ඒ පිළිබඳවම චෝදනා ඉදිරිපත් කරණු ලැබ තමා නිවැරදි කරු යයි කියා සිටියේය. මෙම චිත්තිකරු එක් වරක් මීට කලින් මෙම වරද තුනටම චෝදනා ලැබ නොඃ 21419 දරණ නඩුවෙන් නිදහස් වී ඇති නිසා නොම්මර 25279 දරණ මෙම නඩුව ඔහුට විරුඬව කියා ගෙන යාමට එය සංබාධකයක් වී ඇතැයි චිත්තිකරුගේ ආයාචකයා (Pleader) තර්ක කෙළේය. මෙම "ඕත්‍රුවා අක්වී" (Autrefois Acquit) නමැති කලින් වරක් නිදහස් වීම පිළිබඳ ආයාචනයෙන් උද්ගතවූ කරුණ මූලික ප්‍රශ්නයක් ලෙස විනිශ්චයට භාජනවිය. මෙහිදී උසාවියේ වාර්තා කිපයක් ඉදිරිපත් කිරීමෙන් හා මේ පිළිබඳව තර්ක කිරීමට සවන් දීමෙන් පසුව (නොඃ 21419 දරණ කලින් නඩුවේ නියෝගයම කළ) උගත් මහෙස්ත්‍රාත්වරයා චිත්තිකරු වෙනුවෙන් කළ එම ආයාචනය පිළිගනිමින් තම තීන්දුව වර්ෂ 1959 අප්‍රියෙල් මස 27 වෙනි දින දුන්නේය. දැන් අප ඉදිරියේ ඇති මේම ඇපැල එම තීන්දුවට විරුඬව ඇටෝර්නි ජනරාල් තුමා විසින් ඉදිරිපත් කරණ ලද්දකි. අපරාධ නඩු විධාන සංග්‍රහයේ 338 (2) ඡේදය අනුව මහෙස්ත්‍රාත් වරයකුගේ අවසාන නියෝගය හෝ තීරණයකට විරුඬව ඇපැලක් ඉදිරිපත් කිරීමට අපරාධ නඩුවිධාන සංග්‍රහයේ 338 (2) දරණ ඡේදය අනුව ඇටෝර්නිජනරාල් තුමාට බලය තිබේ.

ඇටෝර්නිජනරාල්තුමා නඩි කලේ පහත සඳහන් කරුණු උඩය.

(1) නීත්‍යානුකූල ලෙස යටහත් නොවීම නිසා නොඃ 21419 දරණ නඩුවේ චෝදනාව නරක නම් ඒ නිසාම සුදුසු නඩුවිභාගයක් නොපැවැත්විය හැකි බැවින් එබඳු චෝදනාවකට අනුව දඩුවම් දීමක් හෝ නිදහස් කිරීමක් සිදුවිය නොහැකි බව ;

(2) ඕත්‍රුවා අක්වී (Autrefois Acquit) ප්‍රඥප්තිය අනුව ආයාචනයක් යාර්ථක වීමට එම නඩුවේ කරුණුවල වටිනාකම් අනුව නිදහස් කිරීමක් තිබිය යුතු බව.

මෙම තර්ක දෙකින් පළමු වැන්න සලකා බැලීමට නම් කලින් සඳහන් කළ **මොහිදීන් එ. පිටකොටුවේ පොලිස් පරීක්ෂක** අතර කියවුනු නඩුවේ දී මෙම අධිකරණය මතින් දුන් තීන්දුව දෙස සිත යොමුවිය යුතුය. මෙය අධිකරණ ආඥාපණතේ 48 වන ඡේදය යටතේ විනිශ්චය කරුවන් තිදෙනෙකු ඉදිරියට එවූ ඇපැලක නඩුතීන්දුවකි. නව නීති වාර්තාවේ පළවි ඇති මෙම නඩුවේ වාර්තාවේ මානෘකා පාඨයේ මෙම තීන්දුව සම්පිණ්ඩනය වී ඇත්තේ එම නඩුවෙහි යදහන් කරුණු උඩ ඉදිරිපත් වන චෝදනාවක් අපරාධ නඩුවිධාන සංග්‍රහයේ 425 වන ඡේදයෙන් පවා සංශෝධනය කළ නොහැකි අක්‍රමිකතාවක් බවය. එහෙත් මෙම නඩුවේ ද සිල්වා විනිශ්චයකාර තුමා විසින් දෙන ලද එම විනිශ්චය මණ්ඩලයේ වැඩි දෙනකුගේ තීන්දුව එම නඩුවේ චෝදනාව නීත්‍යානුකූල නොවේය යන්න බව සලකා ගැනීම වඩා සියුම් සත්‍යය බව මෙහි ලා සඳහන් කළ යුතුය. අග්‍රවිනිශ්චයකාරතුමාණන්ගේ තීන්දුවෙහි ද මෙහි කෙරී ඇති නඩුවිභාගය සාමාන්‍ය අක්‍රමිකතාවයක් පමණක් නොවේය යි සඳහන් වීමෙන් ද එතුමා (නීත්‍යානුකූල චෝදනා ඉදිරිපත් කිරීමක් නොමැතිවීම සංශෝධනය කළ හැකි සාමාන්‍ය අක්‍රමිකතාවයක් නොව නීති විරෝධී අඩු ලුහුඩුවක් බව කියා ඇති) **චාර්ගීස් එ. පෙරේරා**, (1942) 43 නව නීති වාර්තා 564, අතර වූ නඩුව නිවැරදි ලෙස තීරණය වී ඇති බව තමාගේ මතය යයි කියා තිබීමෙන් ද එතුමා ද එම නඩුවේ චෝදනාව නීත්‍යානුකූල නොවේයයි නිගමනය කළ බව සලකා ගැනීම සුදුසු යයි සිතේ. මෙම නඩු තීන්දුවට විපක්ෂවූ පුල්ලේ විනිශ්චයකාරතුමා ද අපරාධ නඩු විධාන සංග්‍රහයේ නඩු විභාගයක් පිලිබඳ ගතයුතු පියවරක් චෝදනා

ඉදිරිපත් කිරීමට කලින් ගතයුතුයයි සඳහන් වී ඇතොත් එය නොගත් කලෙක එම චෝදනාව එමනිසාම නිරර්ථක වන බව අනෙක් විනිශ්චයකාර වරුන් දෙදෙනා මෙන්ම තමාත් පිලිගන්නා බව **මොහිදීන්ගේ** එම නඩුවේදී කියා ඇති බව මට පෙනේ. නොඑසේ : 21419 දරණ නඩුවේ ඉදිරිපත් වී ඇති චෝදනාව අඩුලුහුඩු ඇති චෝදනාවක් මිස නීතිවිරෝධී චෝදනාවක් නොවේයයි වික්‍රමනායක මහතා කරුණු සැලකර සිටියේය. මෙම මතයට මට එකඟ විය නොහැක. **මොහිදීන්ගේ නඩුවෙහි** විනිශ්චය මණ්ඩලයෙන් වැඩි කොටසකගේ මතය වූයේ එම චෝදනාව නීති විරෝධී බවය. එබැවින් ඒ හේතුව නිසාම ඒ පිලිබඳව කලින් කෙරුණු නඩුවිභාගය නිෂ්ප්‍රභා කොට නීත්‍යානුකූලව සටහන් කරන ලද චෝදනාවක් අනුව එම නඩුව නැවත අසනු පිණිස ආපසු යවන ලදී.

කලින් යළහන්වූ **මොහිදීන් එ. පිටකොටුවේ පොලිස් පරීක්ෂකතුමා** අතර කියවුණු නඩුවේ තීන්දුවේ නිරවද්‍යභාවය ගැන ප්‍රශ්නයක් අප ඉදිරියේ මතුවී නැත. කෙසේ වුවත් තුන්දෙනෙකුගෙන් යුත් විනිශ්චය මණ්ඩලයක් වන අපට මීට කලින් තුන්දෙනෙකුගෙන් යුත් විනිශ්චය මණ්ඩලයක තීන්දුවක් විවරණය නිරීමට සුදුසු කමක් නොමැති බැව් මට කිව නැක. එමනියා **මොහිදීන්ගේ නඩුවේ** තීන්දුවෙන් අප බැඳී ඇති බව සලකාගෙන මෙම ඇපෑල ගැන කටයුතු කළ යුතුය. කෙසේ වෙතත් **මොහිදීන්ගේ නඩුවේ** ඇපෑල විභාග කල විනිශ්චය මණ්ඩලය එම තීන්තිකරුවා නීත්‍යානුකූල ලෙස ඉදිරිපත්වූ චෝදනාවක් ඇතුව විසඳිය යුතුයයි තීරණය කර ඇතිබව මෙහිදී සලකාගැනීම යෝග්‍යය. එබැවින් වික්‍රමනායක මහතා තර්ක කල අන්දමට පැමිණිලි පක්ෂය කරුණු ඉදිරිපත් කිරීම අවසාන කළ පසු මහේස්ත්‍රාන්වරයෙකුට කළ හැකි එකම නියෝගය චෝදනාව යුක්තියුක්ත වූ කලෙක හෝ එසේ නොවූ කලෙක විත්තිකරුවා නිදහස් කිරීම පමණක් නම් අපරාධ නඩු විධාන සංග්‍රහයේ 347 දරණ ඡේදය අනුව නැවත නඩුව ඇසීමටයයි නියෝග කිරීමට ශ්‍රේෂ්ඨාධිකරණයට පවා බලයක් නොමැති බව **මොහිදීන්ගේ නඩුවේ** දැනි කරුණු පර්ක්ෂාවෙන් බලන කල පෙනී යේ.

ඕත්‍රපුවා අක්වී නමැති (Autrefois Acquit) කලින් නිදහස්ව නිබීමේ ආයාවනය පිලිගැනීමෙහිදී මෙම මහේස්ත්‍රාන්වරයා මෙම උසාවියෙන් දෙනලද **ප්‍රනාන්දු එ. වෙන්නප්පුවේ පොලිස් පරීක්ෂකවරයා** (1958) 60 නව නිති වාර්තා 227, යන නඩුවේදී ඇති තීන්දුවෙන් තමා බැඳී ඇතිබව (නීත්‍යානුකූලව ඔහු එසේ බැඳී ඇති නිසාම) පිලිගත් යේ පෙනේ. මෙම නඩුවේ කරුණු ද අප ඉදිරියේ ඇපල් ගෙන දැති නඩුවේ කරුණුවලට හුදෙක් සමානය. එම නඩුවේදී විරසූරියවිනිශ්චයකාරතුමා එම නඩුවේදී විත්තිකරු කලින් එම චෝදනාවෙන්ම නිදහස්ව නිබේයයි කියන (ඕත්‍රපුවා අක්වී) ආයාවනයක් පිලිගෙන තිබේ. ඉදින් ඉහත සඳහන් මෙම ඇපෑල නිවැරදිව තීරණය වී ඇත්නම් අපි ඉදිරියේ ඇති ඇපෑල නිෂ්ප්‍රභා විය යුතුය. උගත් ඇටෝර්නි ජනරාල් තුමා විසින් අප ඉදිරියේ ගෙනහැර දැක්වූ තර්ක වීරසූරිය විනිශ්චයකාරතුමා ඉදිරියේ කරන ලද තර්කවල සාරාංශයටම ගැලපෙති. එහෙත් අප ඉදිරියේ ගෙනහැර දැක්වූ ඇටෝර්නි ජනරාල් තුමාගේ තර්කය නිවැරදි බවත් එය පිලිගතයුතු බවත් විරසූරිය විනිශ්චයකාර තුමාට හුදු ගෞරවයෙන්ම මෙහිලා යඳහන් කරමි. මෙයට හේතුසාධක මෙහිලා දැක්වීමට මම උත්සාහ කරමි. යම් කිසි චෝදනාවක් නීත්‍යානුකූලව සකස් වී නොමැති නිසා එය අනුව කෙනෙකු වැරදි කරුවෙකු කිරීම බලපවත්වන ලෙස ගිණිය හැක්කක් නොවේනම් මෙවැනිම කරුණු උඩ නැගූ නීත්‍යානුකූල නොවන චෝදනාවක් නිසා දෙන නිදහස් කිරීම පිලිගත හැක්කේ කෙසේ ද යනු මට තේරුම්ගත නොහැකි බව අවංක ලෙස මම පිළිගනිමි. එහෙත් මෙආකාරයෙන් ප්‍රතිඵලවිරහිත නම් අනිසද ඒ අයුරින්ම ප්‍රතිඵලවිරහිත වනු දැන.

නොඑසේ : 21419 දරණ නඩුවේ නියෝගය දෙන මහෙස්ත්‍රාන්වරයා විත්තිකරු නිදහස් කරණ ලද ලෙස සැලකෙන හැටියට නියෝගය දීමට හේතුවන කරුණු ගැනද මා විසින් සඳහන් කල යුතු වේ. තීන්දුව දීමෙදී විනිශ්චයකාර තුමෙකු විසින් භාවිතා කරණ ලද වචන මාලාව ඔහු විසින් දීමට අදහස් කරණලද නියෝගයේ සවභාව ගැන නිරූපාත්මක සාක්ෂියක් නොවන බව අවුරුදු බොහෝ ගණනාක් තුල විසඳ ඇති නොයෙක් නඩුවලදී මෙම අධිකරණය විසින් පිලිගෙන තිබේ. එම සෑම නඩුවකම ප්‍රශ්නයක් වී ඇත්තේ එම නඩුවේ නියෝගය තේරුම් ගැනීම පිණිය ඊට අදල නඩු විභාගය පරීක්ෂාවෙන් බැලීමය. මීට විරුද්ධ මතයක් අනුගමනය කල විටෙක ඇතිවන්නේ විත්තිකරුවෙකුට මහෙස්ත්‍රාත්වරයා විසින් ඔහුට විරුද්ධව ඇති නඩුව නිෂ්ප්‍රභා කල බව නියෝගයෙහි සඳහන් කලහොත් තමා නිදහස්වී ඇතත් එම නිදහස්වීමේ ප්‍රතිඵල ලැබීමට නොහැකි වී යාමය. මේ හැර තවත් විස්මය ජනක ප්‍රතිඵල ද ඇතිවීමට බැරි නොවේ. එබැවින් වර්ෂ 1958 පෙබරවාරි 5 වනද දෙන ලද නියෝගයේ සවභාවය විමසා බැලීමට අපට සුදුසුකම් ඇති අතරම එය නිදහස් කිරීමේ නියෝගයක් ද නැතහොත් නඩුව නිෂ්ප්‍රභා කිරීමේ නියෝගයක්දැයි විනිශ්චය කිරීම හුදෙක්ම අප යතුය.

යම්හෙයිවිට ඇහැලම නැනක ඉදිරිපත්වන මතයක් මෙහිදී වික්‍රමනායක මහතා අප ඉදිරියේ සැල කර සිටිමින් එය නිවැරදි මතය බව කියා සිටියේය. එනම් පැමිණිල්ලේ සාක්ෂි ඉදිරිපත් කළ පසු එම නඩුව ලඝු නඩු විභාගයකින් විසඳූ මහෙස්ත්‍රාත්වරයා විත්තිකරු වැරදි කරුවකු හෝ නිවැරදි කරුවකුයයි නිගමනය කළ යුතු බවත් ඉන්පසු මහෝස්ත්‍රාත්වරයාට විත්තිකරුට විරුද්ධව ඇති නඩුව නිෂ්ප්‍රභා කිරීමට බලයක් නැති බවත් ය. මෙම මතය ගොඩ නැගී ඇත්තේ අපරාධ නඩුවිධාන සංග්‍රහයේ 191 වන ජේදයේ ඇති වචන අනුවය. ඒ අනුව ''විත්තිකරුවකුගේ නඩුවක් නිෂ්ප්‍රභා කිරීමට බලය ඇත්තේ නඩුවේ මූලික අවස්ථාවකය'' යි සඳහන් වී ඇත. මෙහි ''මූලික අවස්ථාව'' යන්න තේරුම්ගෙන ඇත්තේ පැමිණිල්ලේ සාක්ෂි ඉදිරිපත්කොට පැමිණිල්ල නිම කිරීමට පෙරාතුවය කියාය. නමුත් විත්තියෙහි සාක්ෂි සටහන් කරගන්නා අතර නීත්‍යානුකූලව ඉදිරිපත් කල නොහැකි සාක්ෂි යම්කිසිවක් මේ අතරතුර ඉදිරිපත්විය හැකි නඩුවක් ගැන සිතාගැනීමට කෙනෙකුට පිළිවන. ඇටෝර්නි ජනරාල්තුමා තර්කකල පරිදිම, එවිට ඒ තත්වය පවතින අතර මේ නිසා නඩුව නිෂ්ප්‍රභා කිරීමේ නියෝගයක් දිය හැකි කාලය ඉක්ම ගොස් තිබෙන හෙයින් විත්තිකරු නිදහස් කල යුතුයයි කිය හැකි ද ? එමනිසා ''කිසියම් මූලික අවස්ථාවකය'' යි කිමෙන් අදහස් කරන්නේ විත්තිකරු වරදකරුද නිවැරදිකරුද යයි තීරණය කිරීමට පෙර මිස පැමිණිලි පක්ෂයේ කරුණු ඉදිරිපත් කිරීම නිමවීමට පෙර නොවෙයයි යන මතය පිලිගැනීමට මටද එකඟවීමට සිදුවී ඇති බව මෙහිදී කිව යුතුය.

කලින් මෙහි සඳහන් කලපරිදි ඇටෝර්නි ජනරාල් තුමා විසින් ඉදිරිපත්කල පළමුවැනි තර්කයට නැවතත් අපි සිතයොමුකරමු. අපරාධ නඩු සංවිධානයෙහිදැනට ඇත්තේ එහි සඳහන් වී ඇති දෑමට වචනාවක් සංස්කරනය වී නඩුවක් ඉදිරිපත් කොට පවත්වා ගෙන යා යුතු බවකි. වෙන වචන වලින් කිවහොත් මෙයින් කියැවෙන්නේ එම සංග්‍රහයේ සඳහන් වී ඇති අන්දමට චෝදනාව යකස්විය යුතු බව හා නීති විරෝධීව යකස් නොවිය යුතු බවය. අබේසේකර එ. ගුණවර්ධන (1938) 39 නව නීති වාර්තා 525, නැමැති නඩුවේ දී විත්තිකරුවන් වරදකරුවන් කිරීමෙන් කෙළවර වූ නඩු විභාගයක තීන්දුව ප්‍රතික්ෂේප කරමින් ඒල්ලහමිස් අග්‍රවිනිශ්චය කාර තුමා පහත සඳහන් පරිදි කියා තිබේ. ''එසේ නම් මෙහි චෝදනාවක් නොමැත. චෝදනා වක් නොමැතිකල නඩුවිභාගය මුලුමනින් දුෂිත වන බවට බොහෝ සාධක පාය් තිබේ''. එම නඩුවේ දී අපරාධ නඩුවිධාන සංග්‍රහයේ 187 (1) දරණ ඡේදය අනුව චෝදනාව සංස්කරණය වී නැතැයි තීන්දු විය. මේ අනුව නීත්‍යානුකූල චෝදනාවක් එහි නොමැති බවත් පරිසමාප්තාජීයෙන් තීරණය විය. එමෙනියා මූලාරම්භයේ පවතිම නඩුව නීතිවිරෝධී වූ බව ප්‍රකාශකරන ලදී. ඒල්ලහමිස් අග්‍ර විනිශ්චයකාර තුමා කළ එම ප්‍රකාශයෙහි අඩු ලුහුඬු දැකිව හැකැසුණු චෝදනාවක් මත විභාග වන නඩුවක් හෝ නියම චෝදනාවක් නැතිව විභාග වන නඩුවක් හෝ මහේශ්ත්‍රාත්වරයාගේ දාඳ බලයෙන් තොර දෙයක්යයි සඳහන් වී නැති බව වීරසූරිය විනිශ්චයකාර තුමා විසින් ප්‍රකාශ්තු ඒ. වෙන්නප්පුවේ සුරාබදු පරීක්ෂකයා අතර කියවුන (කලින් සඳහන්කල) නඩුවේ දී මතයක් පල කලේය. මට මීට එකඟ විය නොහැකි බව වීරසූරිය විනිශ්චය කාරතුමාට ගෞරව පූර්වකව මෙහිලා සඳහන් කරමි. මට වැටහී යන අයුරුට අපරාධ නඩුවක නියම අන්තිම වාරම චෝදනාවයි. එසේම චෝදනාවෙහි නීත්‍යානුකූල නමේ අඩුලුහුඬු කමක් ඇතිවීම නිසා එය නීත්‍යානුකූල නොවූකලක හෝ ඒ නයින්ම නියම චෝදනාවක් සංස්කරණයවී නොමැති කල හෝ විත්තිකරුවකු වරදකරුවකු බවට පත්කිරීමේ නිගමනයක් නගා සිටුවිය නොහැකිය යන මතය අපේ අධිකරණය අනවරතයෙන්ම අනුගමනය කර ඇති බව පෙනීයයි. නීතිවිරෝධී චෝදනාවකින් ගලා එනවිත්තිකරුවෙකු නිදහස් කිරීමේ නියෝගයක් ක්‍රියාකාරී වේද එසේම නීත්‍යානුකූල කිසිම චෝදනාවක් නොමැති නඩුවකින් දෙන එබඳු නියෝගයක් ක්‍රියාකාරීවේ ද යන ප්‍රශ්න දෙක අතර කිසියම් වෙනසක් ඇද්දයි මට කිසිසේත් නොපෙනේ. මා අදහස් කරන හැටියට විත්තිකරුවකු වැරදිකරුවකු බවට පත්කරන ලද නියෝගයක නීත්‍යානුකූලභාවය ගැන සලකන විට ප්‍රශ්නය එක් අංශයකින්විසඳීමත් විත්තිකරුවකු නිදහස් කිරීමේ නියෝගයක නීත්‍යානුකූලභාවය සලකන විට ප්‍රශ්නය තවත් අංශයකින් විසඳීමත් කිසිසේත් කල නොහැකි ක්‍රියාවකි.

(කලින් සඳහන් කල) අබේසේකර එ. ගුණවර්ධන අතර වූ නඩුවට වඩා මේ කරුණට ගැලපෙන්නේ ඊටත් කලින් විසඳුනු **රෝස්මලේ කොකෙ එ. කලුමා** (1936) 38 නව නීති වාර්තා 373, අතර කියවුන නඩුවය. මේ නඩුවද ඒල්ලහමිස් අග්‍රවිනිශ්චයකාර තුමන් විසින් තීරණය කරණු ලැබූ නඩුවකි. විත්තිකරුවන් වැරදිලෙස එකට

එකතුකොට නඩුපැවරීම සහ චෝදනා අයථා අන්දමින් එක්කොට එකට නඩු පැවරීමේ හේතුවෙන් චෝදනාව නීතිවිරෝධී වීම නිසා විත්තිකරුවන් වරදට පත්කිරීමේ නියෝගයක් ඉවත හෙළූ ගරු අගවිනිශ්චයකාරතුමාණෝ පහත යළඟන් පරිදි ප්‍රකාශ කළහ.

" නියැකයෙන්ම මට මේම නඩුව නැවතත් ඇසීමට යයි නියෝග කල හැක. අනෙක් අතින් එසේ නැවත වරක් අළුත් නඩුවක් දැමීමටයයි නියෝග නොකලහොත් පැමිණිලි පක්ෂය එම කරුණු උඩම නඩු පැවරීම වැලැක්වීම මට කළ හැකි ද? නමුත් විත්තිකරු නිදහස් කිරීමේ නියෝගයක් දීමේ බලයක් මට ඇත්නම් මේම නඩුවේ දැපල් කරු නැවත නඩුවකට මුහුන දීමෙන් මට වැලක්විය හැක. ඇපල්කරුගේ නීතිඥ තැන එසේ විත්තිකරු නිදහස් කරමින් මට තීන්දුව දිය හැකැයි තර්ක කරයි. ඔහු **මැන්ඩිස් එ. කයිකන්** අෂ්ඨාංගී (1935) 37 නව නීති වාර්තා 285, යන නඩුව මා ඉදිරියේ උපුටා දක්වයි. එම නඩුවේ දී එයට කලින් විසඳුණු **මාරම්බේ එ. කිරිඇප්පු** 2 සි. ඇල්. ඩබ්ලිව් 122, යන නඩුවෙහි තීරණය දුන් මැක්ඩොනල්ඩ් අගවිනිශ්චයකාරතුමාගේ ප්‍රකාශය අනුව යමින් ධරිබර්ග් විනිශ්චයකාරතුමා ඇපල්කරු නිදහස් කරමින් එම ඇපැලට ඉඩදුන්නේ එම නඩුව නැවත ඇසීමට යයි දාපසු යැවුවහොත් එහි ඇති පරිසරය හා කරුණු අනුව පැලිනිලි පක්ෂය දාලෙස්යම් ගතියකට හා විධිමත් නොවන තත්ත්වයකට වැටෙන බව හේතුවක් හැටියට දක්වමිනි. මේ නඩු දෙකින් එකක්වත් මම සවිස්තරව පරීක්ෂා නොකෙළෙමි. මන්ද? මේ නඩු දියඳූ උගත් විනිශ්චයකාරවරු යම්කිසි නඩුවක ශූන්‍ය භාවය හේතුවෙන් ඇපැල් උසාවිය මගින් විත්තිකරුවන් නිදහස් කලයුතුයයි පිලිගත් බව හැඟියේ නම් මම ඊට ගෞරව පෙරටුව විරුද්ධ වෙමි. එයට මා දෙන හේතුව කෙබඳු නීතිවිරෝධී නඩුවක්වුවද නියම අසඳමේ නඩුවක් නොවන නියා එම නඩුව විසඳන උසාවිය හෝ එය ඇපැල්ගත් උසාවිය හෝ විත්තිකරුවකු නිදහස්කරමින් දෙන තීන්දුව ක්‍රියාත්මක නොවීමය."

මෙම නඩුව වීරසූරිය විනිශ්චයකාර තුමාණන්ගේ සැලකිල්ලට භාජන කල බවක් නොපෙනේ.

විනිගසේකරට එ. සයිමන් (1956) 57 නව නීති වාර්තා (377)–381, අතර කියවුණු නඩුවේ ශ්‍රේෂ්ඨ විනිශ්චයකාර තුමා විසින් කරන ලද ප්‍රකාශ කිපයකට මා සිත්යොමු කිරීම සුදුසුයැයි හැඟේ. මා දැන් පරීක්ෂා කරන තර්කයට ඒ ප්‍රකාශ තරමක් අදළ බැව් කිවහැක. එහිදී එම උගත් විනිශ්චයකාරතුමා මෙසේ කිය. " මට අවවාද දී ඇති අසඳමට අපේ අපරාධ නඩු සංග්‍රහය අනුව ඒංගලන්තයේ මෙන්ම චෝදනාවක් හෝ අයිචෝදනාවක් කලින් නඩුවක ඉදිරිපත් වී තිබිණි නම් එය දෙවැනි වර ඉදිරිපත්කර ඇති නඩුවේ චෝදනාවට දිය හැකි දඩුවමක් ලැබිය හැකි පරිදි දැඩි සුදුසු නඩුවක්වූ කලෙක පමණක් 'ඔත්තුවා අක්වි' ආඥාවනයක් බලපවත්වන බව මගේ නිගමනයයි. එසේම විත්තිකරුවකුට විරුඬව ඇති නඩුවිභාගයක් නතර කිරීමේ නියෝගයක් චෝදනාවේ අඩු ලුහුඬුකමේ හේතුවෙන් බලපවත්වන්නේ අපරාධ නඩු සංවිධාන සංග්‍රහයේ 191 වැනි ඡේදයට අනුකූලව " චෝදනාව නිෂ්ප්‍රභා කිරීමක් " හැටියට පමණකි. එබඳු කලෙක මහේස්ත්‍රාත්වරයාගේ තීන්දුවේ යථාර්ථය ලෙස ගත හැක්කේ 190 වැනි ඡේදය යටතේ ගොඩ නැංවිය හැකි (වරදකරු කිරීමේ හෝ නිදහස් කිරීමේ) තීන්දුවක් දිය හැකි චෝදනාවක් එහි නොමැති බවය. මේ උගත් විනිශ්චයකාරවරු දෙදෙනා සමගම මම ගෞරව සම්ප්‍රයුක්තව එකඟවෙමි. එතුමෝ, නිවැරදිව තේරුම් ගන්කල මා දැන් සලකා බලන ප්‍රශ්නයට ප්‍රවිශ්ඨ විය යුතු නියම මාර්ගය සකසා පැහැදිලි කර දක්වති. එසේම අපරාධ නඩු සංවිධාන සංග්‍රහයේ අර්ථ නිරූපන ඡේදයේ (දෙවන ඡේදයේ) "නඩුව නිෂ්ප්‍රභා කිරීම" යන වාක්‍යඛණ්ඩයේ විග්‍රහය වෙනද සිතයොමු කල යුතුව තිබේ. " නඩුව නිෂ්ප්‍රභා කිරීම ", එයට අයත් ව්‍යාකරණානුකූල විවිධත්වයට සහ ඉන් බිහිවන අහොකුත් ප්‍රභාශයන්වද අවධානය යොමුකොට ගත්විට එයින් අදහස් කැරෙන්නේ විත්තිකරුවකුට විරුඬව පවරා ඇති අපරාධ නඩුවක් නතර කිරීමය. නමුත් විත්තිකරුවකු නිදහස් කිරීම එයට ඇතුලත් නොවේ. **සේනාරත්න එ. ලෙනෝහාමි** (1917) 20 නව නීති වාර්තා 44, අතර කියවුණු නඩුවේ ශ්‍රේෂ්ඨාධිකරණ ආංශයේ තීන්දුව දුන් වුඩරෙන්ටන් අගවිනිශ්චයකාර තුමාණන් විසින් මේ විග්‍රහය වෙගවත්ව ගෙනහැර දක්වා තිබේ. මෙහිදී විනිශ්චය මණ්ඩලයෙන් වැඩිදෙනා පිලිගෙන ඇත්තේ අපරාධ නඩුවිධාන සංග්‍රහයේ 191 වන ඡේදයට අනුව විත්තිකරුවකුගේ නඩුව නිෂ්ප්‍රභා කිරීම ඔහුට විරුඬව නැවත අළුත් නඩුවක් පැවරීමට කිසිම බාධකයක් නොවන බවයි.

කවදුරටත් කල්පනාකර බලන විට **පෙරේරා එ. ජොහොරන්** (1946) 47 නව නීති වාර්තා 568, නැමති නඩුවේ එවකට අවලංගුකරන ලද ව්‍යවස්ථාවක් අනුව චරදකරුවකු බවට පත්කරනු ලැබසිටි විත්තිකරුවකුට

විරුද්ධව දුන් තීන්දුව ඇපැල් උසාවිය මඟින් ප්‍රතික්ෂේප කරන ලදී. එහෙත් ඉන්පසු කලෙක මේ වරද පිලිබඳවම නියම ව්‍යවස්ථාව අනුව චිත්තිකරුට විරුද්ධව එම වරදටම නැවතත් නඩු පවරන ලදින් ''ඕත්‍රපුවා අක්වි'' ආඥාවනයෙන් චිත්තිකරුට ප්‍රයෝජන ගත නොහැකි බව ශ්‍රේෂ්ඨාධිකරණය තීරණය කළේය. මෙහිදී ඩයස් විනිශ්චයකාරතුමා මෙසේ ප්‍රකාශ කළේය. ''කලින් කියවුණු නඩුවේදී වරද කරුවීමේ අන්තරායකට මුහුණ දීමේ අභාග්‍ය චිත්තිකරු වෙත එළඹ නොතිබුණි. මන්ද? කනකරත්න විනිශ්චයකාරතුමා විසින් විනිශ්චය ආසනයෙන් ප්‍රකාශ කලාක් මෙන් එම නඩුව ශූන්‍ය නඩුවක් වූ නිසාය. එබැවින් එම නඩුවෙහිදී චිත්තිකරු වරදකරු බවට පත්වීමේ අවදනමකට ඇති ඉවිතියේ නැත'' මෙම නඩුවෙහිදී ඔහු විසින් (කලින් සඳහන් කරන ලද) රොස්මලේ කොකෙ එ. කළුවා යන නඩුවෙහිදී ඒබ්‍රහම්ස් අග්‍රවිනිශ්චයකාර තුමා විසින් කරන ලද ප්‍රකාශයන්ට තමාගේද අනුමැතිය ඇති බව දක්වමින් ඒ ප්‍රකාශ ගෙන හැර දැක්වීය. ඒ ප්‍රකාශවල ගැබ්වී තිබුණේ නීතිවිරෝධ නඩුවක විසඳීමක් කොයි අන්දමකින් වුවද නියම නඩු විසඳීමක් නොවන බවය. එබැවින් නඩුව විසඳන උසාවියෙන් හෝ ඇපැල් උසාවියෙන් මෙවැනි නඩුවක් පිලිබඳව දෙන ලද විත්තිකරුවකු නිදහස් කිරීමක් ක්‍රියාත්මක නොවන නිදහස් කිරීමක් වේ.

එසේම **ගුණරත්න එ. හෙන්ද්‍රික් අප්පුහාමි** (1950) 52 නව නීති වාර්තා 43, නැමති නඩුවේදී විත්තිකරුවෙකුට විරුද්ධව නඩුවක් පවරා තිබුනේ අවලංගුවූ ආඥාපණතක් අනුව නිසා ඔහු නිදහස් වූ පසු ඒ කරුණ උඩම නැවත වරක් ඔහුට විරුද්ධව නියම ආඥාපණත අනුව නඩු පැවරූ කලක කලින් සඳහන් කල **පෙරේරා එ. ජොහොරන්** නැමති නඩුව විසඳූ නාගලිංගම් විනිශ්චයකාරතුමා ''ඕත්‍ර පුවා අක්වි'' ආඥාවනයක් පිලිගත් නමුත් **පෙරේරා එ. ජොහොරන්** නැමති නඩුව එම නඩුවේ කරුණු සම්බන්ධව සලකා බලන කල එය නිවැරදියයි ඔහු පිලිගත්තේය. ඔහු මෙම නඩුවේ වෙනස හැටියට පෙන්වා දුන්නේ එම නඩුව තමා විසඳූ නඩුවට නො ගැලපෙන බවය. එයට හේතුවශයෙන් ඔහු කීයේ පෙරේරා එ. ජොහොරන් නැමති කලින් සඳහන් කල නඩුවේදී මුල් නඩුවේදී විත්තිකරු වරදකරු වීම ඉවත දමූ ශ්‍රේෂ්ඨාධිකරණය විත්තිකරුට විරුද්ධව යම්කිසි පියවරක් ගැනීමට රිසි නම් එසේ ගැනීමට නිලධාරීන්ට ඉඩදුන් බවය. මෙසේ පෙන්වා ඇති වෙනස පිලිබඳවට ඔට හැඟී යන්නේ මුල් නඩුවේදී විත්තිකරු වරදකරු වීම නිෂ්ප්‍රභා වූ පසු ගත හැකි පියවර පැමිණිලි පක්ෂයට පෙන්වා දීමෙන් මුල් නඩුවේදී දී තිබෙන නියෝගයට කිසිම හානියක් නොවන බවයි. එම නියෝගය නඩුව නිෂ්ප්‍රභා කිරීමේ නියෝගයක් මිස විත්තිකරු නිදහස් කිරීමේ නියෝගයක් නොවන හෙයිනි.

අපේ අපරාධ නඩු විධාන සංග්‍රහයේ 330 වන ඡේදය ඉංග්‍රීසි නීතියේ ''ඕත්‍ර පුවා අක්වි'' සහ ''ඕත්‍ර පුවා ඩොන්වි'' නමැති ප්‍රඥප්තීන් ගැඹ කිරීමට යත්න දරණ සේ පෙනේ. සමහර අපේ උසාවිවල නඩු නීන්දුවල මෙසේ 330 වන ඡේදයේ ගැබ්වී ඇත්තේ ඉංග්‍රීසි ප්‍රඥප්තිය ඒ හැටියටම නොවේයයි කියන ප්‍රකාශ අන්තර්ගතවී ඇතත් මෙහි කිසිම වෙනසක් ඇත්තේ නැතැයි මම ථලිදරව් කර කියනු කැමැත්තෙමි. **පෙරේරා එ. ජොහොරන්** නමැති නඩුවේදී ඩයස් විනිශ්චයකාර තුමා ප්‍රකාශ කලාක් මෙන් ඉංග්‍රීසි නීතියේ ඇති ප්‍රඥප්තිය ලංකාවේද නීතිය යයි මමද එකඟ වෙමි. කලින් පවරණු ලැබූ නඩුවෙහි තිබුණු චෝදනාව සංශෝධනය කිරීමෙන් මහේස්ත්‍රාත්වරයාට ඇපැල්කරු වරදකරු බවට පත් කිරීමට අවකාශ තිබුණ නියාත් එමෙන්ම ඇපැල් නඩුවෙහි විනිශ්චයකාරතුමාටද එසේම කලහැකි වූ නියත් මෙහිදී ''ඕත්‍රපුවා අක්වි'' (Autrefois Acquit) නැමති ප්‍රඥප්තිය පසුව ගෙනෙන ලද නඩුවකට බාධකයක් වශයෙන් පවතිය යන තර්කය ඔහු (ඩයස් විනිශ්චයකාරතුමා) සම්පූර්ණයෙන්ම ප්‍රතික්ෂේප කළේය. නමුත් (කලින් සඳහන් කළ) **ගුණරත්න එ. හෙන්ද්‍රික් අප්පුහාමි** නැමති නඩුව විසඳූ නාගලිංගම් විනිශ්චයකාරතුමා **පෙරේරා එ. ජොහොරන්** (කලින් සඳහන් කල) යන නඩුවේ තීන්දුවෙන් එක්කොටසක් අනුමත කල නමුත් ඔහු ඩයස් විනිශ්චයකාර තුමා විසින් ප්‍රතික්ෂේප කරන ලද ඉහත සඳහන් තර්කය අනුමත කරන්නේ ද නැතහොත් එයට අනුමැතිය නොදෙන්නේ ද යන වග නොකියවෙය. ඉංග්‍රීසි නඩුවක් වන හැල්ස්ටෙඩ් එ. ක්ලාර්ක්, (1944) 1 සමස්ත එංගලන්ත වාර්තා 270, (Halsted v Clark) යන නඩුවේ තීන්දුව ගැන ඔහු විසින් සඳහන් කිරීම නිසා ඩයස් විනිශ්චයකාර තුමා විසින් මෙම තර්කය ප්‍රතික්ෂේප කිරීම ගැන ඔහුගේ අනුමැතිය ලැබෙයයි සිතිය නොහේ. නමුත් එම ඉංග්‍රීසි නඩුවේදී ලෝරන්ස් විනිශ්චයකාර තුමා විසින් කරන ලද ප්‍රකාශවලින් පෙනී යන්නේ කලින් නඩුවෙහි ඉදිරිපත් කරන ලද සංශෝධනය කිරීම කිසිම වරදක් කෙරී ඇතිලෙස පෙනී නොයන නිසා ඉන් පලක් නොවේය යන මතය මෙහිදී පලවී තිබෙන්නාක් මෙනි.

නඩු දෙකෙහිදීම විත්තිකරු එකම වරද කිරීම පිළිබඳව චෝදනා ලබාසිටි බව නාගලිංගම් විනිශ්චයකාර තුමා පිලිගත්තේය. දඬුවම් ලැබිය හැකි වරදක් අපේ සංශුද්ධ යෙහි (දෙවන ඡේදයෙහි) විග්‍රහ වී තිබෙන්නේ එවකට ලංකාවේ බලපවත්වන යම්කිසි නීතියක් අනුව දඬුවම් කලහැකි ක්‍රියාවක් හෝ පැහැර හැරීමක් ලෙසය. මෙම විග්‍රහය ඔස්සේ නඩුගත් විට මට හැඟී යන්නේ යම්කිසි කටයුත්තක් කිරීම පිළිබඳව හෝ පැහැර හැරීම පිළිබඳව කිසියම් පුද්ගලයෙකුට අවලංගු කරන ලද නීතියක් යටතේ නඩු පවරා ඉන්පසු දෙවන වරට එම ක්‍රියාවම කිරීම නිසා හෝ පැහැර හැරීම නිසා එවකට බලපවත්වන යම්කිසි නීතියක් යටතේ ඔහුටම නඩු පැවැරුවහොත් දෙවන වර එකම වරද කිරීම යම්බන්ධයෙන් නඩුපවරා නොමැති බවකි.

ශ්‍රීමත් ගරු අග්‍රවිනිශ්චයකාර තුමාණන් (ශ්‍රේෂ්ඨාධිකරණයේ ම විනිශ්චයකරුවකුව සිටියදී) පැමිණිල්ලේ සාක්ෂි අවසාන වූ පසු විත්තිකරු තම නිදහසට කරුණු නොපෙන්වා තමා වෙත නිකුත්වූ සිතාසියේ නීත්‍යානුකූලතාවයට විරුඬව කරුණු දක්වන ලදින් මහේස්ත්‍රාත්වරයා ඒ අනුව පැමිණිල්ල "නිෂ්ප්‍රභා" කළ—**සොලිසිටර් ජනරාල් එ. අරඩියෙල්** (1948) 50 නව නීති වාර්තා 233,—නඩුවේ තීන්දුව දී ඇත්තේ මහේස්ත්‍රාත්වරයාගේ නියෝගය විත්තිකරු නිදහස් කිරීමකැයි කියාය. මේ නඩුව වෙත විකුමනායක මහතා අප සිත් යොමු කළේය. මේ නිගමනය උගත් විනිශ්චයකාර තුමා ගෙන තිබෙන්නේ එම මහේස්ත්‍රාත්වරයාගේ නියෝගය පැමිණිල්ලේ සාක්ෂි අවසන් වූ පසුව දී තිබෙන්නෙන් නිසා ඒ සීමාවෙන් පසුව උගත් විනිශ්චයකාර තුමාගේ අදහසේ හැටියට නඩුව නිෂ්ප්‍රභා කිරීමේ නියෝගයක් පමණක් දීමට මහේස්ත්‍රාත්වරයා බලය නැති බව සිතාගෙන යැයි අදහස් කළනැක. මේ පිලිබඳව මගේ මෙම නඩු-නිත්දුවෙහි, මගේ අදහස දක්වා ඇත්තේ කොටි අවස්ථාවක දී චෝදනාව නීත්‍යානුකූල නොවන බව දැනගන්ට ලැබුණ විට එම චෝදනාව ඇති නඩුවෙන් වරදකරු කිරීමක් හෝ නිදහස් කිරීමක් ඇතිවිය හැක්කේ එම චෝදනාව පසුව නීත්‍යානුකූල කිරීමෙන් පමණක් බව කහවුරු කරමිනි. එමනිසා මෙම නඩුවේ ඇටෝර්නි ජනරල් තුමාගේ පලමුවන තර්කය මා පිලිගැනීම පිලිබඳව තවදුරටත් කරුණු එකතු කිරීම අවශ්‍යයැයි මට නොසිතේ.

මා විසින් සඳහන්කල යුතු තව එකම නඩුවක් තිබේ. එනම් **අටෝර්නිජනරාල් එ. සිල්වා** (1959) 61 නව නීති වාර්තා 454, **නැමති නඩුවයි.** මෙම නඩුවෙහිදී එච්. ඇන්. ජී. ප්‍රනාන්දු විනිශ්චයකාරතුමා විසින් "ඕත්‍රපුවා අන්වී" (Autrefois Acquit) ආරක්ෂණයක් පිලිගෙන ඒයට ඉඩදී තිබේ. මෙහි පැමිණිල්ලේ සාක්ෂි අවසන් වූ පසුව විත්තිකරු විසින් තමාගේ නිදහසට සාක්ෂි නොකැඳවන බව කී විට නඩුපොත්හි "සංශෝධනය කරන ලද චෝදනා පත්‍රයකින්" විත්තිකරුට විරුඬව චෝදනා ඉදිරිපත් වී තිබුණ බව සඳහන් වී තිබූ නමුත් විත්තිකරුට විරුඬව කිසිම චෝදනාවක් ඉදිරිපත් වී නැති බව අවබෝධ වූ මහේස්ත්‍රාත්වරයා නීන්දුව දී තිබුණේ විත්තිකරුගේ නඩුව "නිප්‍රභා කරමිනි". නමුත් මෙම නඩුවෙහිදී උගත් විනිශ්චයකාරතුමා සලකා ඇත්තේ සාමාන්‍ය වශයෙන් ඉතාම සුළු චෝදනාවක් අවුරුදු දෙකක පමණ කාලයක් තිස්සේ විත්තිකරුට විරුඬව ලක්වී නිබුන නිසා ඒ පිලිබඳව දියයුත්තේ නිශ්ප්‍රභා කිරීමේ නීන්දුවක් ද නැතහොත් නිදහස් කිරීමේ නීන්දුවක්දැයි විසඳීම අයිති පූර්ණ අධිකරණයකට බවය.

ඇටෝර්නි ජනරාල් තුමාගේ දෙවන තර්කය ගැන—එනම් නියම වශයෙන් "ඕත්‍රපුවා අක්වී" ආරක්ෂණයක් ඉදිරිපත් කිරීම පිණිස කලින් නඩුවකදී කරුණුවල වටිනාකම් අනුව එම නඩුවෙන් නිදහස් වී තිබිය යුතුය යන්න ගැන—කිව යුත්තේ ඔහුගේ පලමුවන තර්කය සම්බන්ධව මගේ තීරණය යම් නඩුවක චෝදනාව නීත්‍යානුකූල නොවේ නම් එයින් සවි ඇති තීරණයක් ඉදිරිපත් නොවේය යන්න නිසා අප ඉදිරියෙහි ඇති මෙම නඩුවේදී වර්ෂ 1958 පෙබරවාරි මස 7 වන දින මහේස්ත්‍රාත්වරයා විසින් දී තිබෙන තීරණය අසම්පූර්ණ නිෂ්ප්‍රභා කිරීමේ තීරණයකට වැඩිනොවන්නක් වන බැවින් ඒ කරුණ උඩම මෙම ඇපෑලට ඉඩදිය යුතුයයි මම සිතමි. එමනිසා දෙවන තර්කය ගැන කරුණු කීමට අවශ්‍යතාවයක් ඇතැයි මට නොවැටහේ. නමුත් අප ඉදිරියේ මේ කරුණ ගැන විවාද කල නිසා අපේ අපරාධ නඩුවිධාන සම්ප්‍රදය අනුව මේ සඳහා ඇතිවිය යුතු නියම තත්වය කුමක්ද යන්න සැකෙවින් සඳහන් කරමි. **ප්‍රනාන්දු එ. පොලිස් පරීක්ෂක රාජසූරිය** (1944) 47 නව නීති වාර්තා 399, **නැමති නඩුවෙහිදී සූරිස් විනිශ්චයකාරතුමා** "ඕත්‍රපුවා අක්වී" ආරක්ෂණයක් පිලිගත හැකිවන අපදමින් ක්‍රියාත්මක විමට නම් එයට කලින් නඩුවේ කරුණු වල වටිනාකම් උඩ නිදහස් වී තිබීමක් අවශ්‍ය බව ප්‍රකාශ කෙළේය. **වනිගසේකර එ. සයිමන්** (කලින් කියවුණු) නැමති නඩුවෙහි ද මේ සඳහා ඇති නියම පරීක්ෂණය මහේස්ත්‍රාත්වරයා (කවර අවස්ථාවක

නීන්දුව දී ඇතත්) නඩුවේ කරුණුවල වටිනාකම අනුව චිත්තිකරු නිදහස් කිරීමේ අදහසින් නීන්දු සටහන් කර තිබේද යන්න පරීක්ෂාකර බැලීම බව ශ්‍රේෂ්ඨාධිකරණ විනිශ්චයකාරතුමාද ප්‍රකාශකොට ඇත. ඉතාම මෑත කාලයකදී **ඇටෝර්නිජනරාල් එ. කිරිබණ්ඩා** (1959) 61 නව නීති වාර්තා 227, අතර කියවුණු නඩුවෙහි දී යන්සෝනි විනිශ්චයකාරතුමා කියේ අපේ අපරාධ විධාන සංග්‍රහයේ 190 වැනි ඡේදය යටතේ නිදහස් කිරීමක් ක්‍රියාත්මක වීමට නම් එය නඩුවේ කරුණුවල වටිනාකම උඩම දුන් තීරණයක් විය යුතු බවත් අත්කිසිම් කරුණක් උඩ එය එසේ නොවන බවත්ය. නමුත් අපේ අපරාධ නඩු විධාන සංග්‍රහයට අනුව කළ නිදහස් කිරීමක් නඩුවේ කරුණු උඩම කිරීම අවශ්‍ය නොවන බව කියන ඇතැම් නඩුතීන්දු මෙම උසාවියෙන් දී තිබෙන බවද මම දනිමි. මෙම තීරණ දීමට හේතුවූ මතය කෙරෙහි බොහෝ සෙයින් බලපවත්වන්නේ 194 හා 195 ඡේද යටතේ දෙන ඇතැම් නිදහස් කිරීම් පිලිබඳ නියෝග සන්‍යා වශයෙන්ම උසාවිය නඩුවේ කරුණුවල වටිනාකම පිලිබඳව තීරණයකට බැහීමට කලින් දීමය. නමුත් එම ඡේද දෙක පරීක්ෂාවෙන් බැලීමේදී පෙනියන්නේ නිදහස් කිරීමයයි හැඳින්වෙන මෙම නියෝග නිකුත්වන්නේ (1) නඩුව ඇසීමෙහිදී පැමිණිලි කරුගේ නොපැමිණීම නිසාත් (194 වන ඡේදය) එමෙන්ම (2) පැමිණිලි කරු විසින් පැමිණිල්ල අස්කර ගැනීම නිසාත්ය. (195 ඡේදය) මේ සිදුවීම් දෙකෙහිදීම ව්‍යවස්ථාදායක මණ්ඩලය සිතා ඇත්තේ මෙහිදී පැමිණිල්ලේ වටිනාකම ඇති කරුණු කිසිවක් නොමැති බවය. මේ හැර කරුණුවල වටිනාකම් අනුව නොකෙරෙන නිදහස් කිරීමක් අපේ අපරාධ නඩු විධාන සංග්‍රහයෙන් අනුමත වී ඇති එකම ස්ථානය 290 වන ඡේදය යටතේ ඇති නඩු සමථය කට පැමිණවීමේ ක්‍රියා පිලිවෙල පමණකි. එහි 5 වන උපඡේදයෙන් නඩුවක් සමථයකට පැමිණෙන කල එම නඩුවෙහි චිත්තිකරු නිදහස් වන බව කියැවෙයි. සාමාන්‍ය වශයෙන් නඩුවක් සමථයකට පැමිණවීම එම නඩුවෙන් චිත්තිකරු නිදහස් වීමක් ලෙස ගිණිය නොහැකි නමුත් නීත්‍යානුකූල නිදහස්වීමකදී චිත්තිකරු ලබන සියළු ප්‍රතිපල මෙයින් ද ලැබෙන නිසා එය නිදහස් කිරීමක් හැටියට අපේ නීතිය පිලිගනී. මෙය ''නිදහස ලැබීමට'' නම් කරුණුවල වටිනාකම උඩ තීරණයක් ලැබිය යුතුය යන **ප්‍රඥප්තියට** ඇති ව්‍යතිරේකයක් (Exception) යයි කිවහැක. නඩු සමථයකට පත් කිරීමේ ක්‍රියා පිලිවෙල පසෙක තිබියදී 194 හා 195 වන ඡේද යටතේ ඇතිවන නිදහස් කිරීම්ද එසේම සමහර විටෙක පැමිණිල්ල නිෂ්ප්‍රභා කිරීම් ලෙසත් නවත් සමහර විටක නිදහස් කිරීම් ලෙසත් විස්තර වන අනිකුත් නියෝගද පැමිණිලි පක්ෂයට උසාවියෙන් පහසුකම් සලසා ඇති අවස්ථාවලදී පවා අවශ්‍ය සාක්ෂි කැඳවා ගත නුහුණු විටක දෙනලද නියෝගද නිදහස් කිරීම් ලෙස සැලකී තිබෙන බව පෙනේ. එහෙත් මේ අවස්ථාවලදී එම පැමිණිල්ලේ කරුණුවල වටිනාකමක් නොමැතියයි කීමට කිසිසේත් අවකාශ නොමැත. නමුත් මේ කරුණ උඩ දීර්ඝ විස්තරයක් කිරීම මෙහිලා අනවශ්‍යයි මට සිතේ. නොව: 21419 දරණ නඩුවේ විභාගයෙහි නීත්‍යානුකූල තාඩය ගැන මා එලඹී ඇති මතය අපට මෙහිදී නිරාකරණය කිරීමට තිබෙන කරුණට සෑහෙන පිලිතුරක්යයි මම කල්පනා කරමි.

නොව : 21419 දරණ නඩුවේ වෝදනාව, මගේ අදහසේ හැටියට නීත්‍යානුකූල ලෙස පිලියෙලවී නොමැති නිසා වර්ෂ 1958 පෙබරවාරි මස 6 වන දින මහේස්ත්‍රාත්වරයා විසින් දෙන ලද නියෝගය ක්‍රියාත්මක වන්නේ නඩුව නිෂ්ප්‍රභා කිරීමක් වීලස මිස චිත්තිකරු නිදහස් කිරීමක් වීලස නොවේ. එබැවින් මෙම ඇපැලට ඉඩදී මම 25279 දරණ නඩුව නීතියට අනුව විසඳීමට නැවත වරක් මහේස්ත්‍රාත් උසාවියට යවන්නෙමි. කෙසේ වෙතත් මේ දඩුවම් ලැබිය යුතු වරද කළැයි කියන දින සිට අවුරුදු 5 කට ආසන්න කාලයක් ඉක්ම ගොස් ඇති හෙයිනුත්, දැන් ඒ සඳහා මතුවී ඇති නීති ප්‍රශ්නය විසඳී ඇති හෙයිනුත් නැවතත් මෙම නඩුවිභාගය පසු පස ලුහුබැඳ යා යුතුද යන්න පැමිණිලි පක්ෂය විසින් කල්පනාවට ගත යුතු කරුණකි.

ගරු ගුණසේකර විනිශ්චයකාරතුමා

මාගේ සහෝදර ප්‍රතාන්දු විනිශ්චයකාර තැනගේ නඩු තීන්දුවෙහි මෙම නඩුවෙහි කරුණු සවිස්තර ලෙස දක්වා තිබේ.

තීන්දුකිරීම පිණිස මෙහි ඇති කරුණ නම් නොව : 21419 දරණ නඩුවෙහි එම නඩුවිභාගය සමාප්තකරමින් දුන් තීන්දුව චිත්තිකරු නිදහස් කිරීමේ නියෝගයක්ද එසේ නැතහොත් අපරාධ නඩු විධාන සංග්‍රහයේ 191 වන ඡේදය යටතේ චිත්තිකරුගේ නඩුව නිෂ්ප්‍රභා කරමින් දෙන ලද නියෝගයක්ද යන්නයි. මහේස්ත්‍රාත්වරයා මෙම නියෝගය දී ඇත්තේ '' නිකුත්කරන ලද සිතාසියක හෝ වරෙන්තුවක මෙහෙයීමෙන් උසාවියට නොපැමිණි චිත්තිකරුට විරුඩව සාක්ෂි ඉදිරිපත් නොකොට ඔහුට නඩුපැවරීම නිසා '' මෙම නඩු විභාගය නීති

වියෝයි බව කියමිනි. ඔහු වැඩි දුරටත් ''එබැවින් මම විත්තිකරු නිදහස් කිරීමට නියෝග කරමි'' යි කියා තිබේ. දැන් නැගී ඇති ප්‍රශ්නය මේ වචන මේ අයුරින් භාවිතා කර තිබියදීත් මෙය (විත්තිකරුට චිරුද්ධ නඩුව) නිෂ්ප්‍රභා කිරීමේ චෝදනාවක් පමණක් ද යන්නයි. එමෙන්ම ප්‍රශ්නය වී ඇත්තේ එය නිදහස් කිරීමේ චැරදි නියෝගයක්ද නිවැරදි නියෝගයක්ද යන්න නොව එය ඇත්ත වශයෙන්ම නිදහස් කිරීමේ නියෝගයක්ද යන බවය. එබැවින් මෙය නිදහස් කිරීමේ නියෝගයක් නම් එය සදෙස්ද නිදෙස්ද යන වග ඒ තරම් සැලකියයුතු කරුණක් හැටියට මට නොවැටහේ. එය මහේස්ත්‍රාත්වරයාගේ ආඥාබලය යටතේ දියහැක් නියෝගයක් වූ අතරම එය ශ්‍රේෂ්ඨාධිකරණය මඟින් වෙනස් කර නොමැත. එනිසා එම චෝදනාවම ඉදිරිපත් කරමින් දමන අලුත් නඩුවකට මෙය බාධකයක් ලෙස පවතී. නමුත් එය විත්තිකරුට විරුද්ධව ඇති නඩුව නිෂ්ප්‍රභා කිරීමේ නියෝගයක් නම් මේම නඩුවේදී ''ඕත්‍රපුවා අක්වී'' (Autrefois Acquit) නමැති කලින් නිදහස් වී නිබෙන බව දක්වමින් එත්තිකරු වෙනුවෙන් කරණ ලද ආයාචනය මහේස්ත්‍රාත්වරයා විසින් පිළිගැනීම වැරදිය.

මාගේ සහෝදරයා විසින් පෙන්වාදී ඇති පරිදි යම් කිසි නියෝගයක් ප්‍රකාශයට පත් කිරීම සඳහා යොදන ලද වචන අනුසාරයෙන්ම එය නිදහස් කිරීමේ නියෝගයක්ද එසේ නැතහොත් නිෂ්ප්‍රභා කිරීමේ නියෝගයක් ද යන්න තීරණාත්මක ලෙස නිගමනය කළ නොහැක. එහි අර්ථ කථනය කිරීමේදී ඒ ඒ නඩුවේ කරුණු සම්බන්ධයෙන් සලකා බැලිය යුතුය.

දැන් ප්‍රශ්නයට භාජනවී තිබෙන එම නියෝගය කරණ ලද්දේ පැමිණිලි පක්ෂය විසින් නඩුවට කරුණු ඉදිරිපත්කිරීම නිමාවට ගෙන ගිය පසුය. අපරාධ නඩුවිධාන සංග්‍රහයේ 191 ඡේදය යටතේ නියෝගයක් දිය හැකි කාලසීමාව මේ නිසා ඉකුත්ව ගොස් නිබිණැයි මෙහිදී තර්ක කොට තිබේ. මම මෙයට එකඟ නොවෙමි. විත්තිකරු චරද කරුවකු ද නැද්ද යන තීරණයට මහෙස්ත්‍රාත් මහතා එළඹුණු සැනින්ම කුමක් හෝ වේවා සුදුසු තීන්දුවක් යටහන් කිරීමේ ප්‍රත්‍යාව 190 ඡේදයෙන් සලසා දී ඇත. එසේම 191 ඡේදයේ ප්‍රඥප්තීන්ට අනුව ''නඩුවක කෙබඳු මූලික අවස්ථාවක හෝ'' විත්තිකරුට විරුඬ නඩුව නිෂ්ප්‍රභා කිරීමට මහෙස්ත්‍රාත් මහතාට අවසරය තිබේ. එබැවින් පැමිණිලි පක්ෂයෙන් ඉදිරිපත් කරණ කරුණු නිමවූ පසුව වුවද, තීන්දුවකට බැසීමට පෙර දෙන්නේනම්, මෙසේ නියෝගයක් දීමෙන් මහෙස්ත්‍රාත් වරයා වැළැක්විය හැකි කිසිදු කරුණක් නොපෙනේ.

නඩු තීන්දුවක් සාමාන්‍යයෙන් දඬුවම් ලැබිය යුතු වරදක් පිළිබඳවම දිය යුතුයයි අදහස් කෙරේ. විත්තිකරුවකු වරදකරුවකු කිරීම හෝ නිදහස් කිරීම චෝදනාවකට සම්බන්ධ කොට ගත් කලක මීය වෙන විධියකින් ගත්කල එහි කිසිද තේරුමක් නැත. නොමැ: 21419 දරණ නඩුවෙහි විභාගය අවසන් කරමින් දුන් නියෝගයට හේතුව (චෝදනාවක් විභාග කිරීමකැයි සැලකිය හැකි මෙය) එහි නියම නීත්‍යානුකූල චෝදනාවක් නොමැති නිසා එම නඩුවිභාගය නීතිවිරෝධී වීමය. චෝදනාවක් කොහෙත්ම නොමැතිවීම හා නීත්‍යානුකූල චෝදනාවක් නොමැතිවීම අතර ඇති වෙනස දැන් විසඳීමට භාජනව තිබෙන මේම නඩුවට එතරම් සැලකිය යුතු දෙයකැයි ගිණිය නොහැක. එමනිසා කරුණු පරීක්ෂණයේ ප්‍රතිඵලයක් වශයෙන් විත්තිකරු වරදට පත් කිරීමට හෝ නිදහස් කිරීමට එහි චෝදනාවක් නැතැයි කී කලක මෙන් ඔහු ''නිදහස් කරමින්'' දුන් නියෝගයෙහි නිදහස් කිරීම යන වචන භාවිතාකොට ඇත්තේ ප්‍රමාද දෝෂයකිනි. එබැවින් වචන මාලාවේ අනුසාරයෙන් මෙය විත්තිකරු නිදහස් කිරීමේ නියෝගයක් ලෙස සැලකෙන නමුත් මෙහි සිදුවූ කරුණුවල ගැඹුම පරීක්ෂාකර බැලීමේදී මෙය නඩුව නිෂ්ප්‍රභා කිරීමක් බව පෙනී යයි.

මෙම ඇපෑලට (අභියාචනයට) ඉඩ දිය යුතුය යි මම ද ප්‍රකාශ කරමි.

ගරු බස්නායක අග්‍රවිනිශ්චයකාරතුමා.

මෙය වනාහි හලාවත මහේස්ත්‍රාත් තුමා විසින් හලාවත මහේස්ත්‍රාත් උසාවියෙහි නොමැ: 21419 දරණ නඩුවෙන් කලින් නිදහස්ව තිබීමේ ආයාචනයක් අපරාධ නඩු විධාන සංග්‍රහයේ 330 වන ඡේදයෙහි ඇති බලය යටතේ ඉදිරිපත් කිරීම ගැන සලකා බලා විත්තිකාර වග උත්තර

කරු නිදහස් කරමින් දෙන ලද නියෝගයට විරුඬව ඇටෝර්නි ජනරාල් තුමා වසින් ගන්නා ලද අැපැලකි (අතියාචනයකි).

විනිශ්චයට භාජන වී ඇති නඩුවෙන් ඉදිරිපත්කරන ලද චෝදනා පහත පලවේ.

"ඔබට විරුඬව ඉදිරිපත්කර ඇති චෝදනාවේ වග හැටි නම් :—ඔබ වර්ෂ 1957 මැයි මස 25 වෙනි දින මෙම උසාවියේ ආඥාබලය පවත්නා එරුම්විල නම් ප්‍රදේශයෙහිදී හලාවත දිස්ත්‍රික්කයේ පුත්තලමේ ආණ්ඩුවේ දිසාපති තැනගෙන් අවසර පත්‍රයක් නොලබා සුරා-බද්දට යටත් දෙයක් වශයෙන් සැලකෙන අරක්කු නිපදවන ලදින් ඒ නියායෙන් සුරාබදු ආඥාපණතේ (42 වන පරිච්ඡේදය) 14 (එ) දරණ ඡේදය උල්ලංඝනය කෙරෙන ක්‍රියාවක් කිරීමේ හේතුවෙන් එම සුරාබදු ආඥාපණතේ (42 වන පරිච්ඡේදය) 43 (බී) දරණ ඡේදයට අනුව දඩුවම් කලහැකි වරදක් කළ බවත්,

(2) වැඩිදුරටත් ඉහත සඳහන් එම ස්ථානයේදී එම කාලසීමාව තුල රා හැරුණු විට සුරාබද්දට යටත් ද්‍රව්‍යයක් වශයෙන් නම් කළ හැකි අරක්කු නිපදවීමේ කටයුත්ත පිණිස හලාවත දිස්ත්‍රික්කයේ පුත්තලමේ ආණ්ඩුවේ දිසාපති තැනගෙන් බලපත්‍රයක් නොලබා පෙරීමේ උප-කරණයක් ඔබලඟ තබාගෙන සිටීම හා හාවිතා කිරීම නිසා සුරාබදු ආඥාපණතේ 14 (ඉ) දරණ ඡේදය උල්ලං-ඝනය කිරීම කරණකොටගෙන එම ආඥාපනතේ 43 (F) දරණ ඡේදය අනුව දඩුවම් ලැබිය හැකි වරදක් කරන ලද බවත්,

(3) තවදුරටත් ඉහත සඳහන් එම ස්ථානයේ දී එම කාල සීමාව තුල සුරාබද්දට යටත් ද්‍රව්‍යයක් වන නීති-විරෝධිලෙස නිපදවන ලද අරක්කු ඩිරැම් 20ක් තමා ලඟ නීත්‍යානුකූල අවසරයක් නොමැතිව තබාගැනීම නිසා එම සුරාබදු ආඥාපණතේ (42 පරිච්ඡේදයේ) 44 වන ඡේදයේ ප්‍රකාර දඩුවම් ලැබිය හැකි වරදක් කළ බවත්ය.

හලාවත මහේස්ත්‍රාත් උසාවියෙහි නො : 21419 දරණ නඩුවෙහි සඳහන්වූ චෝදනා මෙසේය :—

(1) ඔබ වෂ 1957 මැයි මස 25 වෙනි දින මෙම උසාවියේ ආඥාබලය පවත්නා නන්කඩවර නම් ප්‍රදේශ-යෙහිදී හලාවත දිස්ත්‍රික්කයේ පුත්තලමේ ආණ්ඩුවේ දිසාපතිගෙන් අවසර පත්‍රයක් නොලබා සුරාබද්දට යටත් දෙයක් වශයෙන් සැලකෙන අරක්කු නිපදවන ලදින් ඒ නියායෙන් සුරාබදු ආඥාපණතේ (42 වන පරිච්ඡේදය) 14 (අ) දරණ ඡේදය උල්ලංඝනය කෙරෙන ක්‍රියාවක් කිරීමේ හේතුවෙන් එම සුරාබදු ආඥාපණතේ (42 පරිච්ඡේදය) 43 (බී) දරණ ඡේදය අනුව දඩුවම් කලහැකි වරදක් කළබවත්,

(2) වැඩිදුරටත් ඉහත සඳහන් එම ස්ථානයේදී එම කාලසීමාව තුල අරක්කු නිපදවීමේ කටයුත්ත පිණිස හලාවත දිස්ත්‍රික්කයේ පුත්තලමේ ආණ්ඩුවේ දිසාපති තැනගෙන් බලපත්‍රයක් නොලබා පෙරීම උපකරණයක් ඔබ ලඟ තබාගෙන සිටීම හා හාවිතා කිරීම සුරාබදු ආඥාපණතේ 14 (ඊ) දරණ ඡේදය උල්ලංඝනය කිරීම කරණකොටගෙන එම ආඥාපණතේ 43 (F) දරණ ඡේදය අනුව දඩුවම් ලැබිය හැකි වරදක් කරන ලද බවත්,

(3) තවදුරටත් ඉහත සඳහන් එම ස්ථානයේදී එම කාලසීමාව තුල නීතිවිරෝධී ලෙස නිපදවන ලද අරක්කු ඩිරැම් 20 ක් පමණ තමා ලඟ නීත්‍යානුකූල අවසරයක් නොමැතිව තබාගැනීම නිසා එම සුරාබදු ආඥාපණතේ (42 පරිච්ඡේදය) 44 වන ඡේදයේ ප්‍රකාර දඩුවම් ලැබිය හැකි වරදක් කල බවත්ය.

නො : 21419 දරණ නඩුවෙන් නිදහස් කරන ලද්දේ අපරාධ නඩු සංවිධාන සංග්‍රහයේ 187 (1) දරණ ඡේදයේ සඳහන් යම්ප්‍රදය අනුගමනය නොකර මහේස්ත්‍රාත් තුමා විසින් චෝදනා සාදන ලද හේතුව නිසාය. උගත් මහේස්ත්‍රාත්වරයාගේ නියෝගයෙහි මෙයට අදල කොටස පහත පෙනේ :—

"පැමිණිලි පක්ෂය කරුණු ඉදිරිපත් කිරීම නිමකළ පසු චිත්තිකරු වෙතුවෙන් පෙනී සිටි උගත් නීතිවේදියා චිත්තියේ නිදහසට කිසිම සාක්ෂියක් නොකැඳවා මෙම නඩුවෙහිදී සිනාසියක් මගින් හෝ වරෙන්තුවක් මගින් හෝ නොකැඳවූ මෙම චිත්තිකරුට විරුඬව කිසිම සාක්ෂියක් ඉදිරිපත් නොකර චෝදනා ඉදිරිපත් කර තිබීම අපරාධ නඩු විධාන සංග්‍රහයේ 187 (1) දරණ ඡේදයේ ප්‍රකාර නීති විරෝධී බව සැලකරමින් එයට මගේ අවධානය යොමු කෙළේය.

"නඩුපොත පරීක්ෂාවෙන් බැලූ මට මෙම චිත්තිකරු සිනාසියක් හෝ වරෙන්තුවක් මගින් උසාවියට කැඳවා

නොමැති බව පෙනී ගියේය. චිත්තිකරුට විරුඬව චෝදනා ඉදිරිපත්කර ඇත්තේ කිසිම සාක්ෂියක් ගෙනහැර නොදක්වීමෙනි. ශ්‍රේෂ්ඨාධිකරණයෙහි නොෆ : ඇස්. සී. 1345 කොළඹ මහේස්ත්‍රාත් උසාවියේ නොමිමර 19682 දරණ නොබෝද දෙනලද තීරණයක් සලකා බලන විට නඩුවේ සිදුවී ඇති නඩුවිභාගය නීති විරෝධී වේ. එම නිසා මම චිත්තිකරු නිදහස් කරමි.'' 'ඕත්‍ර පුවා අක්වී' (Autrefois Acquit) නොහොත් එබදුම කලින් නඩුවකින් නිදහස් කළ බව කියන ආඥාවනය රඳා පවත්නේ අපරාධ නඩුවිධාන සංග්‍රහයේ 330 වන ඡේදය ඇසුරු කරගෙන ය. එම ඡේදයෙන් මෙම කරුණට අදළ කොටස කියැවෙන්නේ මෙසේය.

'' (1) නියම ලෙස අධිකරණ බලය පවත්නා උසාවියකින් යම් චෝදනාවක් පිළිබඳව නඩුවක් විභාග කරනු ලැබ යම් පුද්ගලයකු එම චෝදනාවෙන් වරදකරුවකු වූ කලෙක හෝ නිදහස් වූ කලෙක එසේ වරදකරු වීම හෝ නිදහස් වීම වලංගුවී පවතින අතර ඒ පුද්ගලයා එම් චෝදනාවටම හෝ එම කරුණු උඩම 181 වන ඡේදය යටතේ සකස්කල හැකිව තිබුවෙන චෝදනාවකට හෝ, එසේම අංක 182 වන ඡේදය යටතේ වරදකරු බවට පත්කල හැකිව තිබු වෙන චෝදනාවකට හෝ භාජනා කොට ඔහුට විරුඬව යළින් නඩු නො පැවරිය යුතුය.''

මෙහිදී විනිශ්චය කිරීම සඳහා මතුවී ඇති කරුණ නම් මෙම චිත්තිකරු පිලිබඳව '' නියම අධිකරණ බලය පවත්නා උසාවියකින් දඬුවම් ලැබිය යුතු වරදක් පිලිබඳව විභාග කොට ඒ වරදින් නිදහස් කොට එම නිදහස් කිරීම මේනාක් වලංගුව පවතිද '' යන්නයි. මෙම ප්‍රශ්නය නිරාකරණය කිරීම පිණිස එකී නඩු විභාගයෙහිදී සිදුවූ දේ ගැන සලකා බැලීම අවශ්‍යය. තමාට විරුඬව තිබුණ චෝදනා චිත්තිකරු ඉදිරියේ කියවන ලදින් ඔහු තමා නිවැරදි කරුයයි යැළකර සිටියේය. පැමිණිලි පක්ෂය විසින් කැඳවන ලද සාක්ෂි කරුවන් චිත්ති පක්ෂය විසින් කෝන්තර ඇසීමට භාජන කළ පසු යලින් පැමිණිලි පක්ෂය ඔවුන්ගෙන් නැවත කට උත්තර අසන ලදී. ඉක්බිති පැමිණිල්ලෙන් කරුණු ඉදිරිපත් කිරීම හමාර විය. මින්පසු තමාගේ නිදහසට කරුණු කීමටයයි චිත්තිකරුට අණ ලැබුණ විට ඔහු වෙනුවෙන් පෙනිසිටි ආයාචකයා චිත්තිකරු වෙනුවෙන් සාක්ෂි නොකැඳවන බව කියා සිටී අතරම 187 (1) දරණ ඡේදයේ අඩංගු කරුණු අනුගමනය කර නොමැති නිසා චෝදනාව යදෙස්යයි කරුණු සැලකලේ 151 (2) දරණ ඡේදය අනුව කලයුතු දෙය පැහැර හැර තිබෙන බවද ඒත්තු ගන්වමිනි. මෙම තර්ක උගත් මහේස්ත්‍රාත්වරයා පිළිගත්තේය.

මගේ අදහසේ හැටියට මෙහි චිත්තිකරු නියම ලෙස ඥාඥබලය පවත්නා උසාවියකින් විභාග කරනු ලැබ නිදහස්වී නිමේ. එබැවින් ඔහු විසින් ඉදිරිපත් කරණ ලද ''ඕත්‍රපුවා අක්වී'' (Autrefois Acquit) නමැති ආඥාවනය පිළිගැනීම යුක්තියුක්තය. **මොහිදින් එ. පිටකොටුවේ පොලිස් පරික්ෂක** (59 නව නිති වාර්ත 217) නැමති නඩුවේදී අපරාධ නඩු විධාන සංග්‍රහයේ 151 (2) ඡේදයේ අඩංගු කරුණු අනුගමනය නොකිරීම නිසා නඩු විභාගයක් ශූන්‍ය වී යා හැකි බවත් මෙසේ කරුණු අනුගමනය නොකිරීම එම නඩු විධාන සංග්‍රහයේ 425 දරණ ඡේදයෙන් පිරිනැමෙන බලය උඩ නිදෙස් කළ නොහැකි බවත් තීරණය වී තිබේ. නඩු විභාගයක් ශූන්‍ය වීමේ හේතුවෙන් නියම අධිකරණ බලයක් ඇති උසාවියක් මගින් දෙන චිත්තිකරුවෙකු නිදහස් කිරීමේ නියෝගයක් ඇපැල් උසාවියකින් වෙනස් නොවී පවතින තාක් එසේ චිත්තිකරුවෙකු නිදහස් කිරීමේ නියෝගයක් නොවන බවට පත් නොවේ. මගේ අදහස නම් අපරාධ නඩු විධාන සංග්‍රහයේ 191 යහ 336 වැනි අනෙක් ඡේදයන් සලකා බලා '' නිදහස් කිරීම '' සහ නඩුව නිෂ්ප්‍රභා කිරීම යන වචනවල තේරුම් ගැන සඳහන් වී ඇති නඩු 330 වන ඡේදයේ ක්‍රියාකාරිත්වය පිළිබඳව අදළ නොවන බවයි. 151 (2) දරණ ඡේදයෙහි අඩංගු කරුණු ගැන නොසලකා චිත්තිකරුවෙකු වරදකරුවෙකු බවට පත්කර දඬුවම් කළ කල්හිද මා මේ කී අදහස එසේම බලපවත්වනු ඇත. මෙසේ වරදකරුවකු බවට පත්කිරීමේ තීන්දුව නොවෙනස්ව පවතී නම් චිත්තිකරු එම උසාවියෙන් දුන් දඬුවම විඳිය යුතුවාක් මෙන්ම මෙම වරදකරු බවට පත්කිරීම නොවෙනස්ව පවතිද්දී ඒ චෝදනාවටම ඔහුට විරුඬව නඩු පැවරුවහොත් එම නඩුව ගෙනයාමට බාධකයක් ලෙස ඔහුට තමා කලින් වරදකරු වූ බව යාඥාපූර්වකව සැළකර සිටිය හැක. මෙම පාඨයෙහි ''වලංගුව පවතී'' යන්න ඇපැල් උසාවියකින් නොවෙනස්වී පවතී යන තේරුමක් දෙන බව මගේ හැඟීමයි.

මෙම ඇපැල ඉවත දැමිය යුතුයයි මම අදහස් කරමි.

ආපසු යවන ලදී.