The
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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 LXII

WITH A DIGEST

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1962

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TABLE OF CASES

	PAGE
ALUVIHARE *vs.* SIYAMPILLAI	10
ARIYADASA AND OTHERS *vs.* INSPECTOR OF POLICE, CRIMES, MATARA	94
AUTO INSURANCE CO., LTD. *vs.* KULAS AND ANOTHER	47
BANK OF CEYLON *vs.* LIVERPOOL MARINE & GENERAL INSURANCE CO., LTD.	111
CEYLON TRANSPORT BOARD *vs.* SAMASTHA LANKA MOTOR SEVAKA SAMITHIYA	46
CHARLIE *vs.* DE SILVA	16
COMMISSIONER OF INLAND REVENUE *vs.* DAVITH APPUHAMY	108
CHRISTINA AND OTHERS *vs.* CECILIN FERNANDO AND ANOTHER	97
DIAS *vs.* ALWIS	30
ESWARALINGAM *vs.* SIVAGNANASUNDARAM, D.J., POINT PEDRO	89
FERNANDO *vs.* JAYATILLAKA	80
HENDRICK *vs.* PERERA	104
KANAPATHYPILLAI *vs.* KUMARASAMY	9
LAIRIS APPU *vs.* TENNEKOON KUMARIHAMY AND OTHERS	68
MALLOWS *vs.* COMMISSIONER OF INCOME TAX	24
MARIYA AND OTHERS *vs.* ARIYARATNE	33
MOHAMED *vs.* COMMISSIONER OF INLAND REVENUE	85
MOOSALEBBAI *vs.* ASIAUMMA	106
MUHANDIRAM NAIDE AND OTHERS *vs.* UKKU NAIDE	31
NAGAMUTTU *vs.* KUMARASEKERAM AND ANOTHER	102
PACKIR *vs.* ABIDAH	26
PIYASENA AND OTHERS *vs.* S.I. POLICE, BOMIRIYA	107
PEIRIS *vs.* GUNAWARDENA	14
PIYADASA *vs.* THE BRIBERY COMMISSIONER	73
PIYADASA *vs.* THE QUEEN	96
PREMARATNE *vs.* SUPPIAH	91
PREMAWANSA *vs.* SOMALATHA	22
QUEEN *vs.* PUNCHI BANDA	15
QUEEN *vs.* SIRIWARDENE	29
QUEEN *vs.* LIYANAGE AND OTHERS	49
RASIAH AND OTHERS *vs.* INSPECTOR OF POLICE, WELIMADA	20
SAHEED *vs.* SANITARY INSPECTOR, WATTEGAMA	84
SHELL CO. OF CEYLON, LTD. *vs.* PATHIRANA	83
SILVA *vs.* UNIVERSITY COUNCIL OF VIDYODAYA UNIVERSITY AND OTHERS	1
SILVA *vs.* ATTADASSI THERO	27
SOLOMON *vs.* PATHUMA AND ANOTHER	17
VANGUARD INSURANCE CO., LTD. *vs.* RUHUNU TRANSIT CO., LTD., *et al.*	11
WIJEGUNAWARDENE *vs.* VELIN APPUHAMY	110

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DIGEST

Appeal

Appeal from conviction under Bribery Act—Duty of Supreme Court to consider merits of appeal even though appellant unrepresented—Section 69A of Act as amended.

Whether there is a right of appeal under Act when other provisions of Act *ultra vires.*

PIYADASA *vs.* THE BRIBERY COMMISSIONER .. 73

Audi alteram partem

See under—CERTIORARI 1

Bail

Application for bail pending an appeal to the Court of Criminal Appeal—Circumstances to be taken into consideration in granting bail.

See under—CRIMINAL PROCEDURE 15

Bribery Act

Bribery Act, No. 11 *of* 1954, *as amended by the Bribery (Amendment) Act, No.* 40 *of* 1958*—Charges of bribery under—Conviction by Tribunal constituted under Bribery Act—Provisions of Act challenged as being unconstitutional—Appeal to Supreme Court—Right of appeal—Duty of Supreme Court to consider merits of appeal even though appellant unrepresented—Section 69A of Bribery Act, as amended.*

Ceylon Constitution (Orders-in-Council) 1946 *and* 1948*—Sections 29, 39 and 52 of the Order-in-Council of* 1948*—Power of Parliament to take away judicial power vested in Supreme Court and officers appointed by Judicial Service Commission and confer it on tribunals appointed otherwise—Validity of Bribery Act, as amended by Act, No.* 40 *of* 1958.

Held : (1) That the provisions of the Bribery Act, No. 11 of 1954, as amended by the Bribery (Amendment) Act, No. 40 of 1958, which give a right of appeal from the decisions of the Bribery Tribunal to the Supreme Court are *intra vires*. Hence a person convicted on charges of bribery under the Act has a right of appeal even though some of the other provisions of the Bribery Act are *ultra vires*.

(2) That, notwithstanding the absence of the appellant or of counsel representing him at the hearing of an appeal from a conviction under the Bribery Act, it is the duty of the Supreme Court to consider the appeal on its merits, as if it were an appeal from a decision of the District Court, in view of section 69*A* of the Act as amended by Act, No. 40 of 1958, which brings sections 339 to 352 of the Criminal Procedure Code into operation.

(3) That a consideration of the relevant provisions of the Ceylon Constitution (Order-in-Council) 1948 and other statutes shows that the judicial powers exercised by the Civil Courts of this country, when the Order-in-Council came into operation were, in fact, conferred on the Judges of the Supreme Court, and the judicial officers appointed by the Judicial Service Commission, although no special mention has been made therein to this effect. (*Vide* Senadhira's case, 60 C.L.W. 65 ; *Regina* v. *Liyanage and Others*, 62 C.L.W. 49).

(4) That the Ceylon Constitution (Order-in-Council) 1948, created the Judicial Service Commission and empowered only this statutory body to appoint judical officers.

(5) That the legislature could not take away the "judicial power" vested by our constitution in the Supreme Court and officers appointed by the Judicial Service Commission, and confer the same on tribunals otherwise appointed, without amending the Constitution.

(6) That an examination of the provisions of the Bribery Act as amended clearly shows that the legislature has purported to create a tribunal and has conferred upon it the judicial power exercised by the Supreme Court and other minor Courts presided over by judicial officers appointed by the Judicial Service Commission. Hence the Tribunals constiuted under the Bribery Act are unconstitutional. There is no provision in the Act which gives them power even to act as a fact-finding commission.

PIYADASA *vs.* THE BRIBERY COMMISSIONE .. 73

Certiorari

Certiorari—Courts Ordinance, section 42*—Vidyodaya University and Vidyalankara University Act, No.* 45 *of* 1958*—Appointment of Professor under section* 18(*e*) *of such Act—Dismissal of such Professor—Duty to act in a quasi-judicial capacity—Non-observance of the rules of natural justice—Construction of section* 18 (*e*) *of such Act—Acquiescence in order of discontinuance—Exhaustion of other remedies—Discretion whether to grant relief—Mandamus—Whether Professor is holder of a public office.*

The petitioner, then a lecturer, was promoted to the office of Professor and Head of the Departments of Economics and Business Administration in the Vidyodaya University with effect from 1st October, 1960. The petitioner thereafter functioned in that capacity, until the Vice-Chancellor acting on behalf of the Council purported, by letter dated 4th July, 1961, to terminate his services from that day. It was conceded on behalf of the respondents that the petitioner was not informed of the accusations against him which led to his dismissal, and was not afforded any opportunity of defending himself against them. It was contended for the petitioner that, in deciding whether to terminate his services the Council was bound to act in a quasi-judicial manner, and inasmuch as they had not done so the order of dismissal should be quashed by way of *Certiorari*. It was contended for the respondent, firstly, that the Council in any event was not bound to act in a quasi-judicial manner in deciding whether to dismiss a person in the petitioner's position ; secondly, that the petitioner must in law be considered to have been appointed under section 18 (*f*) of the Act, and in the case of the dismissal of persons so appointed no duty to act in a quasi-judicial manner arose ; thirdly, that the petitioner was not entitled to the remedy sought as he had acquiesced in his dismissal ; fourthly, that the

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remedy by way of *Certiorari* should not be given as other remedies were available ; and fifthly, that in the exercise of its discretion the Court should refuse the remedy of *Certiorari.*

Held : (1) That the power of the Council to suspend or dismiss an officer or teacher was governed by section 18 (*e*) of the Vidyodaya University and Vidyalankara University Act, which required that some incapacity or misconduct should, in fact, exist before suspension or dismissal could take place. In deciding whether such grounds exist, the Council is under a duty to act judicially and as it had admittedly not observed the rules of natural justice in this case, the petitioner was entitled to the remedy of *Certiorari.*

(2) That from a consideration of the letter of appointment, the reply thereto, the fact that the petitioner had functioned as Professor and Head of a Faculty thereafter and a letter written by the Vice-Chancellor on behalf of the Council on the 13th July, 1961, it was clear that the petitioner had been dismissed under section 18 (*e*) of the Act, and not under section 18 (*f*).

(3) That there was no evidence of the acquiescence of the petitioner in his dismissal.

(4) That, as the alternative remedies, in damages at Common Law or under the Industrial Disputes Acts, were not adequate, the petitioner was entitled to the remedy by way of *Certiorari.*

(5) That as the petitioner had, by reason of his local situation, a peculiar grievance of his own and was not applying as one of the public, he was entitled to the *writ of Certiorari ex debito justitiae.*

(6) That inasmuch as the question of whether the petitioner was the holder of a public office had not been argued, and the grant of Mandamus was discretionary, no order relating to mandamus would be made.

SILVA *vs.* THE UNIVERSITY COUNCIL OF THE VIDYODAYA UNIVERSITY AND OTHERS 1

Charge

Framing thereof to be a necessary pre-condition to conviction.

See under—HOUSING & TOWN IMPROVEMENT ORDINANCE 84

Charge of " cheating " under section 398 of Penal Code—Need elements of offence be set out in charge.

FERNANDO *v.* JAYATILLEKE 80

Misjoinder of charges

See under—CRIMINAL PROCEDURE CODE 30

Civil Procedure Code

Civil Procedure Code, section 85—Evidence Ordinance, sections 41 and 44.

Divorce, action for—Defendant's failure to appear and defend though served with summons—Decree nisi entered—Decree nisi made absolute without serving notice on defendant—Is decree absolute a nullity—Does such failure to serve notice deprive Court of jurisdiction—Can a third party collaterally attack such decree absolute.

C. (the respondent), applied for letters of administration to the estate of *L.* (deceased), as his widow. The appellants objected to the grant of letters to her, claiming that they themselves were the lawful heirs of *L.* Their objection was on the ground that *C.* was not legally married to *L.*, as she had been previously married to one *M.* from whom she had not obtained a valid divorce at the time of her second marriage to *L.* *C.* had instituted action for divorce against *M.* and obtained a *decree nisi* by default after due service of summons. This *decree nisi* was thereafter made absolute, but without serving notice of the *decree nisi* on the defendant.

It was contended on behalf of the appellants :—

(i) that the service of notice of the *decree nisi* was an imperative requirement under section 85 of the Civil Procedure Code and that in the absence of a compliance with this section, the Court had no jurisdiction to enter decree absolute ;

(ii) that the decree absolute entered in favour of *C.* was, therefore, a nullity and of no legal effect whatsoever and that her marriage to *C.* was a bigamous one as she was at this time legally married to *M.*

Counsel for the respondent submitted that the decree absolute was only voidable at the instance of *M.* in direct proceedings and that it was not open to collateral attack in other proceedings at the instance of third parties. He strongly relied on sections 41 and 44 of the Evidence Ordinance.

Held : (1) That the provisions of section 85 of the Civil Procedure Code apply to a *decree nisi* for default in a divorce action and the failure to serve notice of *decree nisi* on the defendant was a non-compliance with an imperative provision of the law.

(2) That as the defendant *M.*, in the divorce case was duly served with summons, though he did not appear and defend, the Court had jurisdiction to enter the decree absolute inasmuch as the service of the notice of *decree nisi*, though an imperative step, was not a condition precedent to an exercise of the jurisdiction of the Court.

(3) That the decree could have been reversed on this ground on appeal or set aside by direct action or application to Court, but it was not a nullity.

(4) That it was not open to any person to attack a decree absolute for divorce collaterally, in other proceedings, except on the grounds set out in sections 41 and 44 of the Evidence Ordinance.

CHRISTINA AND OTHERS *vs.* CECILIN FERNANDO AND ANOTHER 97

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Sections 94, 100, 109 (1)—*Interrogatories—Requirement in section* 100 *that Judge should direct whether they should be answered by affidavit or by " viva voce " examination—Absence of such direction in Judge's order—Interrogatories answered but not by affidavit—Effect.*

The learned trial Judge had struck out the answer of the defendant (appellant) under section 109 (1) of the Civil Procedure Code on the ground that the defendant had failed to comply with his order to answer certain interrogatories delivered through Court by the plaintiff. In making his original order the learned trial Judge had not directed whether the answer should be by affidavit or by *viva voce* examination as required by section 100 of the Civil Procedure Code. The defendant answered the interrogatories in writing but not by affidavit.

Held : That the defendant had not failed to comply with the order made by the learned trial Judge as he had, in fact, answered the interrogatories though not by an affidavit. The learned trial Judge was, therefore, wrong in striking out his defence.

ALUVIHARE AND SIYAMPILLAI 10

Sections 184, 188, *and* 408—*Trial—Questions in dispute and evidence not recorded—Facts on which judgment based appearing only in the judgment—Effect.*

The plaintiff in this action asked that he be declared entitled to a certain land, that the defendants be ejected therefrom, and for damages. The defendants filed answer asserting that they were entitled to a decree in their favour under section 3 of the Prescription Ordinance by virtue of possession for the period prescribed therein, and asked that the action be dismissed. The case was set down for trial. At the trial the matters in dispute were at no time recorded, and the proceedings did not show what questions the parties submitted for the decision of the Court. No evidence for either party was recorded. The premises in question were inspected, and after the production of some documentary evidence, order was delivered in open Court in the presence of the parties.

Held : (1) That inasmuch as the procedure prescribed by law for an action had not been observed, no valid decree had resulted. The provisions of sections 184 and 188 of the Civil Procedure Code should have been complied with.

(2) That the case did not fall within the ambit of section 408 of the Civil Procedure Code.

MUHANDIRAM NAIDE *vs.* UKKU NAIDE 31

Writs of Prohibition and Mandamus on District Judge—Notice issued by District Judge on party before inquiring into a complaint—Notice disobeyed—Attachment issued—Order for security on production after arrest, to ensure appearance—Judge's right to make such orders—Civil Procedure Code, sections 137 *and* 138.

Held: (1) That a judge has a right to notice a party to appear before him in order that an inquiry might be held into any matter pending before him.

(2) That where the party noticed fails to obey such notice, the Judge is entitled to enforce obedience to it by issuing an attachment against him.

(3) That when such a party is arrested and produced before the Court, the Court is entitled under section 138 of the Civil Procedure Code to order him to give bail or other security to ensure his appearance and to release him on his complying with such order.

Per SANSONI, J.—" In my view there was a clear case for inquiry. Money had been paid out, as the Judge thought *per incuriam* and which was claimed by the substituted defendants as due to them. It was the duty of the Court to inquire into their complaint and for that purpose to summon the 1st and 2nd defendants and to require them to deposit in Court the money which had been paid out to them until such time as the rights of parties could be ascertained. "

ESWARALINGAM *vs.* SIVAGNANASUNDARAM .. 89

Sections 325, 326—*Delivery of possession to judgment-creditor by Fiscal's officer—Judgment-creditor complaining of being hindered or obstructed in taking complete and effectual possession—Hindrance or obstruction taking place two days after delivery of possession—Can the procedure laid down in these sections be invoked by judgment-creditor in the circumstances.*

Held : That the procedure laid down in sections 325 and 326 of the Civil Procedure Code cannot be invoked by a judgment-creditor, where the hindrance or obstruction complained of takes place two days after the Fiscal had delivered possession of the land to him. In the present case the judgment-creditor had been in possession for two days before the act of re-entry by the judgment-debtor.

NAGAMUTTU *vs.* KUMARASEKERAM AND ANOTHER .. 102

Civil Procedure Code, sections 402, 403—*Abatement of action—Case fixed for trial—Joint motion to take case off trial roll as negotiations for settlement in progress—Court abating action " ex mero motu " owing to lapse of over* 12 *months since last order without plaintiff taking any steps to prosecute action—Is the Court empowered to make such order.*

On a joint motion filed by the parties to this action, Court made order taking the case off the trial roll on the ground *inter alia* that negotiations for settlement were in progress. Later the case was ordered to be laid by. After a period of over twelve months since the last order, the Court, *ex mero motu* and without notice to the plaintiff, abated the action as the plaintiff had failed to take any steps to prosecute the action. The plaintiff subsequently applied for the setting aside of the order of abatement, but the application was refused. The plaintiff appealed.

Held : (1) That the order of abatement was wrongly entered by the learned District Judge as there was no

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step that was necessary to prosecute the action that the plaintiff was required to take.

(2) That as the order of abatement was entered without any notice to or knowledge of the plaintiff it was open to the plaintiff to question the validity of the order in appropriate proceedings in the same case at any time. He was not bound to appeal from the order of abatement under the provisions of the Civil Procedure Code relating to appeals notwithstanding lapse of time.

BANK OF CEYLON *vs.* LIVERPOOL MARINE AND GENERAL INSURANCE CO., LTD. 111

Section 772.

See under—LANDLORD AND TENANT 17

Companies Ordinance

Companies Ordinance (*Cap.* 145), *sections* 161, 164, 166, 216-200 *and* 243—*Voluntary winding-up of company—Action filed against company before winding-up—Liability disputed—Application by liquidator to stay action—Assets of company sufficient to pay creditors in full—Order directing stay of action—Correctness of order.*

Plaintiff, an Insurance Company, instituted this action against the defendant Company for the recovery of Rs. 41,294.11 being insurance premia due on certain buses insured with the plaintiff. Shortly thereafter the defendant Company went into liquidation and a liquidator was appointed, who was later added as a defendant. The defendants filed answer stating *inter alia*,

(*a*) that the amount due to the plaintiff was only Rs. 23,646.05 after setting off certain claims due to the defendants from the plaintiff ;

(*b*) that the assets of the defendant were compulsorily acquired by the Ceylon Transport Board under the Motor Transport Act of 1957 and compensation payable for such assets has not been paid and also that such assets as were in their hands were insufficient to pay the plaintiff's claim ;

(*c*) that the action must be stayed and the plaintiff asked to prove his claim in the winding-up proceedings.

The learned District Judge granted this application and the plaintiff appealed.

Held : (1) That the learned District Judge should not have made the order appealed from, as such an order would not be just and beneficial to the parties concerned.

(2) That in the case of a voluntary winding-up, a stay of an action can be asked for only under section 243 read with section 166 of the Companies Ordinance. Section 166 applies only to cases of winding-up by Court.

(3) That in this action the Court should not stay proceedings because :

(*a*) there can be no prejudice caused to the creditors of the defendant, as the added-defendant's affidavit shows that there are sufficient assets available for payment to creditors in full ;

(*b*) the defendant's liability which is disputed has, in any event, to be adjudicated upon in a Court of Law ;

(*c*) a stay must necessarily cause prejudice to the plaintiff.

VANGUARD INSURANCE CO., LTD. *vs.* RUHUNU TRANSIT CO., LTD. 11

Compensation for Improvements

Compensation for improvements—Defendant in occupation of land on an informal lease permitting erection of permanent buildings of specified dimensions and paying ground rent—Action for ejectment of defendant after construction of said buildings—Claim by defendant for compensation in respect of his improvements—Order by trial Court that claim for compensation can only be enforced after defendant vacates land—Plea of " ius retentionis ".

The defendant entered into occupation of a land and erected buildings thereon after the execution of a non-notarial document which purported to be a lease executed by the plaintiff, as owner, the object of the purported lease being that such person should construct a permanent building of specified dimensions, paying a monthly ground rent. The defendant who was subsequently sued for ejectment claimed compensation for the improvements he had made. The learned District Judge held that the defendant was entitled to compensation but that the right could only be enforced after he vacated the land. The defendant appealed.

Held : (1) That the document being non-notarial was void, and the defendant was never a tenant of the plaintiff.

(2) That the law applicable in such a situation is laid down in the decision of Garvin, J., in *Nugapitiya* v. *Joseph*, (28 N.L.R. 140) and the defendant must be accorded the rights of a *bona fide* possessor and is entitled a *jus retentionis*.

WILLIAM SILVA *vs.* ATTADASSI THERO 27

Constitution Order-in-Council, 1946

Section 88 (1)—*Effect of—Scope of section* 29 (1).

Section 52 (1)—*Unity of Supreme Court.*

See under—CRIMINAL PROCEDURE CODE .. 49

Sections 29, 39 *and* 52—*Power of Parliament to take away judicial power vested in Supreme Court.*

See under—BRIBERY ACT 73

Court of Requests

Tenancy action—Value of premises over Rs. 300/- —*Test of jurisdiction.*

See under—LANDLORD AND TENANT 91

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Action for rent and ejectment filed in Court of Requests—Circumstances in which action will be transferred to District Court.

See under—COURTS ORDINANCE 104

Courts Ordinance

Section 42.
See under—CERTIORARI 1

Section 6—*Can power to nominate a Bench for a Trial-at-Bar be vested in a Minister.?*

See under—CRIMINAL PROCEDURE CODE .. 49

Courts Ordinance (Cap. 6), section 79—Action for rent and ejectment filed in the Court of Requests—Claims in reconvention and plea of "jus retentionis" by defendant—Application to Supreme Court by defendant for an order transferring such action to the District Court on the ground that the Court of Requests had no jurisdiction—Circumstances in which such a transfer will be ordered.

The plaintiff filed action in the Court of Requests for ejectment of the defendant, averring that the defendant had become his tenant on a monthly tenancy of certain premises at a rent of Rs. 70/- per month and that he had given the defendant notice to quit the premises but that the defendant continued to remain in wrongful and unlawful occupation. In his answer the defendant stated *inter alia* that he had given money to the plaintiff for the construction of a bakery on these premises and that he had spent a further sum of Rs. 7,000/- on repairs and improvements. He claimed to be entitled to a *jus retentionis* for this aggregate amount. Thereafter the defendant (petitioner) made the present application to the Supreme Court for the transfer of the case to the District Court on the ground that the Commissioner of Requests would have no jurisdiction to entertain his claim in reconvention.

Held : (1) That the circumstances of the present case did not conclusively exclude the possibility that the defendant's claim to a *jus retentionis* was justified. Thus the claim and counter-claim in the present case were intimately connected in that each party claimed a right to possession of the land.

(2) That the Supreme Court would, in these circumstances, order the transfer of an action filed in the Court of Requests, to the District Court.

HENDRICK *vs.* PERERA 104

Criminal Law (Special Provisions Act), No. 1 of 1962

Direction and nomination by Minister of Justice—Trial-at-Bar—Validity—Does Act offend against principle of separation of powers in the Constitution—Validity of sections 8 and 9.

See under—CRIMINAL PROCEDURE CODE .. 49

Criminal Procedure

Charge—Framing thereof to be a necessary pre-condition for conviction.

See under—HOUSING AND TOWN IMPROVEMENT ORDINANCE 84

Application for bail pending an appeal to the Court of Criminal Appeal—Circumstances to be taken into consideration in granting bail.

Held : That the petitioners should be released on bail in view of : (*a*) the short sentence imposed ; (*b*) the fact that their appeals would not be listed for hearing at the next sitting of the Court of Criminal Appeal ; (*c*) the fact that it was unlikely that the petitioners would abscond in the event of their appeals being dismissed.

QUEEN *vs.* PUNCHI BANDA 15

Criminal Procedure—Trial judge disbelieving prosecution witnesses and accepting defence version of incident—Can he thereafter proceed to convict the accused by acting only on certain parts of the evidence given by the prosecution witnesses—Defence version revealing that the accused had acted in the exercise of their right of private defence—Accused to be entitled to an acquittal in these circumstances.

Held : (1) That where a magistrate unequivocally rejects the evidence of the prosecution witnesses, he cannot in the absence of corroboration, pick and choose certain parts of their evidence and then proceed to convict the accused.

(2) That on the evidence given by the accused, which the learned Magistrate had accepted, this was a case where the accused had acted in the exercise of their right of private defence. Their conviction should, therefore, be quashed.

ARIYADASA *vs.* INSPECTOR OF POLICE (CRIMES), MATARA 94

Forfeiture of car used for offence under Poisons Ordinance—Principles applicable.

See under—POISONS, OPIUM AND DANGEROUS DRUGS ORDINANCE 47

Criminal Procedure Code

Sections 148 (1), 151 (2), 187 (1)—*Accused persons brought to Court otherwise than on summons or warrant—Evidence of persons who brought them to Court not recorded as directed by section* 151 (2)—*Are the provisions of section* 151 (2) *applicable only to cases where the proceedings have commenced under section* 148 (1) (*d*)—*Does failure to hold examination directed by section* 151 (2) *vitiate conviction—Principle not applicable where accused surrenders to Court.*

Held : (1) That as the 1st to 11th accused-appellants in the present case had been brought into Court otherwise than on summons or warrant, and the Magistrate had not complied with section 151 (2) of the Criminal Procedure Code by examining the per-

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son who brought them into Court before framing charges against them, their convictions were vitiated.

(2) That this reasoning did not apply to the case of the 12th accused-appellant, as he was not brought into Court by anybody but had surrendered to Court. However, he, too, was entitled to be discharged as : (*a*) the charge of unlawful assembly could not be maintained against him owing to the discharge of the other accused-appellants ; and (*b*) the other offences with which he was charged could not have been established against him beyond reasonable doubt.

Per HERAT, J.—" I think the real test as to whether there should be compliance with the provisions of section 151 (2) is not whether the accused are brought into Court in custody, but as stated in section 187 (1) where the accused are brought into Court without prior summons or warrants. "

RASIAH AND OTHERS *vs*. INSPECTOR OF POLICE, WELIMADA 20

Section 184—*Misjoinder of charges—Whether illegality, or irregularity which can be cured.*

On count 1 of the indictment all the accused were charged with, in the course of the same transaction, committing house-breaking by entering into premises No 570, Pathiragoda, and also premises No. 953, Wattegedera. On counts 2 to 5, the 2nd, 3rd, 4th, 5th, 6th, 7th and 8th accused were charged with house-breaking in respect of premises No. 570, Pathiragoda, and on counts 6 to 10 the 1st, 2nd, 4th, 5th, 8th, 9th and 10th accused were charged with house-breaking in respect of premises No. 953, Wattegedera. The 1st accused was not charged with committing any offence in respect of premises No. 570, Pathiragoda, and the 3rd accused was not charged with committing any offence in respect of premises No. 953, Wattegedera.

Held : (1) That there had been a misjoinder of charges.

(2) That section 184, of the Criminal Procedure Code, did not permit such a joinder inasmuch as it was not alleged that all the accused acted jointly in respect of both acts of house-breaking.

(3) That the misjoinder amounted to an illegality and was not an irregularity which could be cured.

QUEEN *vs*. SIRIWARDENE 29

Criminal Procedure Code, section 440*A*—*Trial-at-Bar—Direction and nomination by Minister of Justice under Criminal Law* (*Special Provisions*) *Act, No.* 1 *of* 1962—*Whether such nomination and direction valid.*

Official Language Act, No. 33 *of* 1956 *read with Language of the Courts Act, No.* 3 *of* 1961—*Whether nomination and direction should be in Sinhala—Validity of sections* 8 *and* 9 *of Criminal Law* (*Special Provisions*) *Act.*

Constitution Order-in-Council, 1946, *section* 88 (1)—*Effect thereof—Whether judges assembled pursuant to the Minister's nomination and direction constitute the Supreme Court—Scope of section* 29 (1) *of the Constitution Order-in-Council—" Peace, Order and Good Government "—" Mala fides " of Minister in making direction—Whether ascertainable by proceedings in Court.*

Criminal Law (*Special Provisions*) *Act—Whether it offends against principle of the separation of powers in the Constitution—Whether Minister's power of nomination was in pith and substance a power of appointment—Section* 52 (1) *of Constitution Order-in-Council—Unity of Supreme Court—Whether nomination was a violation thereof.*

Courts Ordinance, section 6—*Whether power of nomination constituted an exercise of judicial power—If so, whether it can be vested in the Minister—Is such vesting " ultra vires " the Constitution—Principle that justice should not only be done, but should manifestly and undoubtedly be seen to be done—Whether nomination by Minister offends against this principle.*

On the 23rd June, 1962, the Minister of Justice, purporting to act under section 440 A of the Criminal Procedure Code as amended by section 4 of the Criminal Law (Special Provisions) Act, No. 1 of 1962, filed document " A " in the Registry of the Supreme Court, and informed the Court that he directed that the trial of twenty-four persons named therein in respect of three specified offences all falling under Chapter VII of the Penal Code be held before the Supreme Court at Bar by three judges without a jury. Later that same day the Attorney-General exhibited to the Court an Information—document " B " and informed the Court that the same twenty-four persons had committed the offences which had been specified therein, and sought the issue by the Court of lawful process against the said persons. Thereafter, the Minister of Justice, again on the same day, purporting to act under section 9 of the Criminal Law (Special Provisions) Act, No. 1 of 1962, filed in the Court document " C " nominating T. S. Fernando, L. B. de Silva and Sri Skanda Rajah, JJ., as the three judges who were to preside over the trial of the persons referred to above to be held in pursuance of the direction contained in document " A ". Acting upon the said direction and nomination the afore-mentioned judges ordered summons to issue on the twenty-four persons named in the afore-mentioned documents. On 30th July, 1962, all the defendants being present and represented by Counsel, the judges called upon the defendants to make their pleas in answer to the charges contained in the Information. The following preliminary objections were then raised to the trial proceeding before the judges, and are stated in the order in which they are dealt with in the judgment :—

1. That " the nomination of judges is contrary to law and that the Court has no jurisdiction " and that " (*a*) The direction by the Minister is null and void ; and (*b*) The nomination of the Judges by the Minister is null and void ". The basis of this objection was that the directon and nomination were not in Sinhala, and, therefore, were not valid by reason of section 2 of the Official Language Act, No. 33 of 1956, read with the Language of the Courts Act, No. 3 of 1961.

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2. That " this Court cannot take cognizance of the Information laid against the defendants, and it has no jurisdiction to try the case because it is not a validly or properly or lawfully constituted Court ; nor is it competent to hold a Trial-at-Bar ". In pursuance of this objection, it was argued—

(*a*) That the substitution of the Minister of Justice for the Governor in section 440A of the Criminal Procedure Code was not competent, and that, therefore, the direction given by the Minister of Justice was of no effect ;

(*b*) That the Judges being assembled to hear this case in pursuance of the direction made by the Minister, they constituted a Special Court or Tribunal and not the Supreme Court ;

(*c*) That section 8 of the Criminal Law (Special Provisions) Act 1 of 1962 was *ultra vires* the Legislature, inasmuch as by section 29 (1) of the Constitution Order-in-Council Parliament is only given power to make laws " for the peace, order and good government of the Island " and that this section did not, in fact, promote the peace, order, and good government of the Island.

3. That " (*a*) The constitution of this Court is contrary to law, and, therefore, the Court has no jurisdiction to try the case ;

(*b*) In any event, the direction under section 440A of the Criminal Procedure Code and the nomination under section 9 of the Criminal Law (Special Provisions) Act are bad in law ".

(i) In pursuance of this objection, it was argued that even if the power conferred on the Minister to issue a direction is *intra vires* the powers of the legislature under the constitution, or is not in conflict with them, *mala fides* of the Minister in making this particular direction vitiated it ;

(ii) In pursuance of this objection, and of objection 2, it was argued that the Constitution of Ceylon embodied a Separation of Powers, and that section 9 of the Criminal Law (Special Provisions) Act 1 of 1962 was invalid inasmuch as it violated this principle ;

(iii) In pursuance of this objection it was further argued that section 9 was invalid inasmuch as it was in pith and substance a power of appointing Judges of the Supreme Court, and contravened section 52 (1) of the Constitution Order-in-Council ;

(iv) In pursuance of this objection, and objection 2 above, it was further argued that the Supreme Court was one and indivisible, and that the power of nomination given to the Minister by section 9 violated the unity and indivisibility of the Court, and thereby was in contravention of section 52 (1) of the Constitution Order-in-Council which impliedly entrenched the existence of the Supreme Court ;

(v) In pursuance of this objection, and objection 2 above, it was further argued that the nomination of the three Judges for this Trial-at-Bar effected by the Minister of Justice was an exercise of the Judicial power of the State, and was invalid. The Attorney-General did not contest that judicial power in the sense of the judicial power of the State is vested in the Judicature, *i.e.*, the established Civil Courts of this country.

4. It was also contended that, even if the power of nomination was *intra vires* the Constitution, it offended, in the context of this particular case against the cardinal principle in the administration of justice that justice should not only be done, but should manifestly and undoubtedly be seen to be done.

Held : (1) With regard to objection (1), that as English was still admittedly the language of the Court, the communication by the Minister, to the Court by documents made out in English, of the direction and nomination by him, was a sufficient compliance with the existing law.

(2) With regard to objection (2) (*a*), that having regard to the language of section 88 (1) of the constitution Order-in-Council, 1946, which empowered the Governor to modify, add or adapt the provisions of any law " *as appears to him necessary or expedient*", the Minister of Justice could be substituted for the Governor.

With regard to objection (2) (*b*), that the fact that the Judges had assembled to hear this case in pursuance of the direction made by the Minister did not by itself have the effect of constituting the Judges a Special Court or Tribunal and not the Supreme Court.

With regard to objection (2) (*c*), that the power given to Parliament " to make laws for the peace, order, and good government of the Island " authorized the utmost discretion of enactment for the attainment of the objects pointed to, and that the Court would not inquire whether any particular enactment did, in fact, promote the peace, order, or good government of the Island.

(3) With regard to objection (3) (*b*) (i), that inasmuch as section 8 of the Criminal Law (Special Provisions) Act provided that " any direction issued by the Minister of Justice under section 440A of the Criminal Procedure Code shall be final and conclusive, and shall not be called in question in any Court, whether by way of Writ or otherwise ", no proceedings could be entertained by a Court to test the validity of a direction ; and inasmuch as the direction did not on the face of it contain evidence of *mala fides*, and no proceedings could be entertained which sought to establish *mala fides*, the direction could not be attacked on that ground.

With regard to objection (3) (*b*) (ii), that if by a separation of powers or functions of Government was meant a mutually exclusive separation of such powers or functions as obtains in the American Constitution or even in the Constitution of the Commonwealth of Australia, which was itself based on the American Constitution, there was no such mutually exclusive separation of governmental functions in our Constitution.

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With regard to objection (3) (*b*) (iii), that inasmuch as the Judges nominated by the Minister were already Judges of the Supreme Court, and in holding a Trial-at-Bar under section 440A of the Criminal Procedure Code they functioned as Judges of the Supreme Court and in no other capacity, the nomination of the Judges by the Minister did not constitute an appointment to any new office or even to any office as such.

With regard to objection (3) (*b*) (iv), that if the vesting of the power of nomination in a person outside the membership of the Supreme Court is not *ultra vires* the Constitution on the ground that the power is to be exercised by a person in whom judicial power cannot be vested, the nomination by such a person to constitute the Bench to hear a Trial-at-Bar under section 440A was no different from the nomination by the Chief Justice of such a Bench prior to the enactment of Act, No. 1 of 1962, and that, therefore, the fact of nomination or selection did not violate the concept of the oneness of the Supreme Court.

With regard to objection 3 (*b*) (v), that because—

(*a*) the power of nomination conferred on the Minister was an interference with the exercise by the Judges of the Supreme Court of the strict judicial power of the State vested in them by virtue of their appointment in terms of section of 52 of the Ceylon (Constitution) Order-in-Council, 1946, or was in derogation thereof; and

(*b*) the power of nomination was one which had hitherto been invariably exercised by the Judicature as being part of the exercise of the judicial power of the State, and could not be reposed in anyone outside the Judicature, section 9 of the Criminal Law (Special Provisions) Act, No. 1 of 1962, was *ultra vires* the Constitution and, therefore, void.

(4) With regard to objection 4, that even if a different conclusion had been reached regarding the validity of section 9 of the Criminal Law (Special Provisions) Act, the Judges would have been compelled to give way to this principle which has now become ingrained in the administration of common justice in this country.

THE QUEEN *vs.* LIYANAGE AND OTHERS 49

Sections 167, 168, 169, 171—*Penal Code, section* 398—*Accused charged with offence of "cheating"—Particulars required to be set out in charge—Need the elements of the offence as set out in section* 398 *of the Penal Code also be set out in charge.*

Held : (1) That where an accused is charged with the offence of cheating it is not obligatory to refer in the charge to the elements constituting such offence as the offence defined in section 398 of the Penal Code is given the specific name of "cheating". The fact that the charge did not contain the words by "deceiving" was, therefore, not material.

(2) That the charge in the present case also complied with section 168 of the Criminal Procedure Code by setting out the manner of cheating and the person cheated. It could thus not be attacked as defective on this ground either.

(3) That the decision in *Zahir* v. *Cooray*, 19 C.L.W. 104, had no application to the present case as: (*a*) there was no difference in the manner of cheating as set out in the charge and the evidence led by the prosecution at the trial; (*b*) the appellant's own account of the transaction showed that he had in no way been misled by the charge.

(4) That having regard to the evidence in the case, it was clear that there was no substance in the submission that the prosecution had failed to prove that the appellant had a dishonest intention at the time he received the money.

FERNANDO *vs.* JAYATILLAKA 80

Sections 202 *and* 217—*Indictment—Withdrawal of one of several counts at District Court trial by Crown Counsel—Conviction of accused on remaining counts after trial—Failure to alter charge under section* 172 *of the Criminal Procedure Code—Effect of such withdrawal.*

Two persons were indicted before the District Court on eight counts and Crown Counsel withdrew one count at the trial. The trial proceeded on the remaining counts without altering the indictment under section 172 of the Criminal Procedure Code and the accused were convicted. The accused appealed.

Held : That the effect of the withdrawal of one of the counts from the indictment was that the indictment had been altered in a manner not permitted by section 202 of the Criminal Procedure Code. The proceedings on the indictment were, therefore, invalid and the accused must be discharged.

PIYADASA *vs.* THE QUEEN 96

Section 325—*Order under—Is there a right of appeal ?*

See under—PENAL CODE 107

Decree

Whether decree nisi entered without serving notice on the defendant a nullity—Can a third party callaterrally attack such decree absolute.

See under—CIVIL PROCEDURE CODE 97

Divorce

See under—CIVIL PROCEDURE CODE .. 97

English Law

How far applicable to Executors and Administrators.

See under—EXECUTORS AND ADMINISTRATORS .. 33

Entail and Settlement Ordinance

See under—EXECUTORS AND ADMINISTRATORS .. 33

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Evidence Ordinance

Sections 41 *and* 44.
See under—CIVIL PROCEDURE CODE 97

Section 3.
See under—WORKMEN'S COMPENSATION 110

Executors and Administrators

Testator's immovable property devised by Last Will to wife and children in equal shares—Share of wife subject to a "fideicommissum" in favour of children—Probate issued to wife as executrix—Sale by executrix of some lands so devised including a land mortgaged by testator, for the payment of testator's debts—Authority of Court not obtained—Does such sale pass title to the vendees.

Introduction of the English law of Executors and Administrators into Ceylon—Its development in Ceylon—Extent to which English law now applicable in Ceylon—Charters of 1801 *and* 1833.

Powers of an executor to deal with immovable property of a testator—Need to exercise such power with due regard to provisions of our law.

Executor's power to sell property subject to a "fideicommissum" for the payment of testator's debts—Effect of Roman-Dutch Law and the Entail and Settlement Ordinance—Property vesting in minors on testator's death—Duties of executor in regard to sale thereof—Need to submit executor's decision to sell for scrutiny of Court—Matters to be considered before sale of property subject to "fideicommissum".

One *C.*, by his Last Will devised all his movable and immovable property to his wife *S.* and his two sons, *P.* and *A.* (minors), in equal shares. The one-third share of the wife was subject to a *fideicommissum* in favour of the two sons. The Last Will further provided that the pension and gratuity due to *C.* from his employers should be received by his wife and utilised for the purpose of obtaining a discharge of a mortgage bond and two promissory notes and that any balance left was to be expended on the education of the said children. This Last Will was duly proved in Court and Probate was issued to *S.* as executrix.

The land called Godakumbura was one of the lands mortgaged under the said bond and this had been sold along with two others by the executrix to a third party who had sold it to the defendants. This sale by the executrix had not been sanctioned by Court.

Thereafter *P.* (yet a minor) instituted a partition action in respect of Godakumbura, claiming a 4/27 share thereof. The defendants resisted this claim on the ground that they were the sole owners by right of purchase. The learned District Judge held that the sale by the executrix did not pass the title of the plaintiff and his brother, *A.*, as the authority of the District Court had not been obtained for the sale of these shares. The defendants appealed.

Held : That the said sale by the executrix without the authority of the District Court was not valid.

His Lordship, the Chief Justice, having examined at length the relevant judicial dicta contained in numerous previous decisions of the Supreme Court, in order to ascertain how much of the English law of Executors and Administrators obtains in Ceylon, proceeds to set out the net result of the earlier decisions as follows :—

"*I have cited the earlier dicta in extenso in order to show the development of the law. The net result of the decisions is—*

(a) *that the executor has power over both movable and immovable property and may sell the property left by the testator in accordance with the directions in the Will ;*

(b) *that the immovable property specially devised vests not in the executor but in the heir to whom it is devised subject to the executor's right to have recourse to it in its due order for the payment of the testator's debts ;*

(c) *that the executor's assent or a conveyance by him is not necessary to pass title to heirs appointed in the Will or the heirs at law ;*

(d) *that the executor has power to sell the property left by the testator for the payment of his debts, but that power must be exercised with due regard to the provisions of our law.*"

Thereafter His Lordship goes on to consider the executor's power to sell *fideicommissary* property for the payment of the testator's debts and states :—

(1) that the power has to be exercised with due regard to the provisions of the Roman-Dutch law ;

(2) that where the executor has to resort to the sale of property vested in minors, on the death of a testator, he cannot sell such property without submitting his decision to the scrutiny of the District Court, which is vested with jurisdiction over the persons and property of minors and a supervisory power over the sale of property belonging to them.

Further, following *Voet*, *Van der Linden*, *Sande* and other Roman-Dutch jurists and also decisions of the Courts both in South Africa and Ceylon and in view of the Entail and Settlement Ordinance of 1876, His Lordship lays down that :—

(*a*) the property of minors cannot be sold except on good grounds and then only with the sanc-

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tion of Court (matters which a Court should take into consideration before and after granting such sanction are quoted *in extenso* from *Sande*) ;

(*b*) the fact that it is the executor who wishes to sell does not alter inflexible rule ;

(*c*) the executor in Ceylon, even when exercising the rights of an executor under the English law, cannot do so in disregard of our law.

MARIYA AND OTHERS *vs.* ARIYARATNE 33

Fideicommissum

See under—EXECUTORS AND ADMINISTRATORS .. 33

See under—REGISTRATION OF DOCUMENTS .. 68

Forfeiture

Forfeiture of car used to commit offence.

See under—POISONS, OPIUM AND DANGEROUS DRUGS ORDINANCE 47

Housing and Town Improvement Ordinance

Charge—Framing thereof—Necessary pre-condition for conviction—Continuing offence—Housing and Town Improvement Ordinance, section 15 (3).

The petitioner was convicted of occupying a building without a certificate of conformity from the Chairman of the Wattegama Urban Council and sentenced to pay a fine of Rs. 50/- on 18th November, 1960. An appeal from this conviction was dismissed. The Public Health Inspector of the Urban Council then moved on 23rd December, 1961, that the Court be pleased to pass a "continuing sentence" on the petitioner, as he was continuing to occupy the building without a certificate of conformity. The Magistrate caused notice to be issued on the petitioner to show cause why a "continuing sentence" should not be passed on him, but in the ensuing proceedings no charge was framed against the petitioner. The defence did not lead any evidence, and after the evidence of the Public Health Inspector was led, the petitioner was convicted of an offence under section 15 (3) of the Housing and Town Improvement Ordinance and sentenced to pay a "continuing fine".

Held : That these latter proceedings were invalid as there was no legal trial by reason of the fact that no charge had been framed against the petitioner.

SAHEED *vs.* SANITARY INSPECTOR, WATTEGAMA .. 84

Husband and Wife

See under—DIVORCE 97

See under—MAINTENANCE 30

Income Tax

Income Tax Ordinance (Cap. 242), section 6—Meaning of term "the opinion of the Commissioner" in section 6 (2) (b)—General opinion in mind of Commissioner in regard to such matters insufficient.

Held : That "the opinion of the Commissioner" referred to in section 6 (2) (*b*) of the Income Tax Ordinance is an opinion that must not only be generally entertained in the mind of the Commissioner in regard to such matters, but must also *be put into words in a document* so as to serve, in each case, as evidence to guide those functionaries who have the legal duty cast on them to determine "net annual value" for the purposes of section 6 of the Income Tax Ordinance.

MALLOWS *vs.* COMMISSIONER OF INCOME TAX .. 24

Income Tax Ordinance, section 9 (1)—Business purchased by assessee—Litigation between assessee and certain others over ownership of such business—Are legal expenses so incurred deductible in ascertaining assessee's profits from such business for taxation purposes.

The assessee purchased a business known as the Kandy Ice Company on 16th August, 1949, on a deed of transfer executed on that date. A proposal was thereafter made as between the assessee and certain other persons to form a limited liability company to take over the Kandy Ice Company and its assets. However, even though contributions had been made towards the capital of the Company to be so formed, the plan was abandoned owing to differences of opinion between the prospective shareholders. Subsequently there was litigation between the assessee and some of these other persons, who took up the position that the assessee had, when he purchased the Kandy Ice Company, been acting on behalf of a syndicate of which they were members. They sought a declaration in these terms and also asked for their proportionate share of the profits from the business. This case was ultimately settled and a sum of money paid to the claimants by the assessee who was acknowledged to be sole owner of the business.

The assessee was assessed for taxation purposes in respect of the profits of the Kandy Ice Company from the date of his purchase of the business. He then claimed a deduction in respect of legal expenses incurred by him on account of this case. This claim was disallowed both by the assessor and the authorised adjudicator but on appeal to the Board of Review the claim was upheld.

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Upon a case being stated for the opinion of the Supreme Court at the instance of the assessor :—

Held : That these legal expenses of the assessee were deductible under section 9 (1) of the Income Tax Ordinance in ascertaining the assessee's profits from his business known as the Kandy Ice Company.

COMMISSIONER OF INLAND REVENUE *vs.* DAVITH APPUHAMY 108

Income Tax Ordinance (Cap. 242) as amended by Act, No. 13 of 1959—Method of assessing income of a business for taxation purposes—Monies spent in purchasing refreshments for customers—Such expenditure incurred by persons other than the proprietor or his executive officers—Are such expenses permissible deductions in assessing income of the business.

Taxing statutes to be strictly construed—Construction favourable to assessee to be adopted where two constructions possible.

This was a case stated under section 74 of the Income Tax Ordinance, as amended, in which the opinion of the Supreme Court was sought on the question whether the assessee, the proprietor of a business, could claim as deductible expenses under the Ordinance, monies spent by his salesmen on entertainment in connection with his trade or business in assessing the income of his trade or business for the purpose of taxation.

Held : That in assessing the income of his business for the purpose of taxation the assessee was entitled to deduct as permissible deductions, the expenses incurred by his employees other than executive officers, in entertaining the customers. Such expenses are not covered by section 12 (*a b*) iii of the Income Tax Ordinance, as amended.

Per TAMBIAH, J.—" Express and unambiguous language is absolutely indispensable in statutes passed for the purpose of imposing a tax [*vide* Craies on Statute Law (5th Ed.), (1952), by Sir Charles Odgers, p. 106,] for such a statute is always strictly construed [*vide* Maxwell on Interpretation of Statutes, (9th Ed.), (1946), by Sir Gilbert Jackson, p. 126]. In a taxing statute, if therefore, two constructions are possible, one in favour of the assessee and the other in favour of the assessor, the Court must adopt that construction which is favourable to the assessee."

MOHAMED *vs.* COMMISSIONER OF INLAND REVENUE .. 85

Industrial Disputes

Industrial Disputes Act—Workman dismissed—Application to Labour Tribunal for relief on ground of discrimination on the part of employer—Tribunal ordering reinstatement of workman—Appeal to Supreme Court—President of Tribunal misdirecting himself on question of law—Order of dismissal restored.

A workman (mechanic) employed by the Ceylon Transport Board was dismissed because he had broken a rule which provided that any employee who removed a vehicle belonging to the Board either without authority or without a driving licence would be dismissed. He had, in fact, taken out a bus belonging to the Board out of the Piliyandala Depot and driven it without a licence and the bus had gone off the road.

He applied for relief to the Labour Tribunal and the main ground submitted on his behalf to the President of the Tribunal was that the Board had been guilty of discrimination. This was based on the fact that about an year later an assistant Foreman attached to the same Depot who drove a bus without authority and without possessing a driving licence, was not dismissed, but was only transferred with a final warning.

The President of the Tribunal, relying on a passage from a text book, held that the case of the assistant Foreman was proof of discrimination against the mechanic. The Board appealed.

Held : That the President had misdirected himself in law by thinking that the passage quoted or the assistant Foreman's case, which took place subsequently, applied to the present case.

CEYLON TRANSPORT BOARD *vs.* SAMASTHA LANKA MOTOR SEWAKA SAMITHIYA 46

Industrial Disputes Act, No. 43 of 1950, as amended by Act, No. 62 of 1957, sections 31 B and 31 C—Dismissal of employee held to be both lawful and justified—Has a Labour Tribunal jurisdiction to grant relief to such employee thereafter.

Held : That even where a Labour Tribunal has held that the termination of an employee's services was both lawful and justified, it has jurisdiction to grant relief to such employee. Section 31 B of the Industrial Disputes Act (as amended) read with section 31 C (1) empowers the Tribunal to make such an order.

SHELL CO. OF CEYLON, LTD. *vs.* PATHIRANA .. 83

Interpretation

Interpretation of taxing statutes.
See under—INCOME TAX 85

Interrogatories

See under—CIVIL PROCEDURE CODE 10

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Jus Retentionis

See under—COMPENSATION FOR IMPROVEMENTS.

SILVA *vs.* ATTADASSI THERO 27

See under—COURTS ORDINANCE.

HENDRICK *vs.* PERERA 104

Kandyan Marriage and Divorce Act

Is maintenance payable after dissolution of marriage.

See under—MAINTENANCE 22

Landlord and Tenant

(*See also under*—RENT RESTRICTION).

Landlord and tenant—Action for ejectment, arrears of rent and damages—Finding that tenant was in arrears after notice to quit had been given—Defence of payment of rent by sub-tenant to head landlord—Can judge decide on such questions if no issues were raised—Civil Procedure Code, section 772.

The plaintiff instituted this action against the 1st defendant on the basis that the 1st defendant was her tenant. The plaintiff alleged that she had given notice at the end of February, 1958, to the 1st defendant to quit and deliver possession of the premises at the end of March, 1958. She claimed arrears of rent from 1st July, 1956 to 31st March, 1958, and damages from 1st April, 1958, till she was placed in possession. The 1st defendant denied any tenancy between the plaintiff and himself, but stated that he held the premises on a tenancy between himself and the owners of the premises. The trial judge found that the 1st defendant was a tenant of the plaintiff, that he was not in arrears of rent for the period 1st July, 1956 to 31st March, 1958, but that he had not paid the rent for April, 1958, and that he was thus in arrears of rent for more than one month after it had become due. He accordingly gave judgment for the plaintiff in ejectment, with damages from 1st April, 1958, till the plaintiff was placed in possession. The trial judge also held that, as the 1st defendant had paid the head-landlord (*i.e.*, the landlord of the plaintiff) a sum sufficient to cover the rents for the period July, 1956 to April, 1958, and that as these payments had been made for the benefit of the plaintiff, this should be set off against the rent. The plaintiff did not appeal from the decision of the trial judge, and in appeal plaintiff's counsel was compelled to accept the judge's finding that no rent was due to her for the period 1st July, 1956 to 31st March, 1958. The 1st defendant alone preferred the present appeal. It was, however, argued for the plaintiff that he was under section 772 of the Civil Procedure Code entitled to attack so much of the findings of the trial judge as were adverse to him for the purpose of his argument, so long as he did not ask for the judgment and decree of the lower Court to be in any way altered.

Held : (1) That the trial judge was not entitled to hold that the 1st defendant was in arrears for April, 1958, inasmuch as the case made by the plaintiff in his plaint was that the arrears were in respect of a period prior to the giving of the notice to quit in February, 1958, and that, therefore, the plaintiff's action must necessarily fail.

(2) That, inasmuch as no issue had been raised on the question, and no argument had been addressed to him thereon, the learned judge had misdirected himself in considering the question whether the 1st defendant's payments to the head landlord could be set off against the rent due to the plaintiff.

(3) That under section 772 of the Civil Procedure Code it was only open to the plaintiff to accept the correctness of the decision made against him, and on that basis, if the findings help him, try to support the decree.

SOLOMON *vs.* PATHUMA AND ANOTHER 17

Landlord and tenant—Tenant compelled to leave premises owing to communal disturbances—Refusal by landlord to restore possession of premises to tenant on latter's return—Action by tenant for restoration of possession—Was there an abandonment of the premises by the tenant—Value of premises over Rs. 300/- *—Does Court of Requests have jurisdiction to try such action—Test to be applied in determining whether Court of Requests has such jurisdiction.*

The plaintiff brought this action in the Court of Requests averring that the defendant who had been his landlord had unlawfully dispossessed him from the premises which he had been occupying as tenant. The plaintiff prayed that he be restored to possession of the said premises and also asked for damages. The defendant while admitting that the plaintiff had been his tenant contended that the plaintiff had abandoned the said premises towards the end of May, 1958, and the tenancy had thereby terminated. He also took up the position that the Court of Requests had no jurisdiction to try this case.

The evidence given by the plaintiff was that he was compelled to leave the premises on 27th May, 1958, owing to communal disturbances in the area, but that he returned to Gampaha in June and asked the defendant to give the premises back to him. The defendant had refused. The learned trial Judge accepted the plaintiff's version and went on to hold

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that there had been a justifiable abandonment of these premises by him. The defendant appealed.

Held : (1) That the plaintiff could not in law be said to have abandoned the premises at all. The question whether there had been a justifiable abandonment did not, therefore, arise.

(2) That the Court of Requests had jurisdiction to try this case. The present action was not a possessory action but one based on the breach of the contract of tenancy. The true test to be applied in cases of this nature was not the value of the land but the monthly rental and damages claimed.

PREMARATNE *vs.* SUPPIAH 91

See also under—COURTS ORDINANCE 104

Language Acts

Official Language Act, No. 33 of 1956, read with Language of the Courts Act, No. 3 of 1961—Whether direction and nomination by Minister under the Criminal Law (Special Provisions) Act, should be in Sinhala.

See under—CRIMINAL PROCEDURE CODE .. 49

Legal Maxims

" AUDI ALTERAM PARTEM " 1

Justice must not only be done but should manifestly and undoubtedly be seen to be done .. 49

Maintenance

Maintenance—Kandyan Marriage and Divorce Act, sections 33, 35—Order to pay maintenance—Dissolution of marriage thereafter—Effect of such dissolution on maintenance order—Order to pay maintenance on divorce—How enforced.

Held : (1) That once an order for dissolution of a marriage is made by the District Registrar under the provisions of the Kandyan Marriage and Divorce Act, an order for maintenance previously made by a Magistrate ceases to operate in respect of any period subsequent to the dissolution. A distress warrant for the recovery of arrears of maintenance can, therefore, be issued only with regard to arrears due up to the date of dissolution.

(2) That when the District Registrar acting under the provisions of the Act, has, in ordering the dissolution of the marriage also ordered the payment of maintenance, the order for such payment can be enforced in the same manner as an order made by the District Court in a matrimonial action under Chapter 52 of the Civil Procedure Code.

PREMAWANSA *vs.* SOMALATHA 22

Maintenance—Inability of the wife to live with husband owing to his mother's interference—Cruelty—What amounts to cruelty.

Held : That cruelty on the part of a husband towards his wife need not necessarily be physical cruelty inflicted personally by the husband on the wife. It can be cruelty whether physical or mental caused by persons whose presence it is within the power of the husband to remove from the marital home.

DIAS *vs.* ALWIS 30

Illegitimate child—Jurisdiction of Quazis to grant maintenance—Sections 2 and 47 of Muslim Marriage and Divorce Act (Chapter 115).

Held : That a Quazi has no jurisdiction to hear and determine an application for maintenance in respect of an illegitimate Muslim child whose mother has at no time been married to the alleged father. The provisions of section 47 (1) (*c*) of the Muslim Marriage and Divorce Act, Chapter 115, should be read with section 2 of the said Act.

MOOSALEBBAI *vs.* ASIAUMMA 106

Mandamus

On District Judge—Notice issued by judge on party before inquiring into complaint—Notice disobeyed—Attachment issued.

See under—CIVIL PROCEDURE CODE 89

Misjoinder of Charges

See under—CRIMINAL PROCEDURE CODE .. 29

Muslim Marriage and Divorce Act

Jurisdiction of Quazis to grant maintenance.

See under—MAINTENANCE 106

Natural Justice

Appointment of professor—Dismissal of such professor—Duty to act in a quasi-judicial capacity—Non-observance of the rules of natural justice.

See under—CERTIORARI 1

Official Language Act No. 33 of 1956

Official Language Act, 33 of 1956, read with Language of the Courts Act, No. 3 of 1961—Trial-at-Bar—Whether nomination of Bench and direction should be in Sinhala.

See under—CRIMINAL PROCEDURE CODE .. 49

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Paddy Lands Act

Paddy Lands Act, No. 1 of 1958, section 21—Eviction order made on report under section 21 (1) without issuing summons—Validity of such order.

Held : That an order of eviction made by a magistrate on receipt of a report under section 21 (1) of the Paddy Lands Act, No. 1 of 1958, against persons in possession of the paddy land referred to in such report without issuing a summons as required by sub-section (2) of that section, is invalid.

CHARLES *vs.* DE SILVA 16

Penal Code

Section 398—Need the elements of the offence also be set out in the charge..

FERNANDO *vs.* JAYATILLAKA 80

Charge of mischief thereunder—Accused entitled to use of footpath—Complainant erecting fence encroaching on such footpath—Fence cut down by accused—Accused convicted and bound over under section 325 of Criminal Procedure Code—Appeal—Is there a right of appeal from such order—Revisionary powers of Supreme Court—Can such conviction be sustained.

The accused-appellants were admittedly entitled to the use of a footpath. The complainant erected a fence encroaching on it, thereby rendering it narrower. The accused-appellants cut down the newly erected fence and were charged with mischief. The learned Magistrate convicted them, although he found that the new fence encroached on the footpath and dealt with them under section 325 of the Criminal Procedure Code. The accused appealed. On a preliminary objection being taken that there was no right of appeal from an order made under section 325.

Held : That there is no right of appeal from an order under section 325 of the Criminal Procedure Code.

Acting in revision :—

Held further : That as the footpath was encroached upon, the accused as lawful users were entitled in law to remove the encroachment. An act done in the exercise of a legal right cannot become wrongful because there may be some sense of spite against the complainant.

PIYASENA AND OTHERS *vs.* S.I. POLICE, Bomiriya .. 107

Poisons, Opium and Dangerous Drugs Ordinance

Poisons, Opium and Dangerous Drugs Ordinance (Cap. 172), section 77—Forfeiture of car used to commit offence under such Ordinance—Application by absolute owner of car to have order set aside—No order of forfeiture to be made unless such owner was convicted or is shown to have been implicated in such offence.

Held : (1) That in the present case although the 2nd respondent was the registered owner of the car in question, it was the petitioner who had hired it to the 2nd respondent under a hire-purchase agreement and who was the absolute owner at the relevant time.

(2) That an order of forfeiture under section 77 of the Poisons Ordinance should not be made unless the absolute owner was convicted of or in some way implicated in the commission of the offence.

AUTO INSURANCE CO., LTD. *vs.* KULAS AND ANOTHER 47

Prohibition

On District Judge—Notice issued by judge on party before inquiring into complaint—Notice disobeyed—Attachment issued.

See under—CIVIL PROCEDURE CODE 89

Quo Warranto

Writ of "quo warranto"—Chairman of Village Committee elected by a majority of one—One of the members who voted for the Chairman subsequently held by Supreme Court to be not duly elected—Can election of Chairman be invalidated.

Held : That there is no provision of law which invalidates any act of a *de facto* member of a Village Commitee merely for the reason that subsequently a Court of competent jurisdiction has declared that his election as a member of that committee was void.

KANAPATHYPILLAI *vs.* KUMARASAMY 9

Registration of Documents

Registration of Documents Ordinance, section 7—Fraud or Collusion—Whether deed of gift obtained by these means—"Fideicommissum"—Acceptance by fiduciary alone sufficient.

In 1919 the plaintiff's grandfather by deed of gift donated the land to the plaintiff's father, whereby (*inter alia*) the plaintiff's father obtained a life-interest, after the termination of which the land was to devolve on the plaintiff and her brother. In April, 1945, the plaintiff's father sold the land to the

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defendant, in breach of the *fidei commissum* created by the deed of gift. In August, 1945, the plaintiff obtained her brother's interests in the land by virtue of a deed of partition entered into between them. In May, 1951, the plaintiff's father died, and in September, 1951, the plaintiff brought this action to obtain possession of the land from the defendant. The original deed of gift executed in 1919 was never registered, but the deed of transfer executed in April, 1945, was registered in that month. The defendant, therefore, argued that the unregistered deed of gift was void as against him in terms of section 7 (1) of the Registration of Documents Ordinance. The plaintiff in reply submitted that fraud and collusion existed in obtaining the deed of transfer, and that this operated to defeat the defendant's priority in terms of section 7 (2) of the Registration of Documents Ordinance.

There was evidence to the effect—

(*a*) that the plaintiff's father accepted the Deed of Gift as fiduciary and gave it to his wife for safe-keeping ;

(*b*) that he had written a letter to the Commissioner of Stamps in April, 1935, in which he had stated that he had only a life-interest ;

(*c*) that he was generally short of money and wanted to raise some money on the land and obtained possession of the Deed of Gift from his wife ;

(*d*) that, in 1944, he leased the land to the defendant (a rich man who had taken part in some questionable deals) for ten years, although the power to lease was limited to four years and describing the land as one in which he held only a life-interest ;

(*e*) that shortly after, the plaintiff's husband unsuccessfully attempted to obtain an assignment of the said lease from the defendant urging that the father could not have leased it for more than four years and that there was a *fideicommissum* ;

(*f*) that, thereafter, in April, 1945, *i.e.*, four months after the execution of the said lease bond, the father executed in favour of the defendant the transfer deed, (the material document in the case) through the same notary, who attested the lease and describing himself as being entitled to the land " by right of paternal inheritance " from his deceased father.

The District Judge found for the plaintiff on the ground that fraud and collusion had been established, but the Supreme Court on appeal upheld the judgment, but not the finding of fraud and collusion.

Held : That there was sufficient evidence to establish that the deed of transfer had been obtained by fraud and collusion, and that the District Judge's finding should be restored.

LAIRIS APPU *vs.* TENNEKOON KUMARIHAMY AND OTHERS 68

Rent Restriction

See also under—LANDLORD AND TENANT.

Rent Restriction Act, No. 29 *of* 1948, *sections* 3, 23—*Tenant agreeing to pay as rent an amount in excess of the authorised rent—Consent decree entered in terms of such agreement—Subsequent action filed by landlord for arrears of rent and ejectment—Amount payable as rent put in issue by tenant in such action—Plea of " res adjudicata "—Does the former decree operate as " res adjudicata " and prevent tenant from re-agitating this question.*

The plaintiff sued the defendant, his tenant, for arrears of rent and ejectment claiming that the rent payable by the defendant was Rs. 10/- a month. The defendant denied that he was in arrears and took up the position that the authorised rent was only Rs. 6.55 a month. It was admitted that if this was the amount payable, the defendant was not in arrears. The premises in question were governed by the Rent Restriction Act and the authorised rent within the meaning of the Act, was, in fact, Rs. 6.55 a month. However, the plaintiff contended that in a previous case as between himself and the defendant, decree had been entered of consent by which the defendant was required to pay him Rs. 10/- a month as rent for these same premises and that this decree operated as *res adjudicata* and prevented the defendant from re-agitating this question.

Held : That the previous decree did not operate as *res adjudicata*. The decree flowed not from an adjudication by the Court on the merits but from the consent of parties and in view of the scheme of the Rent Restriction Act (No. 29 of 1948) the tenant could not have consented to pay as rent a sum greater than that which the Act declared to be the authorised rent.

PEIRIS *vs.* GUNAWARDENA 14

Rent Restriction (Amendment) Act, No. 10 *of* 1961, *sections* 13 (1), (2) *and* (3)—*Whether action or proceedings is or are pending—Appeal pending in action—Effect.*

Plaintiff instituted an action on 24th November, 1960, for rent and ejectment against the defendant, claiming this relief on a ground not specified in section 13 (1) of the Rent Restriction (Amendment) Act, No. 10 of 1961. Judgment was delivered for plaintiff in the Court of first instance on 20th March, 1961, but the defendant appealed, and this appeal was pending on the 30th April, 1961. The question for decision was whether these proceedings became null and void under section 13 (3) of the aforementioned Act, on the ground that they were pending on the day immediately preceding the date of commencement of the Act. The Act came into force on the 1st May, 1961.

Held : That the proceedings were pending on the 30th April, 1961, and, therefore, the action or proceedings must be deemed to have been and be null and void.

PACKIR *vs.* ABIDAH 26

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Res Judicata

Rent Restriction Act, No. 29 of 1948, sections 3, 23—Tenant agreeing to pay as rent an amount in excess of the authorised rent—Consent decree entered in terms of such agreement—Subsequent action filed by landlord for arrears of rent and ejectment—Amount payable as rent put in issue by tenant in such action—Plea of "res adjudicata"—Does the former decree operate as "res adjudicata" and prevent tenant from re-agitating this question.

The plaintiff sued the defendant, his tenant, for arrears of rent and ejectment claiming that the rent payable by the defendant was Rs. 10/- a month. The defendant denied that he was arrears and took up the position that the authorised rent was only Rs. 6.55 a month. It was admitted that if this was the amount payable, the defendant was not in arrears. The premises in question were governed by the Rent Restriction Act and the authorised rent within the meaning of the Act was, in fact, Rs. 6.55 a month. However, the plaintiff contended that in a previous case as between himself and the defendant, decree had been entered of consent by which the defendant was required to pay him Rs. 10/- a month as rent for the same premises and that this decree operated as *res adjudicata* and prevented the defendant from re-agitating this question.

Held : That the previous decree did not operate as *res adjudicata*. That decree flowed not from an adjudication by the Court on the merits but from the consent of parties and in view of the scheme of the Rent Restriction Act (No. 29 of 1948) the tenant could not have consented to pay as rent a sum greater than that which the Act declared to be the authorised rent.

PEIRIS *vs.* GUNAWARDENA 14

Roman-Dutch Law

How far applicable to Executors and Administrators —"fideicommissum" property.

See—EXECUTORS *vs.* ADMINISTRATORS 33

Servitude

Accused entitled to use of footpath—Complainant erecting fence encroaching on such footpath—Fence cut down by accused—Criminal liability.

See—PENAL CODE 107

Supreme Court

Whether Judges assembled in pursuance of a direction made by Minister of Justice under Criminal Law (Special Provisions) Act, No. 1 of 1962, constituted the Supreme Court—Unity and indivisibility of Supreme Court.

See under—CRIMINAL PROCEDURE CODE .. 49

Trial-At-Bar

See under—CRIMINAL PROCEDURE CODE. 49

Vidyodaya University and Vidyalankara University Act, No. 45 of 1958

Appointment of professor under section 18 (e)—Dismissal of such professor—"Certiorari"—Is professor holder of a public office—Construction of section 18 (e).

See under—CERTIORARI 1

Village Committee

Chairman elected by majority of one—One of the members who voted for the Chairman subsequently held by Supreme Court to be not duly elected—Can election of Chairman be invalidated.

See under—QUO WARRANTO 9

Words and Phrases

"in the opinion of the Commissioner" (Income Tax).
See under INCOME TAX 24

"peace, order and good government" (Constitution).
See under—CRIMINAL PROCEDURE CODE .. 49

Workmen's Compensation

Workmen's Compensation Ordinance (Cap. 117 of the Legislative Enactments, 1938 Ed.)—Claims for compensation thereunder—Rules of evidence to apply at inquiry into such application—Burden of proof to be on applicant—Evidence Ordinance, section 3.

Held : (1) That officers who deal with claims for compensation under the Workmen's Compensation Ordinance are exercising judicial functions and are bound by the rules of evidence.

(2) That in the present case, as the burden was on the applicant to establish that the deceased was employed as a "workman" and he failed to establish that fact, there was no burden on the respondent to prove that the deceased was an independent contractor.

(3) That upon the evidence available in the present case, the inference that there was a contract of service or employment is only as equally justifiable as the inference that there was a contract for work to be "independently" performed, with the result that neither position had been "proved". The applicant had, therefore, failed to discharge the burden which lay upon him.

WIJEGUNEWARDENE *vs.* VELIN APPUHAMY .. 110

Writs

Certiorari.
See under—CERTIORARI 1

Mandamus.
See under—MANDAMUS 1
See under—CIVIL PROCEDURE CODE 89

Prohibition.
See under—CIVIL PROCEDURE CODE 89

Quo Warranto.
See under—QUO WARRANTO 9

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

LINUS SILVA *vs.* THE UNIVERSITY COUNCIL OF THE VIDYODAYA UNIVERSITY AND OTHERS

In the matter of an application for the issue of mandates in the nature of a Writ of Certiorari and a Writ of Mandamus in terms of section 42 *of the Courts Ordinance* (*Cap.* 6)

S.C. Application No. 378 *of* 1961.

Argued on : 16th and 17th October, 1961.
Decided on : 20th November, 1961.

Certiorari—Courts Ordinance, section 42*—Vidyodaya University and Vidyalankara University Act, No.* 45 *of* 1958*—Appointment of Professor under section* 18 (*e*) *of such Act—Dismissal of such Professor—Duty to act in a quasi-judicial capacity—Non-observance of the rules of natural justice—Construction of section* 18 (*e*) *of such Act—Acquiescence in the order of discontinuance—Exhaustion of other remedies—Discretion whether to grant relief—Mandamus—Whether Professor is holder of a public office.*

The petitioner, then a lecturer, was promoted to the office of Professor and Head of the Departments of Economics and Business Administration in the Vidyodaya University with effect from 1st October, 1960. The petitioner thereafter functioned in that capacity, until the Vice-Chancellor acting on behalf of the Council purported by letter dated 4th July, 1961, to terminate his services from that day. It was conceded on behalf of the respondents that the petitioner was not informed of the accusations against him which led to his dismissal, and was not afforded any opportunity of defending himself against them. It was contended for the petitioner that, in deciding whether to terminate his services the Council was bound to act in a quasi-judicial manner, and inasmuch as they had not done so the order of dismissal should be quashed by way of *Certiorari*. It was contended for the respondent, firstly, that the Council in any event was not bound to act in a quasi-judicial manner in deciding whether to dismiss a person in the petitioner's position ; secondly, that the petitioner must in law be considered to have been appointed under section 18 (*f*) of the Act, and in the case of the dismissal of persons so appointed no duty to act in a quasi-judicial manner arose ; thirdly, that the petitioner was not entitled to the remedy sought as he had acquiesced in his dismissal ; fourthly, that the remedy by way of *Certiorari* should not be given as other remedies were available ; and fifthly, that in the exercise of its discretion the Court should refuse the remedy of *Certiorari*.

Held : (1) That the power of the Council to suspend or dismiss an officer or teacher was governed by section 18 (*e*) of the Vidyodaya University and Vidyalankara University Act, which required that some incapacity or misconduct should, in fact, exist before suspension or dismissal could take place. In deciding whether such grounds exist, the Council is under a duty to act judicially and as it had admittedly not observed the rules of natural justice in this case, the petitioner was entitled to the remedy of *Certiorari*.

(2) That from a consideration of the letter of appointment, the reply thereto, the fact that the petitioner had functioned as Professor and Head of a Faculty thereafter and a letter written by the Vice-Chancellor on behalf of the Council on the 13th July, 1961, it was clear that the petitioner had been dismissed under section 18 (*e*) of the Act. and not under section 18 (*f*).

(3) That there was no evidence of the acquiescence of the petitioner in his dismissal.

(4) That, as the alternative remedies, in damages at Common Law or under the Industrial Disputes Acts, were not adequate, the petitioner was entitled to the remedy by way of *Certiorari*.

(5) That as the petitioner had, by reason of his local situation, a peculiar grievance of his own and was not applying as one of the public, he was entitled to the *writ of Certiorari ex debito justitiae*.

(6) That inasmuch as the question of whether the petitioner was the holder of a public office had not been argued, and the grant of Mandamus was discretionary, no order relating to mandamus would be made.

Cases referred to : *R.* v. *Electricity Commissioners ; Ex-parte London Electricity Joint Committee*, (1924) 1 K.B. 171; 130 L.T. 164; 39 T.L.R. 715.
R. v. *Manchester Legal Aid Committee*, (1952) 1 A. E.R. 480; (1952) 2 Q.B. 413.
Franklin v. *Minister of Town and Country Planning*, (1947) 2 A. E.R. 289; 1948 A.C. 87.
Vine v. *National Dock Labour Board*, (1956) 3 A. E.R. 947.
De Verteuil v. *Knaggs*, (1918) A.C. 557; 87 L.J.P.C. 128.
Subramaniam v. *Minister of Local Government and Cultural Affairs*, (1957) 59 N.L.R. 254.
The University of Ceylon v. *Fernando*, (1960) 61 N.L.R. 505; (1960) 1 A.E.R. 631
Sugathadasa v. *Jayasinghe and The Minister of Local Government*, (1958) 59 N.L.R. 457.
Suriyawansa v. *The Local Government Commission*, (1947) 48 N.L.R. 433; XXXV C.L.W. 36

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Nakkuda Ali v. *Jayaratne*, (1950) 51 N.L.R. 457 ; XLIII C.L.W. 33; 1951 A.C. 66
Abeygunasekera v. *Local Government Service Commission*, (1949) 51 N.L.R. 8
R. v. *Metropolitan Police Commissioner, Ex-parte Parker*, (1953) 2 A. E. R. 717 ; (1953) 1 W.L.R. 1150.
Ex-parte Fry, (1954) 2 A. E. R. 118; (1954) 1 W.L.R. 730.
R. v. *Postmaster-General, ex-parte Carmichael*, (1928) 1 K.B. 291; 43 T.L.R. 228; 137 L. T. 26
R. v. *Boycott, ex-parte Keasley*, (1939) 2 K.B. 651; (1939) 2 A.E.R. 626
Sirisena v. *Kotawera-Udagama Co-operative Stores, Ltd.*, (1949) 51 N.L.R. 263; XLI C.L.W. 1
R. v. *Wandsworth Justices*, (1942) 1 A. E.R. 56
The Queen v. *Justices of Surrey*, (1870) L.R. 5 Q.B. 466; 34 J.P. 614

H. V. Perera, Q.C., with *M. Tiruchelvam, Q.C., M. L. de Silva, T. Devarajah, U.B. Weerasekera* and *A. Wijesekera*, for the petitioner.

H. W. Jayewardene, Q.C., with *D. S. Wijeyewardene* and *Ranjit Dheeraratne*, for the respondent.

T. S. FERNANDO, J.

The Vidyodaya University and the Vidyalankara University Act, No. 45 of 1958, which became law on December 19, 1958, provided for the establishment, *inter alia*, of a University called the Vidyodaya University of Ceylon. Part III of that Act relates to the constitution of the University Authorities, and section 13 thereof declares that the Authorities of the University shall be the Court, the Council, the Senate, the Faculties, the General Board of Studies and Research, and such other bodies as may be prescribed by Statute as authorities of the University. Section 17 (2) describes the persons who shall constitute the membership of the Council, while by section 17 (1) the University Council is declared to be the executive body of the University. The 2nd to the 20th respondents to the application before me were the members of the Council at all times relevant thereto. The 1st respondent is the Council itself.

Section 31 of the Act provides that the appointment of a Professor or Lecturer in the University shall be made by the Council. The petitioner claims that on May 15, 1959, he was appointed by the Council as Lecturer, Grade I, and as Head of the Department of Economics. He claims further that on October 1, 1960, he was promoted as Professor and Head of the Department of Economics and Business Administration. He relies on two documents, " A " and " B " attached to his petition as evidencing his appointment. These documents are reproduced below :—

DOCUMENT " A "

VIDYODAYA UNIVERSITY OF CEYLON

Colombo 10,
1st Sept., 1960.

NUS SILVA, ESQ.,
Head of the Dept., of Economics,
Colombo.

POST OF PROFESSOR AND HEAD OF THE DEPT. OF ECONOMICS & BUSINESS ADMINISTRATION.

In pursuance of the decision of the Council to establish a Department of Business Administration in order to widen the scope of the Department of Economics, I am pleased to promote you to the Post of Professor and Head of the Departments of Economics and Business Administration with effect from 1st October, 1960. The salary scale attached to the post is Rs. 15,000/- 4 of Rs. 600/- and 4 of Rs. 900/- —Rs. 21,000/-. You will be entitled to cost of living, special living and rent allowances according to Government Rates. You will continue to be a contributor to the University Provident Fund.

This promotion is, however, subject to the passage of the University Budget for 1960/61.

Please acknowledge receipt of this letter. I shall be glad if you will please undertake the re-organisation of the Departments immediately so that the two Departments will commence academic work for the beginning of the Third Academic Year.

(Sgd.) DHARMASASTRONNATIKAMI
Vice-Chancellor.

DOCUMENT " B "

Room 250,
Bank of Ceylon Buildings,
Colombo 1.
2.9.60.

THE VEN. VICE-CHANCELLOR,
Vidyodaya University of Ceylon,
Maligakanda,
Colombo 10.

Ven'ble Sir,

POST OF PROFESSOR AND HEAD OF THE DEPT. OF ECONOMICS AND BUSINESS ADMINISTRATION.

I acknowledge with thanks your favour of the 1st September, 1960, and I am pleased to accept the above appointment with effect from 1st October, 1960.

Yours faithfully,

(Sgd.) LINUS SILVA,
Head of the Department of Economics

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The Vice-Chancellor, the 2nd respondent, who has signed document "A" is by virtue of section 11 (3) of the Act, Chairman of the Council. It is his statutory duty to convene all meetings of the Council, to secure that the provisions of the Act and of the Statutes, Regulations and Rules are duly observed, to give effect to the decisions of the Council regarding the appointment, dismissal or suspension of the officers and teachers of the University and to exercise general supervision over the educational arrangements of the University.

It is not disputed that after the letters "A" and "B" had passed between the 2nd respondent and the petitioner the latter did function as Professor and Head of the Department of Economics and Business Administration. On July 4, 1961, the 2nd respondent, as Vice-Chancellor addressed the letter "E" to the petitioner informing him that the Council at a meeting held that day had unanimously resolved to terminate his appointment in the University as from that day. That letter is reproduced below :—

DOCUMENT "E"

VIDYODAYA UNIVERSITY OF CEYLON,
Colombo 10.
4th July, 1961.

MR. LINUS SILVA,
P. O. Box 1342,
Colombo 1.

Dear Sir,

TERMINATION OF APPOINTMENT

You are hereby informed that the Council at its meeting held on the 4th of July, 1961, has unanimously resolved to terminate your appointment in the University as from today.

The Council has also decided to pay a sum equivalent to three months' salary less whatever amounts are due from you. The total now due is Rs. 1,151.15, as shown in the Schedule hereunder.

I am hereby conveying to you the decision of the Council. I enclose the cheque No. D/9 207613 for Rs. 3,346.15 (Three thousand three hundred and forty-six Rupees and Cents Fifteen only) ; being the balance due to you in terms of the decision of the Council.

Any books, answer scripts or other property of the University now in your custody should be returned by you.

(Sgd.) DHARMASASTRONNATHIKAMI,
Vice-Chancellor.

Schedule referred to :—

Allowance as Head of Department overpaid since appointment as Professor, October, 1960 to June, 1961	Rs.	900.00
Cost of Telegrams, paid from Petty Cash	"	5.65
Due on account of sale of Publications	"	10.00
Lectures delivered by Mr. K. T. R. de Silva in February, 1961 ..	"	235.50
Total due ..	Rs.	1,151.15

The petitioner contends that in terminating his appointment the respondents have acted wrongfully and unlawfully and also in violation of the rules of natural justice by not making the petitioner aware of the nature of the accusations against him and also by not affording him an opportunity of being heard in his defence. Various allegations, *e.g.*, of bias have been included in the petition and affidavit presented to this Court by the petitioner, and some of these have been refuted by affidavits presented by the respondents. It does not become necessary to examine and consider any of the allegations on the present application except that which is designed to show that the order embodied in letter "E" was made in violation of the rules of natural justice. Learned counsel appearing for the respondents admitted that the petitioner was not informed of the accusations against him and was not afforded any opportunity of defending himself against them. He contended however that the violation of natural justice, the non-observance of the *audi alteram partem* rule, is irrelevant in the present case where the respondents in dismissing the petitioner were acting not in a judicial or quasi-judicial capacity but purely in an administrative capacity. He submitted, for that reason, that their action was not liable to be canvassed by way of *certiorari.* Learned counsel for the petitioner, while not disputing that in deciding whether the petitioner was unfit to be a teacher of the University the Council acts in an administrative capacity, argued that in making that administrative decision as to unfitness the relevant law required the Council to ascertain the existence of certain facts objectively, and that in the ascertainment of these facts the Council was required to act judicially. It can hardly be doubted that, if in the process of arriving at a decision as to unfitness of the petitioner to remain as a teacher the Council is throughout acting in an administrative capacity, there is no room for the requirement of the observance of the rules of natural justice. The application therefore turns on the question whether at any

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stage in arriving at the administrative or subjective decision as to unfitness the Council is required to consider certain matters judicially. If so, the Council would be amenable to *certiorari*. If not, this application must fail.

The general principle which forms the basis of the jurisdiction of this Court to grant the remedy of *certiorari* is best stated in the oft-quoted words of Atkin, L.J., in *Rex* v. *Electricity Commissioners ; Ex-parte London Electricity Joint Committee*, (1924) 1 K.B. at 205 :—

> " But the operation of the writs (of prohibition and *certiorari*) has extended to control the proceedings of bodies which do not claim to be and would not be recognised as courts of justice. Whenever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."

Before a body of persons may be made amenable to this remedy, it has to be shown not only that such body has legal authority to determine questions affecting the rights of subjects but it must also be shown that the body is required to act judicially. Where these two conditions can be shown to exist, the legal authority of the body attracts to itself the duty to observe the rules of natural justice and a non-observance thereof constitutes one method of exceeding its jurisdiction. That the Council of the University has legal authority to determine questions affecting the rights of subjects is undeniable. Is it required to act judicially in determining such questions ?

The circumstances in which a person or body of persons is required to act judicially came to be examined by the Queen's Bench Division in *R.* v. *Manchester Legal Aid Committee*, (1952) 1 A.E.R. 480, at 489, where Parker, J., (as he then was) reading the judgment of the Court stated :—

> " The true view, as it seems to us, is that the duty to act judicially may arise in widely different circumstances which it would be impossible, and, indeed, inadvisable, to attempt to define exhaustively. Where the decision is that of a Court then, unless, as in a case, for instance, of justices granting excise licences, it is acting in a purely ministerial capacity, it is clearly under a duty to act judicially. When, on the other hand, the decision is that of an administrative body and is actuated in whole or in part by questions of policy, *the duty to act judicially may arise in the course of arriving at that decision.* Thus, if, in order to arrive at the decision, the body concerned has to consider proposals and objections and consider evidence, then there is a duty to act judicially in the course of that inquiry."

Again, in relation to a matter to which I shall advert later, at page 490 :—

> " If, on the other hand, an administrative body in arriving at its decision at no stage has before it any form of *lis* and throughout has to consider the question from the point of view of policy and expediency, it cannot be said that it is under a duty at any stage to act judicially : compare *Franklin* v. *Minister of Town and Country Planning* (1947) 2 A.E.R. at 289."

The relevant section—section 18—of the Vidyodaya University and the Vidyalankara University Act, No. 45 of 1958, empowers the Council " to suspend or dismiss any officer or teacher on the grounds of incapacity or conduct which, in the opinion of not less than two-thirds of the members of the Council, renders him unfit to be an officer or teacher of the University ". Whether the extent of the incapacity or misconduct reaches that stage at which the required majority of the members of the Court considers the officer or teacher in question unfit is a question to be determined solely by the members of the Council in their discretion. But whether incapacity or misconduct is established—whatever be its extent—appears to me no more than the ascertainment of an objective fact.

It is submitted on behalf of the petitioner that he was (and in law still is) a teacher of the University within the meaning of the expression " teacher" appearing in the interpretation section 61 of the Act. He was employed and paid by the University, although in accordance with the procedure laid down by Statute (section 31) he is appointed by the Council which is but one of the authorities of the University. The submission that the petitioner was a teacher is disputed by the respondents, but for reasons which will be indicated by me later in connection with another argument on behalf of the respondents I am satisfied that the submission is well founded.

The question whether the Council is at any stage of the decision as to unfitness required to act judicially must ultimately rest on the construction of the relevant words of the Statute reproduced by me above, but, however considered, the power to dismiss an officer or teacher on grounds of incapacity or misconduct can never, in my opinion, be construed as implying a power to dismiss merely on allegations of incapacity or misconduct. There must be proof of incapacity or misconduct, or at any rate some incapacity or misconduct must exist, although the members of the Council are constituted the judges

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both of their existence and of their sufficiency. Mr. Perera referred me to certain observations made by Lord Cohen in the course of the opinion he delivered in the House of Lords in *Vine* v. *National Dock Labour Board*, (1956) 3 A.E.R. at 947, a case in which also the question arose whether in exercising a particular power conferred by virtue of a statute a certain body was acting in an administrative as opposed to a judicial capacity. In reaching a conclusion that the body concerned in that particular case was acting in a judicial capacity that learned judge, in stating one of his reasons for that conclusion, observed :—

> "The significant language is, I think, as follows :- (*a*) In cl. 15 (1) and (2) the words "without adequate cause". The determination of whether there is adequate cause seems essentially a proper matter for decision judicially."

In the case of *De Verteuil* v. *Knaggs*, (1918) A.C. at 557, where power was given in an Ordinance to the Governor of Trinidad "on sufficient ground shown to his satisfaction" to transfer the indenture of immigrants from one employer to another, the Privy Council expressed the opinion that although no special form of procedure was precirsbed there was, apart from special circumstances, a duty of giving to any person against whom a complaint was made a fair opportunity to make any relevant statement which he may desire to bring forward and a fair opportunity to correct or controvert any relevant statement brought forward to his prejudice.

Certain local cases also bear on the question that calls for decision on the present application. The situation that must arise when the University Council is considering an exercise of the power of suspension or dismissal is not in essence different from the situation in which a Minister is placed in exercising his powers of dissolution of a Council or removal of a Chairman or members of a local authority under either section 197 of the Town Councils Ordinance, No. 3 of 1946 or section 61 of the Village Committees Ordinance. The relevant words of the sections in these Ordinances were :—

> "If at any time the Minister is satisfied that there is sufficient proof of . . ., the Minister may . . . by Order published in the *Gazette*, remove the Chairman from office."

As Gunasekara, J., in *Subramaniam* v. *Minister of Local Government and Cultural Affairs*, (1957) 59 N.L.R. 254, at 260, in rejecting an argument that because in the exercise of his discretion to make an Order under the provision of law referred to above the Minister may take into account considerations of policy and expediency and therefore *certiorari* does not lie to review such an Order, stated, "before the Minister can make an Order in the exercise of his discretion he must decide on evidence whether there is proof of the necessary facts, and at that stage he has a duty to act judicially". Then again, in the case of *The University of Ceylon* v. *Fernando*, (1960) 61 N.L.R. 505, at 512, where the expression that came on for interpretation was "where the Vice-Chancellor is satisfied that any candidate for an examination has acquired knowledge of the nature or substance of any question or the context of any paper before the date and time of the examination, or has attempted or conspired to obtain such knowledge, the Vice-Chancellor may suspend the candidate . . .", the Supreme Court, reversing the view taken by the District Judge, held that the Vice-Chancellor's functions were not administrative but quasi-judicial At the appeal taken to the Privy Council from the decision of the Supreme Court, the appellant's counsel disclaimed the contention that the Vice-Chancellor's functions under clause 8 were administrative and not quasi-judicial. In *Sugathadasa* v. *Jayasinghe and The Minister of Local Government*, (1958) 59 N.L.R. 457, at 471, where three judges of this Court were called upon to decide whether, in exercising his powers of dissolution of a Municipal Council, the Minister under section 277 (1) of the Municipal Councils Ordinance, No. 29 of 1947, was required to act judicially or quasi-judicially, the Court observed that "the ultimate test is, what did the legislature really intend by the language used. It may be stated as a general rule that words such as "where it appears to . . .", or "if it appears to the satisfaction of . . .", or "if the . . . considers it expedient that . . .", or "if the . . . is satisfied that . . ." standing by themselves without other words or circumstances of qualification, exclude a duty to act judicially". In the case before me the power of the Council to determine the unfitness of an officer or teacher is qualified by the words "on the grounds of incapacity or conduct" and, it seems to me, that the power can be exercised only where incapacity or misconduct exists whatever be the extent of that incapacity or misconduct. Therefore, although the Council is the judge of the extent of the incapacity or misconduct, in deciding whether incapacity or misconduct exists the Council is required to act not administratively, but judicially.

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Mr. Jayewardene, for the respondents, sought to find principally in certain observations of Canekeratne, J., in *Suriyawansa* v. *The Local Government Service Commission*, (1947) 48 N.L.R., at 433, as well as in the opinion of the Board of the Judicial Committee of the Privy Council in *Nakkuda Ali* v. *Jayaratne*, (1950) 51 N.L.R. at 457, support for his contention that the respondents were throughout acting in an administrative capacity and nothing more. There is point in Mr. Perera's suggestion that the observations of Canekeratne, J., went beyond the necessities of that particular case, and it must not be overlooked that the correctness of the view taken in *Suriyawansa's* case (*supra*) was doubted by Nagalingam, J., in the case of *Abeygunasekera* v. *Local Government Service Commission*, (1949) 51 N.L.R. at 8, although the observations of Nagalingam, J., in this case last-mentioned were themselves *obiter*. The decision in *Nakkuda Ali's* case (*supra*) has itself been the subject of no little controversy, but it is necessary to remember that the decision followed the view expressed by Their Lordships that when the Controller is cancelling a licence he is not determining a question, but is taking executive action to withdraw a privilege because he believes and has reasonable grounds to believe that the holder is unfit to retain it. These cases are not, in my opinion, of real assistance in the actual controversy that arises on the present application. Nor do I think that two other cases—English cases—cited by Mr. Jayewardene assist in the determination of the question whether the Council was throughout acting administratively. They were relied on for the proposition that where disciplinary action is taken against a person, the validity of that action, cannot be questioned by way of *certiorari*. In *R.* v. *Metropolitan Police Commissioner, ex parte Parker*, (1953) 2 A.E.R. at 717, which relates to the case of a cab driʌer who had his licence revoked by the proper police authority, the decision appears to me to have rested—as is seen in the judgment of Donovan, J., at page 721—on the ground that the revocation of a licence is a purely administrative act. In the other case relied on, *ex parte Fry*, (1954) 2 A.E.R. at 118, a writ of *certiorari* had been applied for to quash an order of a caution to be administered to a person in the service of a fire-brigade. There Lord Goddard, C.J., in the Queen's Bench Division stated that it seemed to him impossible to say that where a chief officer of a force which is governed by discipline, as is a fire-brigade, is exercising disciplinary authority over a member of the force, that he is acting judicially or quasi-judicially. While it is not easy to find an analogy between the case of a dismissal of a University professor on grounds of incapacity or misconduct and that of a caution administered to a member of a fire-brigade service merely because both are in a sense examples of disciplinary action, it is necessary to remember that in the Court of Appeal Singleton, L.J., with whom two other judges agreed, decided against the issue of a writ of *certiorari* not on the ground that the writ does not lie, but that the remedy is discretionary and should not be granted in the particular case.

I should now revert to the question to which I have made some reference earlier, viz., the existence at some stages of a *lis* before the Council which attracts to it the duty on the part of the Council to act judicially. Where the administrative process and the quasi-judicial process are so intermingled that the product is, as one eminent English judge has stated, a hybrid operation, it may not be easy to make a strict demarcation of the points at which the administrative process is stayed, the judicial process is brought on, and thereafter the administrative process is resumed ; it is nevertheless not difficult to envisage at the stage of deciding the existence of incapacity or misconduct the arising of a process in the nature of a prosecution or proposition which requires for its consideration something in the nature respectively of a defence or a refutation or negation thereof. If *lis* in this context is to be given the very strict and technical meaning it bears in Court litigation, it will be difficult to discover the existence of such a *lis* in the processes considered in the cases of (1) *R.* v. *Postmaster-General ; ex parte Carmichael*, (1928) 1 K.B. at 291, and (2) *R.* v. *Boycott ; ex parte Keasley*, (1939) 2 K.B. at 651, cases dealing with the issue of medical certificates, in both of which the process was held to be in the nature of a judicial act. Whatever name be given to the process, the operation involved cannot be performed without a consideration of matters not only in support of the proposition but also of those against it. The latter cannot properly be considered without an opportunity being afforded for their presentation.

For the reasons which I have endeavoured to set out above, I am of opinion that the Council was under a duty to act judicially at the stage of ascertaining objectively the facts as to incapacity or misconduct. The non-observance of the rules of natural justice being admitted by the respondents in this case, the petitioner is in my opinion, entitled to a grant of a mandate in the

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nature of a writ of *certiorari* to quash the order of discontinuance of his services as a teacher, subject however to a consideration, of other objections raised on behalf of the respondents to such a grant. I shall therefore now address myself to these other objections. These objections were three-fold in character :—(*a*) that the petitioner must in law be considered to have been appointed under the power vested in the Council by clause (*f*) of section 18 of the Act, (*b*) that the petitioner has by his conduct acquiesced in the order of discontinuance of his services and is therefore not entitled to the remedy sought, and (*c*) that this remedy is not available where other remedies can be shown to be available.

In regard to the first objection, my attention has been drawn to section 33 of the Act which requires every appointment of a teacher to be upon agreement in writing between the University and the teacher. If the process of suspension or dismissal of a teacher can be said to attract at some stage the duty to act judicially [section 18 (*e*),] it has been contended that no such duty arises in the case of suspension or dismissal of persons in the employ of the University other than officers or teachers [section 18 (*f*)]. The distinction between clauses (*e*) and (*f*) in section 18 is itself significant as indicative of a distinction in rank or status between officers and teachers as defined in section 61 and those of ordinary employees. In the case of the latter suspension or dismissal can be effected presumably on any ground, while in the case of the former that can be done only on grounds of incapacity or misconduct. On behalf of the respondents it has been submitted that there is a special form of agreement teachers are required to enter into and that the petitioner has failed and neglected to sign that form of agreement. The petitioner denies knowledge of any request made to him by the University authorities to sign such a form of agreement. It is unnecessary for me to decide between the parties on the question of the request to sign the special form of agreement because, in my opinion, not only is there in existence a sufficient agreement in writing in relation to the appointment of the petitioner, but also I am satisfied that the respondents cannot, having regard to their conduct, now be heard to say that the petitioner was dismissed by virtue of the power vested in the Council by clause (*f*) of section 18. Document " A " and " B " reproduced earlier in this judgment provide in this case, in my opinion, a sufficient agreement within the meaning of section 33. Not only is it not denied that the petitioner has, in fact, functioned as Professor and Head of a Faculty in the University after " A " and " B " passed between the Vice-Chancellor and the petitioner, it is also quite apparent from the Council's own reply to certain members of the Tutorial Staff of the Faculty concerned that the Council itself considered that action was taken in this case in terms of clause (*e*) of section 18. This reply which is the document " G " attached to the petitioner's affidavit is reproduced below, and the statement contained therein that " the termination of services of Mr. Linus Silva was decided upon in terms of section 18 E of the University Act on adequate evidence placed before it " is itself revealing in regard to the process followed, viz., the hearing of evidence placed before the Council and a consideration of its adequacy, a process during which a *lis* in the sense indicated earlier had, in my opinion, arisen.

DOCUMENT " G "

VIDYODAYA UNIVERSITY OF CEYLON,
Colombo 10.
July 13th, 1961.

DR. W. M. TILAKARATNE,
Central Bank of Ceylon,
Colombo.

Dear Sir,

The Council at its meeting on 12.7.61 considered your letters of the 6.7.61 and of 11.7.61.

I am directed by the Council to inform you that the termination of the services of Mr. Linus Silva was decided upon in terms of Section 18 E of the University Act on adequate evidence placed before it. The Council therefore regrets its inability to vary its decisions.

With regard to Prof. Mukerji, the Council unanimously decided to request Prof. Mukerji to reconsider his decision. A copy of a letter addressed to him is annexed for your information.

I shall be thankful if you will bring this letter to the notice of the other signatories.

DHARMASASTRONNATIKAMI
Vice-Chancellor.

The first objection must therefore fail.

In regard to the second objection, it was argued that the petitioner has accepted the balance salary due to him as computed in the manner indicated in letter " E " of 4th July, 1961, and has therefore acquiesced in the termination of his services. It is pointed out that the cheque for Rs. 3,346.15 sent to him with that letter has been credited by the

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petitioner to his bank account. I am unable to see any substance in this objection where the petitioner claims his services have been terminated otherwise than as provided by law. Where his position is that he is still lawfully in the service of the University, he is quite entitled to utilize the salary paid to him.

The third objection is that the remedy by way of *certiorari* is not available where other remedies are open to the petitioner and it has not been shown that he has availed himself of these. It is contended that the relationship between the University and the petitioner was that between employer and employee and that therefore he must seek his remedy at common law which is an action for damages for wrongful dismissal. Mr Perera's reply to this contention was that it is not open to the petitioner to obtain a reinstatement in service by recourse to the common law remedy which is confined to an award of damages. I agree with Mr. Perera's submission that to disentitle a petitioner to the remedy by *certiorari* the alternative remedy must be an adequate remedy. If a person can establish that he has been wrongfully dismissed there may well be many cases where damages can never form an adequate remedy. Moreover, as Gratiaen, J., pointed out in *Sirisena* v. *Kotawera-Udagama Co-operative Stores, Ltd.*, (1949) 51 N.L.R. at 263, the alternative remedy rule is not a rigid one. In regard to this third objection to the granting of this application, Mr. Perera relied strongly on the House of Lords decision in *Vine* v. *National Dock Labour Board* (*supra*) which dealt with the question whether damages were an adequate remedy in the case of the dismissal of a dock worker registered in the reserve pool by the National Dock Labour Board under a scheme set up by a Statutory Order. The dismissed worker claimed damages for wrongful dismissal and a declaration that his purported dismissal was illegal, *ultra vires* and invalid. The Queen's Bench Division granted him damages and the declaration, but on an appeal by the National Board to the Court of Appeal the declaration was struck out. On the worker taking an appeal to the House of Lords, the House, while observing that the granting of a declaration was discretionary, nevertheless granted it because Their Lordships were of opinion that the award of damages in that case was not an adequate remedy. In the course of his opinion expressed in that case Lord Keith observed that the relationship between the National Board and the worker in that case was not a straightforward relationship of master and servant, and Mr. Perera argued that in the case of the petitioner too it was not the ordinary relationship between employer and employee. I do not feel called upon to discuss this matter at any length as I am satisfied that in the case of a dismissal of a person in the situation of the petitioner the common law remedy is not an adequate remedy.

Mr. Jayewardene, however, has contended that, apart from the common law remedy, it is open to the petitioner to take his grievance to a Labour Tribunal established under section 31A of the Industrial Disputes Act, No. 43 of 1950, as amended by the (Amendment) Act, No. 62 of 1957. Under section 31B of that Act, it is open to a workman to make an application to a Labour Tribunal for relief or redress in respect of the termination of his services and it is not doubted that the Labour Tribunal has a power to order reinstatement of a workman. Mr. Jayewardene contended that the definition of "workman" in the Industrial Disputes Act is wide enough to cover the case of the petitioner, while Mr. Perera argued that the workmen contemplated in the Act were persons under a contract of service as opposed to a contract for services. It is unnecessary to decide that question here because, even if it is assumed that the petitioner is a workman within the meaning of that Act, I am satisfied that the remedy by way of an application to a Labour Tribunal with its procedure of appeal to this Court is not as convenient, speedy and effective a remedy as that which the petitioner has already invoked.—see *R.* v. *Wandsworth Justices*, (1942) 1 A.E.R. at 56, If I may adopt respectfully the language of Humphreys, J., in that case, substituting "dismissal" for "conviction", "I think that the appellant is perfectly entitled to come to this Court and say, upon precedent and authority, I was dismissed as the result of a denial of justice, and I ask for justice, which can only be done by the quashing of that order".

Lastly, interference by way of *certiorari* being a discretionary remedy, should it be granted in this case ? In *R.* v. *Manchester Legal Aid Committee* (*supra*), the Court granted the writ *ex debito justitiae* because the applicant was a person aggrieved. The principle to be followed is that indicated by Blackburn, J., in *The Queen* v. *Justices of Surrey*, (1870) L.R. 5, Q.B. at 466, which is that where the applicant has by reason of his local situation a peculiar grievance of his own, and is not merely applying as one of the public, he is entitled to the writ *ex debito justitiae.*

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All the objections to the application for interference by way of *certiorari* therefore fail, and the order of discontinuance calls to be quashed. There remains the application for an order in the nature of a *mandamus*. Mandamus is applied. for as being being consequential to a quashing of the order of discontinuance. If the petitioner was wrongly discontinued, it seems to follow that he must be considered to be still a teacher at the University. Before the question of dismissal or discontinuance can be finally determined it seems but reasonable that the authorities should have a right in the nature of an interdiction of the petitioner, but on that matter as well one has to be guided by the Statute [section 18 (*e*)] where not only dismissal but even suspension is conditioned by the existence of misconduct or incapacity. The question whether the petitioner is the holder of an office of a public nature as would entitle him in the circumstances of the present case to the grant of an order by way of *mandamus* was not specifically argued before me. The fact that the petitioner has *de facto* ceased to be a teacher of the University after the service on him of the letter " E " of 4th July, 1961, and that he has no actual possession of his post of Professor and Head of a Faculty may be due to the circumstance that the respondents honestly believed that their order of 4th July, 1961, was lawful. Now that this Court has pronounced on the validity of this order, I have no reason to think that the respondents who are a responsible body of men will not take action that is lawful and appropriate. I do not, therefore, consider it essential that I should now explore here whether the petitioner is the holder of an office of a public nature. *Mandamus* is itself a discretionary remedy, and it will be sufficient for the present if I make no order in respect of the prayer relating to a *mandamus*.

The order of the University Council of 4th July, 1961, terminating the petitioner's appointment as from that date is hereby quashed. The respondents are ordered to pay to the petitioner the taxed costs of this application.

Application for a Writ of Certiorari allowed.

Present : **Abeyesundere, J.**

KANAPATHYPILLAI *vs.* KUMARASAMY

Application No. 475 *for a mandate in the nature of a Writ of Quo Warranto on K. S. Kumarasamy and another.*

Argued and decided on : 21st May, 1962.

Writ of quo warranto—Chairman of Village Committee elected by a majority of one—One of the members who voted for the Chairman subsequently held by Supreme Court to be not duly elected—Can election of Chairman be invalidated.

Held : That there is no provision of law which invalidates any act of a *de facto* member of a Village Committee merely for the reason that subsequently a Court of competent jurisdiction has declared that his election as a member of that committee was void.

Case referred to : *Givendrasinghe* v. *R. F. S. de Mel*, (1948) 49 N.L.R. 422; XXXVIII C.L.W. 1.

M. Tiruchelvam, Q.C., with *T. W. Rajaratnam* and *D. J. Tampoe*, for the petitioner.

N. E. Weerasooria, Q.C., with *V. Arulambalam* and *M. Underwood*, for the first respondent.

ABEYESUNDERE, J.

On 17th February, 1961, there was a meeting of the Village Committee of Delft for the election of the Chairman of that Committee. There were two candidates seeking election to the office of Chairman. They were the petitioner and the first respondent, both of whom were at that time members of the Village Committee. The voting at the election was open. Seven members voted for the proposal that the petitioner should be elected the Chairman and eight members voted for the proposal that the first respondent should be elected the Chairman. The first respondent was declared elected as the Chairman.

K. Maruthalingam was one of the members of the Village Committee of Delft who had voted

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for the first respondent at the aforesaid election. By an order made on 29th September, 1961, on an application for a writ of *quo warranto* on K. Maruthalingam, the Supreme Court held that he had not been duly elected as a member of the Village Committee of Delft.

The petitioner seeks to invalidate the election of the first respondent as the Chairman on the ground that, by virtue of the aforesaid order of the Supreme Court, K. Maruthalingam was not a duly elected member of the Village Committee of Delft when he voted for the first respondent.

There is no provision of law invalidating any act of a *de facto* member of a Village Committee by reason only of the fact that subsequently a Court of competent jurisdiction has declared that he was not duly elected as a member of that Committee. I hold that the voting for the first respondent by K. Maruthalingam when he was a *de facto* member of the Vilage Committee of Delft is not invalidated by the subsequent declaration of the Supreme Court that he was not duly elected as a member of that Village Committee. I find support for this view in the decision of the Supreme Court in the case of *Givendrasinghe* vs. *R. F. S. de Mel* (49 N.L.R. 422). The notice issued on the respondents is therefore discharged and the petition is dismissed with costs payable by the petitioner to the first respondent.

Application dismissed.

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

ALUVIHARE *vs.* SIYAMPILLAI*

S.C. No. 482/59—*D.C.* (*F*) *Badulla No.* 12748/*M with Application No.* 533.

Argued on : January 22 and 23, 1962.
Decided on : January 23, 1962.

Civil Procedure Code, sections 94, 100, 109 (1)—*Interrogatories—Requirement in section* 100 *that Judge should direct whether they should be answered by affidavit or by viva voce examination—Absence of such direction in Judge's order—Interrogatories answered but not by affidavit—Effect.*

The learned trial Judge had struck out the answer of the defendant (appellant) under section 109 (1) of the Civil Procedure Code on the ground that the defendant had failed to comply with his order to answer certain interrogatories delivered through Court by the plaintiff. In making his original order the learned trial Judge had not directed whether the answer should be by affidavit or by *viva voce* examination as required by section 100 of the Civil Procedure Code. The defendant answered the interrogatories in writing but not by affidavit.

Held : That the defendant had not failed to comply with the order made by the learned trial Judge as he had, in fact, answered the interrogatories though not by an affidavit. The learned trial Judge was therefore wrong in striking out his defence.

H. V. Perera, Q.C., with *E. B. Wikremanayake, Q.C.*, *H. Wanigatunge* and *H. Mohideen*, for the defendant-appellant and for the defendant-petitioner in application No. 533.

Colvin R. de Silva with *V. J. Martyn*, for the plaintiff-respondent in both the appeal and the application.

BASNAYAKE, C.J.

The question for decision in this appeal is whether the learned District Judge was right in striking out the defence of the defendant under section 109 (1) of the Civil Procedure Code.

Shortly the facts are as follows :—The plaintiff who had delivered through the Court interrogatories in writing for the examination of the defendant as provided in section 94 of that Code asked for an order under section 100 requiring the defendant to answer the interrogatories as the defendant had failed to do so. Upon that motion the learned District Judge made the following order :—

> " I order the answers to the interrogatories to be filed on 31.8.59."

Section 100 of the Civil Procedure Code requires that in making an order under that section

* For Sinhala translation, see Sinhala section, Vol. 4, part 1, p. 1

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the Judge should direct whether the answers should be by an affidavit or by *viva voce* examination. In the instant case there has been no such direction. The defendant who was ill in hospital at the time the order was served on him answered the interrogatories, but he did not do so by an affidavit. In his statement containing the answers the defendant states, "These interrogatories are answered from bed with those documents I have".

It is contended on behalf of the respondent that as the interrogatories have not been answered by an affidavit, there has been a failure to comply with the learned Judge's order and that in the circumstances the learned Judge rightly struck out the defence of the defendant in the exercise of the power conferred by section 109. We are unable to agree with that contention. The order of the learned District Judge did not direct that the answers to the interrogatories should be by an affidavit. The defendant answered the interrogatories as directed by the order though not by an affidavit. The defendant had therefore not failed to comply with the order made by the learned Judge. The learned Judge is therefore wrong in striking out his defence.

We therefore quash the order dated 17th September, 1959, and all proceedings thereafter. We also direct that the case be remitted to the lower Court for the continuation of the proceedings.

On the question of costs, learned counsel for the respondent has submitted that as no objection was taken by the defendant's proctor to the procedure adopted on any of the grounds now urged before us the plaintiff should not be condemned in costs. We are of opinion that there is substance in that submission and we therefore do not award costs of the appeal to the appellant.

Application No. 533 is rejected.

SANSONI, J.

I agree.

Appeal allowed.

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

VANGUARD INSURANCE CO., LTD. *vs.* THE RUHUNU TRANSIT CO., LTD. & ANOTHER

S.C. No. 42/60 (*F*)—*D.C. Matara, No. M* 1149.

Argued on : 26th June, 1962.
Decided on : 9th July, 1962.

Companies Ordinance (*Cap.* 145), *sections* 161, 164, 166, 216-200 *and* 243—*Voluntary winding-up of company—Action filed against company before winding-up—Liability disputed—Application by liquidator to stay action—Assets of company sufficient to pay creditors in full—Order directing stay of action—Correctness of order.*

Plaintiff, an Insurance Company, instituted this action against the defendant Company for the recovery of Rs. 41,294/11 being insurance premia due on certain buses insured with the plaintiff. Shortly thereafter the defendant Company went into liquidation and a liquidator was appointed, who was later added as a defendant. The defendants filed answer stating inter alia,

(a) that the amount due to the plaintiff was only Rs. 23,646/05 after setting off certain claims due to the defendant from the plaintiff;

(b) that the assets of the defendant were compulsorily acquired by the Ceylon Transport Board under the Motor Transport Act of 1957 and compensation payable for such assets has not been paid and also that such assets as were in their hands were insufficient to pay the plaintiff's claim;

(c) that the action must be stayed and the plaintiff asked to prove his claim in the winding-up proceedings.

The learned District Judge granted this application and the plaintiff appealed.

Held : (1) That the learned District Judge should not have made the order appealed from, as such an order would not be just and beneficial to the parties concerned.

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(2) That in the case of a voluntary winding up, a stay of an action can be asked for only under section 243 read with section 166 of the Companies Ordinance. Section 166 applies only to cases of winding-up by Court.

(3 That in this action the Court should not stay proceedings because :

(*a*) there can be no prejudice caused to the creditors of the defendant, as the added-defendant's affidavit shows that there are sufficient assets available for payment to creditors in full;

b) the defendant's liability which is disputed has, in any event, to be adjudicated upon in a Court of Law ;

(*c*) a stay must necessarily cause prejudice to the plaintiff.

Per G. P. A. Silva, J.—" For, even if the assets were insufficient to meet the liabilities and all the creditors were to be paid *pari passu*, it would always be possible for the added-defendant to apply to Court for stay of execution of the decree until he was prepared to distribute the assets *pari passu* amongst the creditors at the final winding-up."

C. Ranganathan with *S. C. Crossette Thambiah*, for the plaintiff-appellant.

K. Shinya with *U. C. B. Ratnayake*, for the defendant-respondent and added defendant-respondent.

G. P. A. Silva, J.

The plaintiff in this case, the Vanguard Insurance Co., Ltd., filed action on 18th December, 1957, in the District Court of Matara against the Ruhunu Transit Co., Ltd., for the recovery of Rs. 41,294.11 being the amount due to the plaintiff on account of insurance premia in respect of certain buses belonging to the defendant company which buses had been insured with the plaintiff. Very shortly after this action was filed, the defendant went into voluntary liquidation and the liquidator, Noel de Costa of Carter, de Costa & Co., was added as a defendant to the action. Thereafter, the defendant and the added-defendant filed answer on 27th June, 1958, praying *inter alia* that the action be stayed. They also pleaded that, according to the defendant's books of accounts, credit was due from the plaintiff to the defendant on account of premia returnable to and claims settled by the defendant and that after these amounts had been set off against moneys due to the plaintiff the net sumo wing from the defendant to the plaintiff was Rs. 23,646.05 as at 31st December, 1957. The defendant further stated that the assets of the defendant company were compulsorily acquired by the Ceylon Transport Board on 1st January, 1958 but that, though compensation was payable in terms of the Motor Transport Act, No. 48 of 1957, such compensation had not been paid and that such assets as were in the hands of the added-defendant were insufficient to pay the plaintiff's claim even if such payment were permitted in law. The Defendants, therefore, prayed that the plaintiff's action be dismissed in respect of any sum in excess of Rs. 24,646.05 and also that the action be stayed and the Plaintiff directed to prove his claim in the winding-up.

The added-defendant also filed together with the answer a petition supported by an affidavit praying that the action be stayed and that the plaintiff be directed to prove his claim in the winding-up, pleading, among other things, that the action was an attempt on the part of plaintiff to obtain an undue preference or an advantage over the other creditors of the defendant, that the plaintiff's proper remedy was to prove its claim in the voluntary winding-up and that, even if the plaintiff obtained judgment and decree against the defendant it cannot in fact, or in law levy execution of such decree against the defendant. The application made by the added-defendant was taken up for inquiry by the learned District Judge in the first instance and he made order that the proceedings be stayed as prayed for and directed the plaintiff to prove its claim in the winding-up. The present appeal is from the order of the District Judge.

In arriving at a decision in this matter it is important to remember that the amount in dispute regarding which the defendant made only a general averment was as much as Rs. 17,648.06 made up of a number of items in which not only the quantum but even the liability was clearly in issue. While the plaintiff filed with the plaint the full account particulars which made up the claim for Rs. 42,294.11 alleged in the plaint as being due to the plaintiff, the defendants filed no such account in support of their averment in the

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answer that only Rs. 24,646.04 was due. It is most unlikely in the circumstances that the liquidator will be able to adjudicate between the parties and to decide on the amount due without a reference to Court.

Section 166 of the Companies Ordinance deals with the power of a Court to stay or restrain proceedings against a company after the presentation of a winding-up petition and before a winding-up order has been made. This section enables a company or any creditor to apply to the Court in which an action or proceeding is pending to stay proceedings therein at any time after the presentation of a winding-up petition and before a winding-up order has been made and the Court is empowered on such application to stay or restrain proceedings on such terms as it thinks fit.

But section 161 and subsequent sections show that the proceedings contemplated by section 166 relate to cases where winding-up is by Court and action can be taken to stay or restrain proceedings only after the presentation of a winding-up petition to Court in terms of section 164. In the present case no petition for winding-up by Court having been presented and the defendant company having only initiated action for a voluntary liquidation or winding-up, the provisions of section 166 would not directly apply. The provisions applicable in such a case are to be found in sections 216 to 220 of the Ordinance. While these sections do not contain any express provision empowering a Court to stay any action or proceeding brought against the company, section 243 permits a liquidator or a creditor to apply to Court for determination of any question arising in the winding-up and thereupon the Court can exercise the same powers as it might exercise in the case of a winding-up by Court.

Mr. Ranganathan for the plaintiff-appellant has argued that in regard to a voluntary winding-up there is no prohibition in law for an action to proceed. He further submitted that even if by virtue of the provisions of section 243 the liquidator in the case of a voluntary winding-up may apply to Court to determine any question arising in the winding-up of a company as in the case of a winding-up by Court, the Court will not stay proceedings when creditors can be paid in full and when the liability itself is disputed. He relied on the affidavit of the added-defendant to show that the creditors could be paid in full.

Mr. Shinya for the defendant-respondent has contended, on the other hand, that no Court will allow an action to proceed where one creditor will thereby obtain an advantage over another creditor and has cited a passage from Buckley on the Companies Acts (11th Edition) page 393, where it is stated that the scope of the Act is to bring all claims within the winding-up and to prevent persons from enforcing the demands by action. He further argued that, where there was a voluntary winding-up, all creditors have to be paid *pari passu* and the Court will interfere by injunction to restrain one creditor from seizing an undue share of the assets of the company for its own benefit, and that, when a creditor commenced action after a resolution to wind-up voluntarily the Court restrained the action.

It seems to me that the passage in Buckley referred to would properly apply firstly, where an action commenced after the resolution to wind-up voluntarily, secondly, where the creditors are to be paid *pari passu*, the assets being clearly insufficient to meet the claims of all creditors, and, thirdly where a creditor who institutes an action will gain an advantage over the other creditors. In this case the action was commenced before the resolution to wind-up. On the affidavit of the added-defendant, the liquidator, the total value of the assets of the defendant company far exceeded the sum of its liabilities. The plaintiff-creditor will not, by being allowed to pursue the action and by obtaining a judgment as to the amount due, gain an advantage over the other creditors. No prejudice whatsoever can be caused to any other creditors by a continuation of this action and by an adjudication as to the actual amount due to the plaintiff. For, even if the assets were insufficient to meet the liabilities and all the creditors were to be paid *pari passu*, it would always be possible for the added-defendant to apply to Court for stay of execution of the decree until he was prepared to distribute the assets *pari passu* amongst the creditors at the final winding-up.

On the other hand, an order to stay this action must necessarily cause prejudice to the plaintiff. The nature and extent of the amount in dispute between the parties is such that a reference to Court by the liquidator at the time of the distribution of the assets will, indeed, be inevitable. A reference to Court at that stage is bound to delay the payment of his dues to the plaintiff who will have to await the decision of Court before

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receiving such payment. In this view of the matter I feel that even if this was a case in which the liquidator could appropriately have referred to Court the question of staying the action by virtue of the provisions of section 243 read with section 166 of the Companies' Ordinance, the exercise by Court of the power to stay proceedings would not be just and beneficial to the parties concerned.

For these reasons I allow the appeal and direct that the action filed by the plaintiff-appellant which was stayed be proceeded with. The plaintiff-appellant will have the costs of this appeal.

SANSONI, J.
I agree.

Appeal allowed.

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

PEIRIS *vs.* GUNAWARDENA*

S.C. No. 173 *of* 1961—*C.R. Badulla, No.* 15716.

Argued on : 9th November, 1961.
Decided on : 23rd November, 1961.

Rent Restriction Act, No. 29 *of* 1948, *sections* 3, 23—*Tenant agreeing to pay as rent an amount in excess of the authorised rent—Consent decree entered in terms of such agreement—Subsequent action filed by landlord for arrears of rent and ejectment—Amount payable as rent put in issue by tenant in such action—Plea of res adjudicata—Does the former decree operate as res adjudicata and prevent tenant from re-agitating this question.*

The plaintiff sued the defendant, his tenant, for arrears of rent and ejectment claiming that the rent payable by the defendant was Rs. 10/- a month. The defendant denied that he was in arrears and took up the position that the authorised rent was only Rs. 6.55 a month. It was admitted that if this was the amount payable, the defendant was not in arrears. The premises in question were governed by the Rent Restriction Act and the authorised rent within the meaning of the Act was, in fact, Rs. 6.55 a month. However the plaintiff contended that in a previous case as between himself and the defendant, decree had been entered of consent by which the defendant was required to pay him Rs. 10/- a month as rent for these same premises and that this decree operated as *res adjudicata* and prevented the defendant from re-agitating this question.

Held : That the previous decree did not operate as *res adjudicata*. That decree flowed not from an adjudication by the Court on the merits but from the consent of parties and in view of the scheme of the Rent Restriction Act (No. 29 of 1948) the tenant could not have consented to pay as rent a sum greater than that which the Act declared to be the authorised rent.

Cases referred to: *Madan* v. *Nana Andy*, (1949), 50 N.L.R. 476; XL C.L.W. 73
Griffiths v. *Davies*, (1943) 122 L.J.K.B. 577; (1943) 2 A.E.R. 209

N. R. M. Daluwatte, for the defendant-appellant.

No appearance for the plaintiff-respondent.

T. S. FERNANDO, J.

In this case the plaintiff sued the defendant, his tenant, for arrears of rent and ejectment, but the defendant denied he was in such arrears. The plaintiff claimed that the rent was Rs. 10/- a month, while the defendant's position was that the authorised rent was only Rs. 6.55 a month. There is no dispute that the premises from which the defendant is sought to be ejected are governed by the Rent Restriction Act. It is admitted that if the rent has to be taken as being Rs. 6.55 a month the defendant was not in arrears. While there is no dispute that the authorised rent within the meaning of the Rent Restriction Act was Rs. 6.55 a month, the plaintiff pleaded that in a previous case (D. C. Badulla 13476) between the defendant and himself in respect of these same premises a decree of Court was entered by which the defendant was required to pay as from 1st December, 1959, Rs. 10/- a month as rent for the premises. That was a case instituted by this plaintiff for a declaration of title to these premises and for ejectment, but the case was settled between the parties by the plaintiff being declared

*For Sinhala translation, see Sinhala section Vol. 4, part 1, p. 2

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entitled to the premises and accepting the defendant as his tenant of the very premises on a monthly rental of Rs. 10/- commencing from 1st December, 1957. A decree was entered in terms of the settlement, and at the trial of the case now before me in appeal the right to receive Rs. 10/- a month as rent under this decree was pleaded by the plaintiff as being a *res adjudicata*. The learned Commissioner, observing that if the defendant is treated now as being liable to pay only Rs. 6.55 a month, as rent that will be permitting the defendant to violate the terms of the decree, held that defendant was in arrears of rent and ordered his ejectment from the premises.

In support of the contention that the decree in D. C. Badulla 13476 does not operate as *res adjudicata*, defendant's counsel referred me to the decision of this Court in *Madan* v. *Nana Andy*, (1949) 50 N.L.R. at 476, where Gratiaen, J., applied (as being applicable in Ceylon, too) what he called a recognised exception to the operation of the general rule as to *res adjudicata*. That exception is expressed in the words of Lord Greene, M.R., in *Griffiths* v. *Davies*, (1943) 122 L.J.K.B. 577, at 579, " where there is a statutory prohibition or direction it cannot be over-ridden or defeated by a previous judgment between the parties ". The case before me appears to be an *a fortiori* case, as here the previous decree flowed not by an adjudication by the Court on the merits but from the consent of parties. Now, the Rent Restriction Act, No. 29 of 1948, section 3, makes it unlawful for a landlord to demand, receive or recover as rent an amount in excess of the authorised rent. The Act also makes it unlawful for the tenant to pay or offer to pay rent in excess of the authorised rent. A contravention of the Act by any person be he landlord or tenant is a punishable offence—*vide* section 23. As Du Parcq. L.J. stated in *Griffiths* v. *Davies* (*supra*) in connection with similar Acts of Parliament of the United Kingdom, here too the whole scheme of the Rent Restriction Act " is to prevent a tenant from coming to any agreement or doing anything which shall increase the standard rent in such a way that his conduct or agreement will have any effect whatsoever on the amount of the rent. "

The plea of *res adjudicata* raised by the plaintiff must therefore fail. In the result, as has been conceded at the trial, the defendant was not in arrears of rent. I would allow the appeal and direct decree to be entered dismissing the plaintiff's action. The defendant will be entitled to his costs in both Courts.

Appeal allowed.

Present : **Weerasooriya, J.** (*Judge of the Court of Criminal Appeal*)

THE QUEEN *vs.* PUNCHI BANDA *et al.**

Application for bail pending determination of Appeals, Nos. 137-142 *of* 1960
in the Court of Criminal Appeal
(*S.C. No.* 4/*M.C. Kegalle, Case No.* 21919).

Argued on : August 11, 1960.
Delivered on : August 17, 1960.

Criminal Procedure—Application for bail pending an appeal to the Court of Criminal Appeal—Circumstances to be taken into consideration in granting bail.

Held : That the petitioners should be released on bail in view of : (*a*) the short sentence imposed ; (*b*) the fact that their appeals would not be listed for hearing at the next sitting of the Court of Criminal Appeal ; (*c*) the fact that it was unlikely that the petitioners would abscond in the event of their appeals being dismissed.

* For Sinhala translation, see Sinhala section, Vol. 4, part 1, p. 3.

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G. E. Chitty, Q.C., with *E. B. Vannitamby*, for the petitioners.

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

WEERASOORIYA, J.

The petitioners were tried before the Supreme Court on an indictment which contained, *inter alia*, a charge of being members of an unlawful assembly the common object of which was to cause hurt and also a charge of murder. They were found guilty only on the charge of unlawful assembly and were sentenced to six months rigorous imprisonment on the 6th July, 1960.

The application for bail was opposed by learned Crown Counsel. But in view of the short sentence imposed and as I understand from the Deputy Registrar of the Court of Criminal Appeal that the appeals filed by the petitioners against their convictions will not be listed for hearing at the next sitting of the Court of Criminal Appeal, and also as, in my opinion, it is unlikely the petitioners will abscond in the event of their appeals being dismissed, I order that each of them be released on his furnishing bail in a sum of Rs. 2,000/- with one surety to appear when noticed by the Registrar of the Court of Criminal Appeal and abide by the sentence.

Application allowed.

Present : **Abeyesundere, J.**

S. H. CHARLIE *vs.* DE SILVA*

Application No. 79 *of* 1962 *for revision in M.C. Galle, Case No.* 14748.

Argued and decided on : 14th May, 1962.

Paddy Lands Act, No. 1 *of* 1958, *section* 21—*Eviction order made on report under section* 21(1) *without issuing summons—Validity of such order.*

Held : That an order of eviction made by a magistrate on receipt of a report under section 21 (1) of the Paddy Lands Act No. 1 of 1958, against persons in possession of the paddy land referred to in such report without issuing a summons as required by sub-section (2) of that section, is invalid.

A.W.W. Gunawardane, for the petitioners.

ABEYESUNDERE, J.

The counsel appearing for the petitioners applies for a postponement of the determination of the petitions on the ground that he requires certain documents to be produced. I do not see the need for the production of any documents. The counsel does not even know the ground on which the applications are made for revision.

In this case the learned Magistrate, upon receiving a report under sub-section (1) of section 21 of the Paddy Lands Act, No. 1 of 1958, has made order of eviction against the petitioners who were in possession of the paddy land to which such report relates without complying with the provisions of sub-section (2) of that section which requires summons to be issued to the persons in possession of the paddy land directing them on a date specified in the summons to show cause why they should not be evicted from the paddy land. The order of eviction is therefore invalid. I set aside the order of eviction, direct that the petitioners be restored to possession of the paddy land in question, and order that the case be remitted to the Magistrate's Court of Galle to be dealt with in accordance with the provission of the aforesaid section 21 (2).

Set aside and sent back.

*For Sinhala translation, see Sinhala section, Vol. 4, part 1, p. 4.

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

C. D. SOLOMON *vs.* C. M. PATHUMA & ANOTHER

S.C. No. 369/60 *(F)—D.C. Colombo, No.* 4404/*M.*

Argued on : 2nd and 15th March, 1962
Decided on : 12th April, 1962

Landlord and tenant—Action for ejectment, arrears of rent and damages—Finding that tenant was in arrears after notice to quit had been given—Defence of payment of rent by sub-tenant to head landlord—Can judge decide on such questions if no issues were raised—Civil Procedure Code, section 772.

The plaintiff instituted this action against the 1st defendant on the basis that the 1st defendant was her tenant. The plaintiff alleged that she had given notice at the end of February, 1958, to the 1st defendant to quit and deliver possession of the premises at the end of March, 1958. She claimed arrears of rent from 1st July, 1956 to 31st March, 1958, and damages from 1st April, 1958, till she was placed in possession. The 1st defendant denied any tenancy between the plaintiff and himself, but stated that he held the premises on a tenancy between himself and the owners of the premises. The trial judge found that the 1st defendant was a tenant of the plaintiff, that he was not in arrears of rent for the period 1st July, 1956 to 31st March, 1958, but that he had not paid the rent for April, 1958, and that he was thus in arrears of rent for more than one month after it had become due. He accordingly gave judgment for the plaintiff in ejectment, with damages from 1st April, 1958, till the plaintiff was placed in possession. The trial judge also held that, as the 1st defendant had paid the head-landlord (*i.e.*, the landlord of the plaintiff) a sum sufficient to cover the rents for the period July, 1956 to April, 1958, and that as these payments had been made for the benefit of the plaintiff, this should be set off against the rent. The plaintiff did not appeal from the decision of the trial judge, and in appeal plaintiff's counsel was compelled to accept the judge's finding that no rent was due to her for the period 1st July, 1956 to 31st March, 1958. The 1st defendant alone preferred the present appeal. It was, however, argued for the plaintiff that he was under section 772 of the Civil Procedure Code entitled to attack so much of the findings of the trial judge as were adverse to him for the purpose of his argument, so long as he did not ask for the judgment and decree of the lower Court to be in any way altered.

Held : (1) That the trial judge was not entitled to hold that the 1st defendant was in arrears for April, 1958, inasmuch as the case made by the plaintiff in his plaint was that the arrears were in respect of a period prior to the giving of the notice to quit in February, 1958, and that therefore the plaintiff's action must necessarily fail.

(2) That, inasmuch as no issue had been raised on the question, and no argument had been addressed to him thereon, the learned judge had misdirected himself in considering the question whether the 1st defendant's payments to the head landlord could be set off against the rent due to the plaintiff.

(3) That under section 772 of the Civil Procedure Code it was only open to the plaintiff to accept the correctness of the decision made against him, and on that basis, if the findings help him, try to support the decree.

[**Editorial Note:** Section 772 of the Civil Procedure Code is referred to and applied in *Premawathie* v. *Welis,* (1961) LXI C.L.W. 67. This section appears to have been given a different interpretation in that case.]

H. W. Jayawardene, Q.C., with *C. D. S. Siriwardene* and *S. S. Basnayake*, for the 1st defendant-appellant.

C. Thiagalingam, Q.C., with *M. L. de Silva*, for the respondents.

SINNETAMBY, J.

The plaintiff instituted this action against the first defendant alleging that the first defendant was her tenant and that he had failed to pay rents from June, 1956. She also alleged that she gave due notice to the 1st defendant to quit and deliver possession of the premises at the end of March, 1958. She claimed a sum of Rs. 6,195/- as arrears of rent from 1st July, 1956 to 31st March, 1958, and also claimed damages thereafter from 1st April, 1958, till she was restored to possession at the same rate as the rent. She also asked for ejectment of the two defendants, the 2nd defendant being a sub-tenant of the 1st defendant. The first defendant in his answer denied any contract of tenancy between himself and the plaintiff and alleged that he was a tenant under the owners of the property, namely, Mrs. F. V. de Silva and Mrs. Sumitra Aratchi. It was not denied that the two ladies were the owners of the property but plaintiff's case is that she had taken the pre

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mises on rent from them and then rented it to the 1st defendant. The 1st defendant in his answer stated that he had taken the premises on rent from the owners and had paid rents to them. For the sake of convenience I shall hereafter refer to the owners as the head landlords, the plaintiff as landlord, 1st defendant as the tenant and the 2nd defendant as the sub-tenant.

On a perusal of the answer it is quite evident that the 1st defendant based his defence entirely on the averment that he was not liable to pay the plaintiff in as much as there was no contract of tenancy between them. He did, no doubt, say that he paid rents to the head landlord, namely, the two ladies, but there was no specific plea based upon it. When the time came for issues to be framed, Mr. Kanagarajah, for the plaintiff, suggested the following :—

1. Did the plaintiff let premises No. 179, 4th Cross Street, Pettah, on a monthly rental of Rs. 295 to the defendant on 28. 10. 1955 ?

2. Has this tenancy been terminated by a notice expiring on 31. 3. 1958 ? (Notice to quit given by the plaintiff to the 1st defendant is admitted).

3. Is the 1st defendant in arrears of rent since 1. 7. 56, for more than one month after it has become due ?

4. If the above issues are answered in the affirmative, is the plaintiff entitled to eject the 1st defendant and those holding under them ?

5. What amount is due on account of arrears of rent and damages from the 1st defendant to the plaintiff ?

Mr. Advocate Somasunderam who appeared for the 1st defendant while accepting these issues suggested only the following issues :—

6. Is the 1st defendant in occupation of the premises in question as a tenant under Mrs. F. V. de Silva and Mrs. Sumitra Aratchi as from October, 1955 ?

7. If so, can the plaintiff maintain this action ?

All the issues framed were accepted.

It was thus clear on a consideration of the issues that the 1st defendant at no time contended that he had paid any rents to the head landlords for and on behalf of his landlord and thereby discharged his obligations to pay rents to her. On the contrary, his defence was that he was a tenant of the owners and was not at all liable to pay rent to the plaintiff. On the main issues the learned trial judge came to the conclusion that the 1st defendant was a tenant of the plaintiff. He, nevertheless, held that the 1st defendant was not in arrears of rent for more than one month after it had become due and that, therefore, the plaintiff was not entitled to maintain his action. He also held that the 1st defendant had by payment to the head landlords discharged his obligations to pay rents to the plaintiff and that on issue 5 no sum of money was due as rent to the plaintiff for the period 1st July, 1956, up to 31st March, 1958, but he held that the 1st defendant had not paid for the month of April, 1958, and on that ground had been in arrears of rent for more than one month after it had become due. He accordingly entered judgment in ejectment and ordered the defendant to pay the plaintiff damages from 1st April, 1958, till the plaintiff was restored to possession.

Against this judgment the plaintiff did not appeal. He did not contest the validity of the Judge's findings that the 1st defendant had discharged his obligations to pay the plaintiff by direct payment to the plaintiff's head landlord at the rate of Rs. 295/- per mensem for the period 1st July, 1956, to 31st March, 1958. The 1st defendant, however, preferred the present appeal against the learned Judge's findings. The plaintiff who received the usual notice in regard to the appeal did not in terms of section 772 " take any objection to the decree which he could have taken by way of appeal " in order to reverse the learned Judge's findings on issues 3 and 5. Counsel appearing for her, thus, was compelled to accept the Judge's findings that no rent was due to her in respect of the period 1st July, 1956, to 31st March, 1958.

The first question that arises for consideration is whether the defendant can be said upon the learned Judge's findings to have been in arrears of rent within the meaning of the Rent Restriction Act. Plaintiff's contention was that she gave notice to the 1st defendant because he was in arrears of rent for more than one month after it had become due. The notice was given at the end of February to quit and deliver possession on 31st March. Indeed, the plaintiff could not have instituted this action for ejectment if the 1st defendant had not been in arrears of rent for more than one month after it had become due in respect of a period prior to 1st March, 1958. The learned Judge, however, having regard to the general terms in which issue 3 was framed,

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took the view that it was open to him to hold that rent had not been paid for the month of April, 1958 ; but, in my opinion, he was not entitled to do so for that was certainly not the plaintiff's case. The plaintiff's case was that the arrears of rent was in respect of a period prior to the giving of the notice. That is the only inference one could draw from a consideration of the plaint, and the issues must ordinarily be referable to the plaint unless it is obvious that something else was intended. If the 1st defendant was not in arrears of rent for the period stated by the plaintiff, his action must necessarily fail.

The learned trial Judge on his own and without any argument being addressed to him also took the view that the tenants had paid the head landlord a sum of money which was sufficient to cover the rents for the period July, 1956 to April, 1958 and that these payments having been made for the benefit of the landlord should be set off against the rent. In coming to this conclusion he relied on a principle of Roman-Dutch law referred to by Wille in his book " Landlord and Tenant " in the following terms :—

> " The tenant has the *actio locati* agains his sub-tenant for rent due under the sub-lease, unless the sub-tenant had paid to the landlord himself what he owes to the tenant in which case the sub-tenant is discharged from liability to the tenant."

For this proposition, Wille has referred to Voet 19.2.21 and 46.3.7. Wille's statement of law in that particular paragraph is not quite complete for, according to Wille himself, the payment by a sub-tenant to a landlord would discharge his liability for payment of rent to his own landlord if only such payment was for the purpose of preventing his own goods from being seized under the landlord's tacit hypothec. At page 178 of the same edition,* Wille puts it in this way :—

> " Privity of contract is not created by the landlord accepting rent from a sub-tenant, even if he does so for a substantial period of time, since that is not sufficient to constitute a *delegatio* or assignment, for a sub-tenant is entitled to pay to the landlord rents due to him by the tenant either to free his goods (the sub-tenant's) from the landlord's *tacit hypothec* or acting as *negotiorum gestor* for the tenant."

Voet makes it clear that the payment to operate as a discharge of the debt due to the landlord must be for the benefit of the landlord. In Book 46, Title 3, section 7, on which Wille relies for his statement of the law, this is what Voet says (Swift and Payne's translation):—

> " Although payment to my creditor's creditor will not be valid without my creditor's consent except in so far as my actions on his behalf have been for his benefit though unknown to him."

It will thus be seen that before the sub-tenant can plead that he has discharged his obligation to pay his landlord the rent due to him by paying such rent to the head landlord, he must also prove that such payments were made to the benefit of the landlord or to prevent his own goods being distrained by the head landlord. These are questions of fact involving evidence and must be covered by express issues. It was never the 1st defendant's case that he was a tenant of the plaintiff and discharged his obligations by payment of rents to the head landlord. On the contrary he repudiated his contract of tenancy with the 1st defendant and it was not open to the judge on his own to have thought of this defence which neither party contemplated in his pleadings or in his issues.

In appeal before us it was not suggested that the sub-tenant can pay the head landlord unless such payment was made for the benefit of his own landlord. Whether that be the true legal position or not, specific issues should have, in my opinion, been framed, otherwise, it would have caused prejudice to the parties. Indeed, the learned Judge at one stage in rejecting the evidence of the plaintiff states that she did not produce any receipt in support of her statements that she had paid rents due from her to the head landlords. It was not necessary for her to produce such receipts. She said she had them with her and ordinarily it would have been totally irrelevant to produce them as the question of whether she was or was not in arrears in regard to rent payable by her to the head landlords was not put in issue. Nevertheless, there is some evidence given by her to the effect that she had made payments to the head landlords and that if an accounting is taken there would be monies due to her from them. One of the head landlords, namely, Mrs. F. V. de Silva when questioned as to whether she had received Rs. 6,000/- as an advance from the plaintiff's husband who held her power of attorney, at first said she could not remember but when a receipt bearing her signature was produced and shown to her, she acknowledged her signature. She had also written a letter P 2 to the plaintiff admitting having taken Rs. 6,000/- in advance. She further stated that she remembered having received Rs. 1,000/- or Rs. 1,500/- as advance against rent due to her. She was questioned in

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regard to these matters solely for the purpose of showing that the 1st defendant was not her tenant and that it was the plaintiff who was her tenant. All these matters would have been properly gone into if proper issues in respect of them had been framed.

In my opinion the learned Judge has totally misdirected himself in embarking on these lines of thought and in deciding the case on matters which were not put in issue. The question he had to determine was first whether the 1st defendant was a tenant of the plaintiff and secondly whether he was in arrears of rent prior to April 1958 for more than one month after it had become due. These matters have not been satisfactorily dealt with.

It was contended on behalf of the appellant that having regard to provisions of section 772 of the Civil Procedure Code it was not open to the defendant to question the validity of the Judge's findings that the 1st defendant was not in arrears of rent for the period ended 1st April, 1958. In as much as there has been no objection filed to the above decree as provided for in the relevant sections it is perfectly correct that the respondent is not entitled in appeal to obtain a variation of the decree in regard to the rents payable to him for that period but it was contended on his behalf that even without filing an objection he could in terms of section 772 support " the decree on any of the grounds decided against him in the Court below ". The meaning of the expression " support the decree on any of the grounds decided against him in the Court below " contained in section 772 (1) does not appear to have been interpreted in any of the decisions of our Courts, but it was contended on behalf of the respondent that he could attack so much of the findings as are adverse to him for the purpose of his argument, so long as he does not ask for the judgment and decree of the lower Court to be in any way altered. I do not agree. The meaning of the expression appears to me to be that the respondent must accept the correctness of the decision which has been made against him and on that basis if the findings help him, try to support the decree. This appears to be the view taken by the High Courts of Calcutta, Madras, Lahore and Rangoon in respect of similar provisions contained in the Order No. 41, Rule No. 22 of the Indian Civil Procedure Code, *vide* Chittaley, 1908 ed., page 2674.

From what has been stated above, it is manifest that the learned trial Judge has decided this case on a consideration of matters which were not in contemplation of the parties and in respect of which they did not tender evidence.

In the circumstances, the judgment of the learned trial Judge cannot be allowed to stand and I think that the proper course for us to follow is to set it aside and remit the case for a fresh trial upon proper issues. If the 1st defendant desires to do so, he may adopt the view of the learned District Judge that he made payment on behalf of the plaintiff to the head landlord. Neither party will be entitled to the cost of this appeal but the costs of the Court below will be costs in the cause.

SANSONI, J.
I agree.

Set aside and sent back.

Present : **Herat, J.**

RASIAH & OTHERS *vs.* INSPECTOR OF POLICE, WELIMADA

S.C. 292-303/1961—*M.C. Badulla, Case No.* 25027.

Argued and decided on : 17th April, 1962.

Criminal Procedure Code, sections 148 (1), 151 (2), 187 (1)—*Accused persons brought to Court otherwise than on summons or warrant—Evidence of persons who brought them to Court not recorded as directed by section* 151 (2)—*Are the provisions of section* 151 (2) *applicable only to cases where the proceedings have commenced under section* 148 (1) (*d*)—*Does failure to hold examination directed by section* 151 (2) *vitiate conviction—Principle not applicable where accused surrenders to Court.*

Held : (1) That as the 1st to 11th accused-appellants in the present case had been brought into Court otherwise than on summons or warrant, and the Magistrate had not complied with section 151 (2) of the Criminal Procedure Code by examining the person who brought them into Court before framing charges against them, their convictions were vitiated.

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(2) That this reasoning did not apply to the case of the 12th accused-appellant, as he was not brought into Court by anybody but had surrendered to Court. However, he too was entitled to be discharged as : (*a*) the charge of unlawful assembly could not be maintained against him owing to the discharge of the other accused-appellants ; and (*b*) the other offences with which he was charged could not have been established against him beyond reasonable doubt.

Per HERAT, J.—"I think the real test as to whether there should be compliance with the provisions of Section 151 (2) is not whether the accused are brought into court in custody, but as stated in section 187 (1) where the accused are brought into court without prior summons or warrants."

Cases referred to : *Mohideen* v. *Inspector of Police, Pettah*, (1957) 59 N.L.R. 217 ; LV C.L.W. 12.
Martin Appuhamy v. *Sub-Inspector of Police, Jaffna*, (1962) LXI C.L.W. 90 ; 64 N.L.R. 34.

Colvin R. de Silva with *Nimal Senanayake* and *Bala Nadarajah*, for the accused-appellants.

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

HERAT, J.

The twelve accused-appellants in this case were charged with being members of an unlawful assembly and with causing hurt and mischief arising out of certain incidents that took place on an estate. Owing to the disturbance, the Police were called in by the estate management and Inspector Weeratunga started investigations. Acting under section 126 (*a*) of the Criminal Procedure Code he forwarded a report and the 1st to 11th accused-appellants through another police officer to the learned Magistrate of Badulla who remanded the accused Nos. 1 to 11. These accused were subsequently enlarged on bail. Later the 12th accused surrendered to Court and the report was filed under section 148 (1) (*b*) of the Criminal Procedure Code. It will be noted, therefore, that none of the accused-appellants were brought to Court on summons or warrant issued by the Court. A point is taken by learned counsel for the appellants that as, at any rate, Nos. 1 to 11 accused-appellants were not brought to Court on summons or warrant, section 187 (1) of the Criminal Procedure Code applies and that the person who brought them to Court should have been examined before the learned Magistrate framed charges against them. Section 187, sub-section 1 reads as follows :—

> " Where the accused is brought before the Court otherwise than on summons or warrant the Magistrate shall after examination directed by section 151 (2), if he is of opinion that there is sufficient ground for proceeding against the accused, frame a charge against the accused."

Section 151, sub-section 2 of the Criminal Procedure Code reads as follows :—

> " Where proceedings have been instituted under paragraph (*d*) of section 148, sub-section 1, the Magistrate shall 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."

Section 148 (1) (*d*) reads as follows :

> " Proceedings in a Magistrate's Court shall be instituted in one of the following ways :—
>
> (*d*) on any person being brought before a Magistrate of such Court in custody without process, accused of having committed an offence which such Court has jurisdiction either to inquire into or try ; "

It is submitted by learned counsel for the appellants that as the first to the eleventh accused were brought to Court without a prior summons or warrant even though they were not in custody the provision of section 187, sub-section 1 came into operation and requires the person who brought them to Court to be examined as required by section 151 (2). Learned counsel further submits that the failure to do so was a fatal defect which could not be cured under section 425 of the Criminal Procedure Code. On the other hand, learned Crown Counsel, Mr. Pullenayegum submits that this is not a case where an examination under section 151 sub-section 2 was required. For he says that section expressly deals with a case where proceedings have commenced under section 148, sub-section 1 (*d*), namely, where the accused are brought into Court in custody. He submits, that in this case the accused were not brought into Court in custody. Therefore, section 151 (2) does not apply as proceedings were also not commenced under section 148 (1) (*d*). Reading the evidence I am of opinion that there is no satisfactory evidence to show that Inspector Weeratunga, in the words of the Code, brought the accused into Court. It is submitted that they were either brought into Court by the Police Officer who produced them before the Magistrate when investigations were going on under section 126 (*a*), or at any rate, that there is no evidence that Inspector Weeratunga produced them. I am inclined, on the evidence as recorded, to accept that view, and I take the view that whoever brought the accused into Court has not been examined by the learned Magistrate.

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In *Mohideen* vs. *Inspector of Police, Pettah*, 59 N.L.R. 217, a Divisional Bench of this Court held that where certain accused were in custody and proceedings against them commenced, by a report under section 148 (1) (*d*) the requirements of section 187, sub-section 1 came into force, and that there should have been an examination under section 151 (2) of the Code. That Bench also held that there had been a failure to examine the person or persons who brought the accused into Court in that case, and the charge framed was improper and vitiated the conviction. The basis of that judgment is that if accused are brought to Court without prior process by way of summons or warrant, then it becomes imperative that the Magistrate should examine the person who brings the accused to Court under section 151 (2). That was a case where expressly proceedings were instituted under section 148 (1) (*b*), but nevertheless the Court quashed the conviction because there was a failure to comply with the examination required under section 151 (2). Later doubts seem to have arisen in the minds of certain Judges of this Court as to whether the requirements of section 151 (2) apply only to cases where proceedings were commenced under section 148 (1) (*d*), where the accused were produced in Court whilst in custody. The matter was dealt with by a Divisional Bench in S.C. 1003/1959, M.C. Jaffna 17894—S.C. minutes of 11th April, 1962.† That judgment has been produced before me and I find that it in reality upholds the judgment of the Court in Mohideen's case. I think the real test as to whether there should be compliance with the provisions of section 151 (2) is not whether the accused are brought into Court in custody, but as stated in section 187 (1) where the accused are brought into Court without prior summons or warrants. In Mohideen's case, as I stated earlier, it is decided that the conviction should not stand as there was non-compliance with section 151 (2). I find that there has been non-compliance in this case, which in my opinion vitiates the conviction. I, therefore, set aside the conviction of the 1st to 11th accused-appellants. In my opinion I do not think that they should be tried again before another Magistrate. The alleged offence took place in April, 1960, and nearly two years have elapsed. I, therefore, discharge the accused-appellants 1 to 11. As regards the 12th accused-appellants the reasoning given so far does not apply to him because it cannot be argued that he was brought into Court, by anybody. He surrendered to Court. But it is clear that in view of the discharge of the 1st to 11th accused-appellants, the charge of unlawful assembly cannot be maintained in his case. I, therefore, discharge him under the charge of unlawful assembly. As regards the charge of mischief, I am not satisfied that the offences were those that could have been established against them beyond reasonable doubt. I, therefore, discharge the 12th accused-appellant under those charges also. In the result all the accused-appellants are discharged.

Appeal allowed.

Present : **Tambiah, J.**

U. S. PREMAWANSA *vs.* K. SOMALATHA

S.C. 223/1961—*M.C. Matale, Case No.* 5531.

Argued on : 19-6-61.
Decided on : 22-6-61.

Maintenance—Kandyan Marriage and Divorce Act, sections* 33, 35*—Order to pay maintenance—Dissolution of marriage thereafter—Effect of such dissolution on maintenance order—Order to pay maintenance on divorce—How enforced.*

Held: (1) That once an order for dissolution of a marriage is made by the District Registrar under the provisions of the Kandyan Marriage and Divorce Act, an order for maintenance previously made by a Magistrate ceases to operate in respect of any period subsequent to the dissolution. A distress warrant for the recovery of arrears of maintenance can, therefore, be issued only with regard to arrears due up to the date of dissolution.

(2) That when the District Registrar acting under the provisions of the Act, has, in ordering the dissolution of the marriage also ordered the payment of maintenance, the order for such payment can be enforced in the same manner as an order made by the District Court in a matrimonial action under Chapter 52 of the Civil Procedure Code.

†See 61 C.L.W. p. 90.

* Cap. 113 of the Legislative Enactments (1956) Edition.

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Cases referred to : *Abdur Rohoman* v. *Sakhina and Others,* I.L.R. 5 Cal. 558 ; Indian Decisions (New Series) Vol. 2, Cal. 963.

In the matter of the Petition of Din Muhammed, I.L.R. 5 All. 226; 2 A.W.N. (1882) 237 ; Indian Decisions (New Series) Vol. 3, All. 154.
Mt. Aziman v. *Pir Baksh,* 1876 Pun. Re. No. 1, Cr., p. 1.
Meniki v. *Siyathuwa,* 42 N.L.R. 53; XIX C.L.W. 37.
D. Simon Appu v. *N. H. Somawathie,* 56 N.L.R. 275.
Sarana v. *Heen Ukku,* 45 N.L.R. 196.
Wimalawathie Kumarihamy v. *Imbuldeniya,* XXXIX C.L.W. 75.

L. G. Weeramantry, for the respondent-appellant.

No appearance for the applicant-respondent.

Tambiah, J.

The appellant was married to the respondent under the Kandyan Marriages and Divorce Act (No. 44 of 1952, as amended by Act No. 34 of 1954), on the 18th of February, 1957. On the 21st of July, 1959, in the maintenance action filed by the respondent against the appellant, the latter was ordered to pay maintenance at the rate of Rs. 10/- per month to the respondent. Subsequently, divorce proceedings were filed under the abovementioned Act and an order granting dissolution was made on the 16th of December, 1959, by the District Registrar.

On an application made by the respondent, by motion dated 26th November, 1956, claiming arrears of maintenance and a distress warrant to recover the same, an inquiry was held by the learned Magistrate on the 3rd of December, 1960. At the inquiry, the appellant produced the certificate of divorce granted by the District Registrar and claimed that the Court cannot enforce the order for maintenance as the marriage between the parties had been dissolved. The learned Magistrate rejected the submission of the appellant and made order that the respondent was entitled to recover from the appellant arrears of maintenance at Rs. 10/- per month. The appellant has appealed from the order of the learned Magistrate.

An order for the dissolution of marriage has the effect of rendering the order for maintenance ineffective as from the date of the dissolution [*vide Abdur Rohoman* vs. *Sakhina* (5 Call. 558); *In the matter of Din Muhammed* (5 All. 226) ; *Mt. Aziman* vs. *Pir Baksh,* 1876, Pun. Re. No. 1, Cr., p. 1 (2) ; *Meniki* vs. *Siyathuwa* (1940) 42 N.L.R. 53 at 54]. This Court has even gone to the extent of holding that an order for separation has the same effect (*vide Simon Appu* vs. *Somawathie,* (1953) 56 N.L.R. 275). It would be artificial to contend that because the order was not formally cancelled, a right, which has been extinguished, could be revived and a liability that had been terminated could be enforced (*Simon Appu* vs. *Somawathie* (supra)). Hence, the order for maintenance ceases to have any effect after the date of the divorce.

However, in the instant case, the respondent is not without a remedy. The District Registrar, acting under the Kandyan Marriages and Divorce Act (supra), has ordered the appellant to pay the respondent the same sum as ordered by the Magistrate in the maintenance proceedings. The respondent could enforce this order in the same manner as an order made by the District Court in a matrimonial action under Chapter 52 of the Civil Procedure Code (*vide* section 35 of the Act, No. 49 of 1952). Under the repealed Ordinance (Kandyan Marriages Ordinance (Cap. 96), the order of the District Registrar could be enforced as if it was an order for maintenance made by a Magistrate (*vide* Section 20 of the Kandyan Marriages Ordinance (supra) ; *Sarana* vs. *Ukku* (1944) 45 N.L.R. 196). This Ordinance is no longer in force.

Therefore, I hold that no distress warrant could be issued to recover any arrears of maintenance due after the 16th of December, 1959, but such a warrant could be issued to recover all arrears due up to that date. The mere filing of an action for divorce, however, does not have the effect of cancelling a maintenance order (*vide Wimalawathie Kumarihamy* vs. *Imbuldeniya,* 39 C.L.W. 75), but once a decree is entered, the order for maintenance by a Magistrate ceases to have any operation for any period subsequent to the date of divorce.

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I set aside the order of the learned Magistrate and send the case back to enable the Magistrate to determine the arrears of maintenance due up to the 16th of December, 1959, and to issue a distress warrant for the recovery of the sums due up to that date if such a course becomes necessary. The respondent was not represented in the appeal and there will be no costs awarded in this Court and in the Magistrate's Court.

Set aside and sent back.

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

MALLOWS *vs.* THE COMMISSIONER OF INCOME TAX

S.C. No. 3 *of* 1961—*Income Tax Case Stated No. BRA*—289.

Argu d on : 6th February,, 1962.
Decided on : 15th June, 1962.

Income Tax Ordinance (*Cap.* 242), *section* 6—*Meaning of term* " *the opinion of the Commissioner*" *in section* 6 (2) (*b*)—*General opinion in mind of Commissioner in regard to such matters insufficient.*

Held : That " the opinion of the Commissioner " referred to in section 6 (2) (*b*) of the Income Tax Ordinance is an opinion that must not only be generally entertained in the mind of the Commissioner in regard to such matters, but must also *be put into words in a document* so as to serve, in each case, as evidence to guide those functionaries who have the legal duty cast on them to determine " net annual value " for the purposes of section 6 of the Income Tax Ordinance.

H. V. Perera, Q.C., with *S. Ambalavanar*, for the assessee-appellant.

M. Kanagasunderam, Crown Counsel, for the Commissioner.

T. S. FERNANDO, J.

The assessee-appellant, during the years of assessment 1955-56, 1956-57, 1957-58 and 1958-59, was provided by his employer with a place of residence free of rent. The employer had for the purpose of so providing a place of residence for the appellant entered into a lease with one landlord for a period of three years commencing from 1st February, 1952, paying him a rent of Rs. 5,580/- per annum in respect of one place of residence and into another lease with another landlord for a period of five years commencing from 1st October, 1955, paying him a rent of Rs. 9,300/- per annum in respect of the other place of residence. These respective places of residence had been assessed for rating purposes by the Colombo Municipal Council and the annual values so assessed were much lower. being Rs. 2,500/-, Rs. 2,667/-, Rs. 3,173/- and Rs. 3,690/-, respectively for the years of assessment referred to above.

Under section 5 of the Income Tax Ordinance, income tax for any year of assessment becomes chargeable in respect of the profits and income of every person for the year preceding the year of assessment. Section 6 (1) of the Ordinance defines profits and income as meaning, *inter alia*, the profits from any employment, while section 6 (2) (*a*) defines " profits from any employment " as including the rental value of any place of residence provided rent free by the employer. The appellant became liable, therefore, to pay income tax in respect of the rental value of the place of residence provided rent free by his employer. That, of course, is undisputed.

Dispute arose in regard to the manner in which the rental value was to be computed. It was the appellant's contention that, as the annual value of the two places of residence concerned have both been assessed for rating purposes by a local authority, section 6 (2) (*b*) of the Ordinance requires that the annual value so assessed, adjusted as specified in the said section and in section 6 (2) (*c*), shall be considered to be the rental value for the purpose of the section. For the Commissioner, it was contended that inasmuch as section 6 (2) (*b*) enacts that for the purposes of section 6 the net annual value of a place of residence shall be determined on the basis of the rent which a tenant might reasonably be expected, taking one year with another, to pay for such a place of residence (the tenant paying rates ano the owner bearing the cost of repairs), subject td a deduction of twenty *per centum* for repairs and

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other expenses, the appellant was liable to be assessed for income tax on the basis of the rent actually paid with suitable adjustment depending on the incidence of the payments for rates and repairs. The Board of Review agreed with the contention advanced on behalf of the Commissioner and held that the rental values of the two places of residence had been correctly fixed at Rs. 5,580/- and Rs. 9,300/- per annum.

Before we could enter upon a consideration of the merits of the respective contentions we were called upon to address our minds to the following question which has been raised as a question of law :—

> "Whether there was any evidence of the opinion of the Commissioner that the assessment made by the local authority does not accurately represent the annual value of the premises in question and, if there was, whether there was any evidence on which the Commissioner could have properly formed such opinion ?"

In regard to the first part of this question, no document embodying an opinion of the Commissioner to the effect indicated above was made available to us. As the case stated contains a paragraph (paragraph 10) which reads that "as the rent paid by the employer in respect of 43, Galle Face Court and 49, Turret Road, was considerably in excess of the annual value assessed under the Municipal Councils Ordinance the Commissioner of Inland Revenue was of opinion that the assessment by the Colombo Municipal Council did not accurately represent the annual value of the two premises for the years of assessment 1955-56 to 1958-59" we requested learned counsel for the Commissioner to inform us whether such an opinion has, in fact, been expressed by the Commissioner. Learned Crown Counsel informed us, after the conclusion of the argument and after reference to the office of the Commissioner, that no such opinion has been expressed in connection with the present case, but that the Commissioner is generally of opinion that where the assessments of annual values made by local authorities are much lower than rents actually paid by tenants the local authorities' assessments do not accurately represent the annual values of the places of residence. I do not think that this kind of general opinion entertained by the Commissioner is included in the expression "the opinion of the Commissioner" specified in section 6 (2) (*b*). The opinion must not only be entertained generally, so to say, in the mind of the Commissioner, but the matter must be taken a step further and translated into words in a document so as to serve as evidence to guide those functionaries who have the legal duty cast on them to determine "net annual value" for the purposes of section 6 of the Income Tax Ordinance. In this state of affairs it does not appear to me to be necessary to enter upon a consideration of the respective contentions in regard to the manner of assessment. The rental value of the places of residence provided by the employer should, in my opinion, in the circumstances here present, be determined on the basis of the annual value as assessed by the Colombo Municipal Council.

Although this appeal calls to be disposed of on the ground that there is no evidence here of any opinion of the Commissioner which is a condition precedent for not equating the net annual value of a place of residence for the purposes of section 6 to its annual value as assessed for rating purposes by a local authority, Mr. Perera invited us to express our opinion on the merits of the respective contentions advanced on behalf of the parties in regard to the manner of assessment. I have given consideration to this request of learned counsel, but as any opinion we may express on that question in the present circumstances would not be so much a decision but a mere *obiter dictum*, I think the better course to take would be to permit that question of law to be decided in another case in the future when perhaps there may be

(*a*) fuller argument than was had before us and

(*b*) more evidence presented by the parties than was placed in this case before the Board of Review.

In view of the decision we have reached and expressed above on one of the questions of law raised, I would set aside the order made by the Board of Review and remit the case to the Board so that a revised assessment in accordance with our opinion may be made.

The appellant is entitled to his costs in this Court and to the return of the fee paid by him in terms of section 78 (1) of the Ordinance.

Tambiah, J.
I agree.

Appeal allowed.

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Present : **Herat, J.**

PACKIR *vs.* ABIDAH

S.C. 55/'61—C.R. Colombo, 78128 *(R/E).*

Argued and decided on : 13th June, 1962.

Rent Restriction (Amendment) Act, No. 10 *of* 1961, *sections* 13 (1), (2) *and* (3)—*Whether action or proceedings is or are pending—Appeal pending in action—Effect.*

Plaintiff instituted an action on 24th November, 1960, for rent and ejectment against the defendant, claiming this relief on a ground not specified in section 13 (1) of the Rent Restriction (Amendment) Act, No. 10 of 1961. Judgment was delivered for plaintiff in the Court of first instance on 20th March, 1961, but the defendant appealed, and this appeal was pending on the 30th April, 1961. The question for decision was whether these proceedings became null and void under section 13 (3) of the aforementioned Act, on the ground that they were pending on the day immediately preceding the date of commencement of the Act. The Act came into force on the 1st May, 1961.

Held : That the proceedings were pending on the 30th April, 1961, and therefore, the action or proceedings must be deemed to have been and be null and void.

Case referred to : *Silva* v. *Fernando,* (1920) 22 N.L.R. 39.

M. Markhani with *Sivagurunathan,* for the defendant-appellant.

M. T. M. Sivardeen, for the plaintiff-respondent.

HERAT, J.

This is an action for rent and ejectment instituted by the plaintiff-respondent against the defendant-appellant. Admittedly the premises in question are subject to the rent restriction law. The action was instituted on the 24th of November, 1960. The Rent Restriction (Amendment) Act, No. 10 of 1961, by section 13, sub-section 1, provides as follows :—

> "Notwithstanding anything in the principal Act the land-lord of any premises to which this Act applies shall be entitled to institute any action or proceedings for the ejectment of the tenant of such premises *only* on any one or more of the following grounds."

Three grounds : (*a*), (*b*) and (*c*) are thereafter set out. The ground or grounds on which the plaintiff-respondent instituted the present action, admittedly are not any of the grounds set out in section 13 (1) (*a*) or (*b*) or (*c*) of the Rent Restriction (Amendment) Act, No. 10 of 1961.

Sub-section 2 of the said section 13 of the said Act provides as follows :—

> "The provisions of sub-section 1 shall be deemed to have come into operation on the 20th day of July, 1960 and shall continue in force for a period of two years commencing from that date."

Therefore, section 13 (1) was in operation at the date when this action was filed. Sub-section 3 of the said section 13 of the Rent Restriction (Amendment) Act, No. 10 of 1961, further provides as follows :—

> "Where any action or proceedings instituted in any court on or after the 20th day of July, 1960 for the ejectment of a tenant from any premises to which the principal Act applies on any ground other than a ground specified in sub-section 1 of this section *is or are pending* on the day immediately preceding the date of commencement of this Act, such action or proceedings shall be deemed at all times to have been and be null and void."

It is admitted that the Rent Restriction (Amendment) Act, No. 10 of 1961 came into force as from the 1st of May, 1961. Judgment in this case was delivered in the Court of first instance on the 20th of March, 1961, but the defendant-appellant filed a petition of appeal in due time and that appeal was pending on the 30th of April, 1961, which is the date immediately preceding the commencement or the coming into force of the Rent Restriction (Amendment) Act, No. 10 of 1961. In my opinion this action or proceedings for the ejectment of the tenant from admittedly protected premises was pending on the 30th of April, 1961, in view of the appeal.

Proceedings or an action which cannot normally terminate with the entering of the decree in the

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

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Court in which they are first instituted are, in my opinion, not terminated if an appeal is filed to the Supreme Court from the decree of the Court of first instance and until such appeal is disposed of by this Court that action or proceedings are, in my opinion, pending. I am supported in the view I take by the decision of this Court reported in 22 New Law Reports, page 39. Even for purposes of *res-judicata* this Court and the Privy Council have both held that where an action or proceedings are pending appeal the decree of the Court of first instance cannot be used as a basis for pleading *res-judicata*. I think the same reasoning applies.

In my view this action was pending on the 30th of April, 1961, and therefore, by sub-section 3 of section 13 of the Rent Restriction (Amendment) Act, No. 10 of 1961, I declare that the action or proceedings may be deemed to have been and be null and void. The appeal is allowed and the decree of the lower Court is set-aside. The action by the plaintiff-respondent is dismissed. The defendant-appellant is entitled to costs in this Court as well as in the Court of Requests.

Appeal allowed.

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

WILLIAM SILVA *vs.* K. ATTADASSI THERO*

S.C. 283 (*F*)/1960—*D.C., Kandy*, 1575.

Argued on : 19th and 20th March, 1962.
Decided on : 29th March, 1962

Compensation for improvements—Defendant in occupation of land on an informal lease permitting erection of permanent buildings of specified dimensions and paying ground rent—Action for ejectment of defendant after construction of said buildings—Claim by defendant for compensation in respect of his improvements—Order by trial Court that claim for compensation can only be enforced after defendant vacates land—Plea of ius retentionis.

The defendant entered into occupation of a land and erected buildings thereon after the execution of a non-notarial document which purported to be a lease executed by the plaintiff, as owner, the object of the purported lease being that such person should construct a permanent building of specified dimensions, paying a monthly ground rent. The defendant who was subsequently sued for ejectment claimed compensation for the improvements he had made. The learned District Judge held that the defendant was entitled to compensation but that the right could only be enforced after he vacated the land. The defendant appealed.

Held : (1) That the document being non-notarial was void, and the defendant was never a tenant of the plaintiff.

(2) That the law applicable in such a situation is laid down in the decision of Garvin, J., in *Nugapitiya* v. *Joseph*, (28 N.L.R. 140) and the defendant must be accorded the rights of a *bona fide* possessor and is entitled a *jus retentionis*.

Followed : *Nugapitiya* v. *Joseph*, (1926) 28 N.L.R. 140.

Cases referred to : *Alles* v. *Krishnan*, (1952) 54 N.L.R. 154 ; XLVII C.L.W. 19.
Jafferjee v. *Cyril de Zoysa*, (1953) 55 N.L.R. 124 ; L C.L.W. 1.
Hassanally v. *Cassim*, (1960) 61 N.L.R. 529.
De Silva et al. v. *Perusinghe*, (1939) XIV C.L.W. 137.

S. Sharvananda, for the defendant-appellant.
B. J. Fernando, for the plaintiff-respondent.

H. N. G. FERNANDO, J.

The only question for determination in this appeal is whether the defendant, who is to be ejected from the plaintiff's land, is entitled to a *ius retentionis* until he is paid compensation for improvements effected on the land with the knowledge and consent of the plaintiff's predecessor in title. The defendant's appeal is against a finding of the learned District Judge that, although he is

*For Sinhala translation, see Sinhala section, Vol. 4, part 4, p 5.

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entitled to compensation in respect of the building erected by him, his claim for compensation can only be enforced after he vacates the land. This finding is based upon *dicta* of this Court in the cases of *Alles* v. *Krishnan*, (54 N.L.R. 154) and *Jafferjee* v. *Cyril de Zoysa*, (55 N.L.R. 124) to the effect that a tenant's right to claim compensation accrues after the tenancy has expired and after he has vacated the leased property. Although counsel has invited us to consider whether these *dicta* correctly express the common law applicable in Ceylon, it is unnecessary for us to examine their correctness in the circumstances of this particular case.

The defendant entered into occupation of the land and erected a building thereon after the execution of the document D 1 which purported to be a lease executed by the owner, the object of the purported lease being that the defendant should construct a permanent building of specified dimensions, paying a ground rent of 33 cents per month. This document, being non-notarial, was plainly void, and the plaintiff's action for ejectment depended on the fact that the document conferred no rights of occupation on the defendlnt, who was, therefore, never a tenant of the aand.That being so, the decisions which construe the law applicable in a case in which a tenant may claim compensation at the termination of the period of the tenancy are not applicable. What is directly applicable is the decision of Garvin, J., in *Nugapitiya* v. *Joseph*, (28 N.L.R. 140), and it is useful to cite in full his observations as to the mode in which the right to compensation has been accorded in our law to a person who improves a land on the faith of a document from the owner which turns out to be void in law :—

"But is it competent for a lesser who repudiates his lease because the failure to comply with certain requirements enables him to do so, to deny his lessee the benefits of the lease, and at the same time to limit the improver's right to compensation by the very lease which he repudiates? The lease admittedly is null and void. If the lessor is free from the obligations imposed upon him by the lease, so also is the lessee. What is the position of a person who is found in possession of land under these circumstances? He is not a *bona fide* possessor, for his possession cannot possibly be said to be *detentio animo domini*. He is not a lessee because the lease is null and void. He is a person who has entered upon a land and has improved it under the *bona fide* belief that his was entitled to possess and enjoy his improvements so long as he pleased. There is a further fact which has a direct bearing on the question, and this is that the improvements were made with the knowledge and consent of that owner and on the representation of the owner that if he made the improvement he was to have the right to possess and enjoy it for so long as he wished on payment of the specified ground rent. Such a person has not the *possessio civilis*. This is a circumstance which might deprive him of the right to claim compensation in other cases, but where, as in this instance, his claim is in effect against the person with whose knowledge and consent these improvements were made, it has been found possible to give him the rights of a *bona fide* possessor though in point of fact he has not the *possessios civilis*. In the case of *Mohamadu* v. *Babun* (2 C. A.C. 86) the defendant in an action for declaration of title and ejectment pleaded that he built a house standing on the land, that he made the plantation thereon with leave and licence of the owner, and that he was therefore not liable to be ejected until compensated for the improvements. Pereira, J. held that in these circumstances he was entitled to all the rights of a *bona fide* possessor, including a right to retain possession until compensated. The case of *Mohamadu* v. *Babun* (*supra*) is referred to by Bertram, C. J. in *Davithappu* v. *Bahar*, (26 N.L.R. 73), who regards it as development of the law by the extension of the doctrine of the rights of a *bona fide* possessor to compensation for improvements, to a class of persons who have not the *possessio civilis*. With all respect it does not seem to me that relief in this case was granted by treating these persons as having *utilis possessio* which is akin to *possessio civilis*, as is suggested by the same learned Judge in the case of *Appuhamy et al.* v. Doloswala Tea & Rubber Co., (23 N.L.R. 129). The result is reached by the extension and application of another rule, which is that an owner who acquiesces in the making of improvements is stopped from disputing the right of the improver to be compensated on the same footing as *bona fide* possessor.

Counsel for the plaintiff-respondent has not referred us to any subsequent decision which doubts the correctness of the view here expressed by Garvin, J. On the contrary, the recent decision of the Privy Council in *Hassanally* v. *Cassim*, (61 *N.L.R.* 529) confirms the view that in a case where an owner repudiates an alleged contract of tenancy and relies upon its invalidity, the claim of the occupier to compensation for improvements is not to be treated as a claim by a tenant.

The decision in *de Silva et al.* v. *Perusinghe*, (14 *C.L.W.* 137) does not deal with a case in which the owner of property repudiated a purported tenancy. In so far therefore as it held that a tenant has no *ius retentionis* even though he may effect improvements in good faith the decision is of no assistance in determining the rights of a person who has not been in fact, a tenant.

Following the decision in *Nugapitiya* v. *Joseph* (*supra*), I hold that the Defendant must be accorded the rights of a *bona fide* possessor, and is therefore entitled to remain in possession of the land until he is paid the compensation due for the improvement, namely, the present value of the building which he erected with the express consent of the plaintiff's predecessor. The value was in dispute at the trial, but no finding as to the value was reached. When the record is received in the District Court, the District Judge will proceed to

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reach such a finding after hearing such evidence as the parties may adduce as to the present value of the building. He will thereafter enter decree for ejectment, but the decree must provide that writ of ejectment cannot issue until the plaintiff pays to the defendant the amount fixed as compensation less any amount due as arrears of rent from 20th October, 1951, to the date of issue of writ.

The decree already entered is set aside *pro forma*. The defendant will be entitled to the costs of the previous proceedings in the District Court as well as to the costs of this appeal.

T. S. Fernando, J.
I agree.

Set aside and sent back.

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

THE QUEEN *vs.* K. SIRIWARDENE

S.C. 4-7—*D.C.* (*Criml.*) *Colombo, No. N.* 1998.

Argued and decided on : 15th February, 1961.

Criminal Procedure Code, section 184—*Misjoinder of charges—Whether illegality, or irregularity which can be cured.*

On count 1 of the indictment all the accused were charged with, in the course of the same transaction, committing house-breaking by entering into premises No. 570, Pathiragoda, and also premises No. 953, Wattegedera. On counts 2 to 5, the 2nd, 3rd, 4th, 5th, 6th, 7th and 8th accused were charged with house-breaking in respect of premises No. 570, Pathiragoda, and on counts 6 to 10 the 1st, 2nd, 4th, 5th, 8th, 9th and 10th accused were charged with house-breaking in respect of premises No. 953, Wattegedera. The 1st accused was not charged with committing any offence in respect of premises No. 570, Pathiragoda, and the 3rd accused was not charged with committing any offence in respect of premises No. 953, Wattegedera.

Held : (1) That there had been a misjoinder of charges.

(2) That section 184, of the Criminal Procedure Code, did not permit such a joinder inasmuch as it was not alleged that all the accused acted jointly in respect of both acts of house-breaking.

(3) That the misjoinder amounted to an illegality and was not an irregularity which could be cured.

Cases referred to : *Jonklaas* v. *Somadasa*, (1942) 43 N.L.R. 284 1; XXII C.L.W. 96.
Cooray v. *Dias*, (1954) 56 N.L.R. 234
Subrahmania Ayyar v. *King-Emperor*, I.L.R. 25 Madras 61.

M. M. Kumarakulasingham, for the 4th accused-appellant.

3rd, 6th and 8th accused-appellants, in person.

S. S. Wijesingha, C.C., for the Attorney-General.

Sinnetamby, J.

There were ten accused in this case and on counts 2 to 5 of the indictment the 2nd, 3rd, 4th, 5th, 6th, 7th and 8th accused were charged with committing offences relating to an act of house-breaking which was committed in respect of premises No. 570, Pathiragoda. On counts 6 to 10 of the indictment the 1st, 2nd, 4th, 5th, 8th, 9th and 10th accused were charged with offences relating to an act of house-breaking in respect of premises No. 953, Wattegedera. It will thus be seen that in respect of premises No. 570, the 1st accused is not charged with any offence and in respect of premises No. 953 the 3rd accused is not charged with having committed any offence, but, nevertheless, all ten accused have been joined in one indictment. Count 1 relates to all the accused and it is suggested that they, in the course of the same transaction, did commit house breaking by entering into house No. 570, Pathiragoda, and also house No. 953, Wattegedera.

Objection is taken to the charges set out in the indictment on the ground that there is a misjoinder of charges. This objection does not appear to have been taken on behalf of the accused in the lower Court, but the learned District Judge himself has discussed it in his judgment. It must be stated that some of the accused were unrepresented.

The question that now arises for our consideration is whether this misjoinder amounts to an illegality which will render all proceedings void or whether it is an irregularity which can be cured.

Learned Crown Counsel sought to support the indictment on the footing that section 184 of the Criminal Procedure Code permitted the joinder

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of different offences provided they are committed in the course of the same transaction. But, as was pointed out in the case of *Jonklaas* vs. *Somadasa*, 43 N.L.R. p. 284, community of purpose and continuity of action are essential elements necessary to link together different acts so as to form one transaction. In this particular case the accused in respect of one transaction are different to the accused in respect of the other transaction. In this case the 1st accused, according to the indictment, was not a party to the other act of house-breaking, though all the others were charged with having taken part in both acts. It will thus be seen that it cannot be said that all the accused acted jointly in respect of both acts of house-breaking and section 184 therefore will not apply.

In the subsequent case of *Cooray* vs. *Dias*, 56 N.L.R. p. 234, it was held that the mere fact that the indictment states that the offences were committed in the course of the same transaction will not cure the defect if in point of fact the evidence does not disclose that they were so committed in the course of the same transaction. That case, as in the case of *Subrahmania Ayyar* vs. *King-Emperor*, I.L.R. 25 Madras, p 61, held that a misjoinder of charges is an illegality and not an irregularity capable of being cured.

In our opinion, in this case, there was a misjoinder of charges—the learned District Judge, I may say, was also of the same opinion—and it is a defect which cannot be cured. The proceedgs, therefore, are illegal and the convictions are puashed. The case will go back for retrial before another Judge. The Crown may take such steps as they may be advised to in regard to the indictment.

TAMBIAH, J.

I agree.

Re-trial ordered.

Present : **Sinnetamby, J.**

K. SOMAWATHIE DIAS *vs.* A. B. ALWIS

Argued and decided on : 3rd July, 1961.

Maintenance—Inability of the wife to live with husband owing to his mother's interference—Cruelty—What amounts to cruelty.

Held : That cruelty on the part of a husband towards his wife need not necessarily be physical cruelty inflicted personally by the husband on the wife. It can be cruelty whether physical or mental caused by persons whose presence it is within the power of the husband to remove from the marital home.

Ananda Karunatillake, for the applicant-appellant.

No appearance for the defendant-respondent.

SINNETAMBY, J.

In this case the learned Magistrate was not satisfied upon the evidence that there was physical cruelty in the nature of assaults by the husband on the person of his wife, the applicant. Nevertheless, he took the view that she had been harassed by her mother-in-law with whom the defendant wanted her to live.

It would appear that she had previously instituted a maintenance case in the course of which the defendant offered to take her back and she agreed to go and live with him. The Court, in that case, had made an order that the parties were to appear before it on the 2nd of July, 1960, but the parties had not done so. The applicant's evidence is that she was prevented from doing so by the defendant and his mother. The defendant, on the other hand, gave no reason why he did not attend Court as he should have done. This, then, leaves one rather inclined to reject the statement made by the defendant. However, subsequently, the defendant did take another house and husband and wife went and lived there for sometime, but once again the defendant left the applicant at his mother's instance and went to her house, abandoning his wife.

Most of the trouble in the case has been caused by the defendant's mother and the finding of the learned trial Judge is that the inability of the defendant to live with his wife is because of the interference of her mother-in-law. He holds that eventually it was the mother-in-law who put the applicant in a bus and sent her away home to

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Wadumulla. Then he goes on to say that the defendant was in no way responsible for his mother's conduct ; he was not even present when this incident occurred, but when he learnt of it he went to the applicant's house at Wadumulla and attempted to get her back.

Cruelty need not necessarily be physical cruelty inflicted personally by the defendant on the applicant. It can be cruelty whether physical or mental caused by persons whose presence it is within the power of the defendant to remove from the marital home. This Court has, more than once, held that a husband must maintain his wife with the dignity and consideration which befits her and that he must give her a home which, having regard to their circumstances, is one which she is entitled to have ; if there is an interfering mother-in-law she should be removed.

It seems to me that on the learned Judge's own findings, the inability of the applicant to live with the defendant is the result of the defendant permitting his mother to behave in the way she has done, that, in my view, amounts to cruelty. I, therefore, set aside the order of the learned Magistrate and allow the application for maintenance. The defendant, on his own evidence, is in receipt of an income of Rs. 90/- per month. On that basis I order him to pay Rs. 20/- a month as maintenance.

Appeal allowed.

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

MUHANDIRAM NAIDE & OTHERS *vs.* UKKU NAIDE

S.C. No. 552/58—*D.C., Kurunegala, No.* 12966.

Argued and decided on : 16th, June 1960.

Civil Procedure Code, sections 184, 188, *and* 408—*Trial—Questions in dispute and evidence not recorded—Facts on which judgment based appearing only in the judgment—Effect.*

The plaintiff in this action asked that he be declared entitled to a certain land, that the defendants be ejected therefrom, and for damages. The defendants filed answer asserting that they were entitled to a decree in their favour under section 3 of the Prescription Ordinance by virtue of possession for the period prescribed therein, and asked that the action be dismissed. The case was set down for trial. At the trial the matters in dispute were at no time recorded, and the proceedings did not show what questions the parties submitted for the decision of the Court. No evidence for either party was recorded. The premises in question were inspected, and after the production of some documentary evidence, order was delivered in open Court in the presence of the parties.

Held : (1) That inasmuch as the procedure prescribed by law for an action had not been observed, no valid decree had resulted. The provisions of sections 184 and 188 of the Civil Procedure Code should have been complied with.

(2) That the case did not fall within the ambit of section 408 of the Civil Procedure Code.

J. A. L. Cooray, for the defendants-appellants.
F. R. Dias with *Annesley Perera*, for the plaintiff-respondent.

BASNAYAKE, C.J.

In this action the plaintiff asked that he be declared entitled to the land described in schedule " A " to the plaint; that the defendants be ejected therefrom ; and for damages in a sum of Rs. 100/-. The defendants filed answer resisting the plaintiff's claims. They asserted that they were entitled to a decree in their favour under section 3 of the Prescription Ordinance by virtue of possession for the period prescribed therein, and asked that the action be dismissed. The case was set down for trial and on 24th July, 1958, the minute of the journal reads as follows :—

> "Trial.
> By consent inspection on 5.8.58."

The matters in dispute were at no time recorded and the proceedings do not show what questions the parties submitted for the decision of the Court. As no evidence for either party has been recorded it is difficult to appreciate the significance of the facts stated in the judgment of the learned Judge. Thereafter the inspection was put off from time to time till 30th September, 1962, when the minute of the journal reads as follows:—

> "Inspection.
> "Inspected the premises in the presence of Mr. Amarasinghe, Mr. Victor Perera, the parties and the V.H.
> "Call on 14.10.58."

On 14.10.58, Proctor Amarasinghe produced marked D 1 the proceedings in Magistrate's Court, Kurunegala, Case No. 19858 and the learned Judge

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ordered the case to be called on 23.10.58. On that date the minute of the journal reads as follows:—

"Case called.
"Order on 30.10.58."

On that date the learned trial Judge delivered his order in open Court in the presence of the parties.

As the facts which the learned Judge took into account in arriving at his decision appear from the judgment alone, I shall quote it in *extenso*—

"The pltff. sues the defdts. for a declaration of title to the Pillewa or high land depicted as Lot 6 in Plan No. 735 filed of record.

The parties agreed to inspect the land. At the inspection the defdts. challenged the record made by the Headman when he visited the land on a complaint as they suggested the Headman was biased. Unfortunately the Police, who went to the scene too had not recorded anything. Mr. Amerasinghe for the defendants showed me the report made by Mr. Mendis, Proctor of this Court, who was commissioned to settle this when a case was filed in the Magistrate's Court. According to his observations there was nothing on the ground to show that a fence existed between Lots 3 and 6.

At the point E 1 of the plan filed of record there is a kon tree. According to the boundaries of the plaintiff's deeds the western boundary of his land is a line joining two kon trees. At the moment there is only one kon tree which is a very big tree. The trace of the other tree is not to be seen. In a line with this boundary I came across another tree with remnants of barb wire. The defdts. alleged that that was placed to demarcate a road and the fence was taken from there to the west. But they were unable to show any tree on the west indicating the western boundary. This clearly shows that that suggestion is untrue. In view of the finding of that tree it appears to me that there had been a fence dividing lots 3 and 6. I therefore, hold that the plaintiff is entitled to Lot 6. Normally in cases of inspection, parties do not ask for costs for damages. I, therefore, make no order as to costs and damages.

A decree was thereafter entered in the following terms:—

"It is ordered and decreed that the plaintiff be and he is hereby declared entitled to the pillewa or highland portion depicted as Lot 6 in Plan No. 735, dated 30th July, 1956, made by Mr. J. L. Chandraratne, Licensed Surveyor, containing in extent A0-R1-P34, and which said Lot 6 is and bounded on the North by Lot 5, and East by Lot 7, and South by Lots 7 and 10, and West by Lot 11 and Bogahamulawatta of defendants and others, and morefully described in the Schedule hereby as part and parcel of the premises described in Schedule hereto depicted as Lots 6 and 7 in the said Plan No. 735.

"It is further ordered and decreed that the defendants be ejected from the said premises and that plaintiff be put and placed in possession thereof."

An action instituted in Court of law can result in a valid decree of Court only if the prescribed procedure is observed. Sections 184 and 188 prescribe how a judgment should be pronounced and a formal decree of Court entered. They read:

"184. (1) The court, upon the evidence which has been duly taken or upon the facts admitted in the pleadings or otherwise, and after the parties have been heard either in person or by their respective advocates or proctors (or recognized agents), shall, after consultation with the assessors (if any), pronounce judgment in open court either at once or on some future day, of which notice shall be given to the parties or their proctors at the termination of the trial.

"(2) On the day so fixed, if the court is not prepared to give its judgment, a yet future day may be appointed and announced for the purpose.

"188. As soon as may be after the judgement is pronounced, a formal decree bearing the same date as the judgment shall be drawn up by the court in the form No. 41 in the First Schedule or to the like effect, specifying in precise words the order which is made by the judgement in regard to the relief granted or other determination of the action. The decree shall also state by what parties and in what proportions costs are to be paid, and in cases in the Courts of Requests shall state the amount of such costs. The decree shall be signed by the Judge."

The instant case does not fall within the ambit of section 408 either. Learned counsel for the respondent did not seek to support what had been done. The procedure adopted by the learned trial Judge is not authorised by any provision of the Civil Procedure Code.

We, therefore, set aside the judgment of the learned District Judge and send the case back to the lower Court so that the action may be tried according to law.

SANSONI, J.

I agree.

Set aside and sent back.

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

MARIYA AND OTHERS *vs.* ARIYARATNE

S.C. No. 486/59—*D.C. Gampaha, No.* 5611/*P.*

Argued on : May 8, 1961.
Decided on : March 16, 1962.

Executors and Administrators—Testator's immovable property devised by Last Will to wife and children in equal shares—Share of wife subject to a fideicommissum in favour of children—Probate issued to wife as executrix—Sale by executrix of some lands so devised including a land mortgaged by testator, for the payment of testator's debts—Authority of Court not obtained—Does such sale pass title to the vendees.

Introduction of the English law of Executors and Administrators into Ceylon—Its development in Ceylon—Extent to which English law now applicable in Ceylon—Charters of 1801 *and* 1833.

Powers of an executor to deal with immovable property of a testator—Need to exercise such power with due regard to provisions of our law.

Executor's power to sell property subject to a fideicommissum for the payment of testator's debts—Effect of Roman-Dutch Law and the Entail and Settlement Ordinance—Property vesting in minors on testator's death—Duties of executor in regard to sale thereof—Need to submit executor's decision to sell for scrutiny of Court—Matters to be considered before sale of property subject to fideicommissum.

One *C.*, by his Last Will devised all his movable and immovable property to his wife *S.* and his two sons, *P.* and *A.* (minors), in equal shares. The one-third share of the wife was subject to a *fideicommissum* in favour of the two sons. The Last Will further provided that the pension and gratuity due to *C.* from his employers should be received by his wife and utilised for the purpose of obtaining a discharge of a mortgage bond and two promissory notes and that any balance left was to be expended on the education of the said children. This Last Will was duly proved in Court and Probate was issued to *S.* as executrix.

The land called Godakumbura was one of the lands mortgaged under the said bond and this had been sold along with two others by the executrix to a third party who had sold it to the defendants. This sale by the executrix had not been sanctioned by Court.

Thereafter *P.* (yet a minor) instituted a partition action in respect of Godakumbura, claiming a 4/27 share thereof. The defendants resisted this claim on the ground that they were the sole owners by right of purchase. The learned District Judge held that the sale by the executrix did not pass the title of the plaintiff and his brother, *A.*, as the authority of the District Court had not been obtained for the sale of these shares. The defendants appealed.

Held : That the said sale by the executrix without the authority of the District Court was not valid.

His Lordship, the Chief Justice, having examined at length the relevant judicial dicta contained in numerous previous decisions of the Supreme Court, in order to ascertain how much of the English law of Executors and Administrators obtains in Ceylon, proceeds to set out the net result of the earlier decisions as follows :—

"*I have cited the earlier dicta in extenso in order to show the development of the law. The net result of the decisions is—*

(a) *that the executor has power over both movable and immovable property and may sell the property left by the testator in accordance with the directions in the Will ;*

(b) *that the immovable property specially devised vests not in the executor but in the heir to whom it is devised subject to the executor's right to have recourse to it in its due order for the payment of the testator's debts ;*

(c) *that the executor's assent or a conveyance by him is not necessary to pass title to heirs appointed in the Will or the heirs at law ;*

(d) *that the executor has power to sell the property left by the testator for the payment of his debts, but that power must be exercised with due regard to the provisions of our law.*"

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Thereafter His Lordship goes on to consider the executor's power to sell *fideicommissary* property for the payment of the testator's debts and states :—

(1) that the power has to be exercised with due regard to the provisions of the Roman-Dutch law ;

(2) that where the executor has to resort to the sale of property vested in minors, on the death of a testator, he cannot sell such property without submitting his decision to the scrutiny of the District Court, which is vested with jurisdiction over the persons and property of minors and a supervisory power over the sale of property belonging to them.

Further, following *Voet*, *Van der Linden*, *Sande* and other Roman-Dutch jurists and also decisions of the Courts both in South Africa and Ceylon and in view of the Entail and Settlement Ordinance of 1876, His Lordship lays down that :—

(*a*) the property of minors cannot be sold except on good grounds and then only with the sanction of Court, (matters which a Court should take into consideration before and after granting such sanction are quoted *in extenso* from *Sande*) ;

(*b*) the fact that it is the executor who wishes to sell does not alter this inflexible rule ;

(*c*) the executor in Ceylon, even when exercising the rights of an executor under the English law, cannot do so in disregard of our law.

Cases referred to : *Staples* v. *Saram et al.*, 1863-68 Ramanathan's Reports 265
Ondaatjie v. *Juanis*, (1888) 8 S.C.C. 192.
Cassim v. *Marikar*, 1.S.C.R. 180
Gavin v. *Hadden*, 8 Moore, P.C.N.S. 90 ; 17 E.R. 247
Kulendoeveloe v. *Kandeperumal*, (1905) 9 N.L.R. 350.
Cantlay v. *Elkington*, (1906) 9 N.L.R. 167
Ex parte Blomerus, 1936 C.P.D. 360
Ex parte Strauss and Another, (1949) 3 S.A.L.R. 929
Perera v. *Silva*, (1893) 2 C.L.R. 159.
Cassim v. *Dingirihamy*, (1906) 9 N.L.R. 257
Marikar v. *Casy Lebbe*, 1863-68 Ramanathan's Reports 283.
Ex parte Odendaal, (1928) O.P.D. 218.
Cassim v. *Peria Tamby*, (1896) 2 N.L.R. 200.

H. A. Koattegoda with *N. R. M. Daluwatte*, for the 3rd and 4th defendants-appellants.

W. D. Gunasekera, for the 7th defendant-appellant.

Ananda Karunatileke, for the plaintiff-respondent.

BASNAYAKE, C.J.

The question that arises for decision on this appeal is whether the sale of the land called Godakumbura of about 10 kurunies paddy sowing extent described in the Schedule to the plaint by the executrix of the last will of one Charlis Silva without the authority of the District Court is valid. As it will be helpful to the discussion of the question to set out the material portions of that will and the probate issued to the executrix I set them out below. The relevant parts of the will read—

"I, the said Kurugamage Charlis Silva, do hereby will and desire that all property movable and immovable now belonging to me or that may hereafter belong to me wherever in this Island of Ceylon situated devolve on my wife and two children, Wanigasuriya Aratchige Somel Nona, Kurugamage Piyasena and Kurugamage Ariaratne all of Pattalagedera aforesaid in equal shares subject to the conditions and orders hereinafter contained.

"The conditions and orders above referred to—

1. The said Wanigasuriya Aratchige Somel Nona out of the aforesaid three persons, Wanigasuriya Aratchige Somel Nona, Kurugamage Piyasena and Kurugamage Ariaratne, shall not during her life-time sell, mortgage, execute, donate or otherwise alienate but possess the just one-third share that may devolve on her out of the immovable property, and after her death the said share of immovable property devolve on her said two children, Kurugamage Piyasena and Kurugamage Ariaratne, in equal shares who shall have the right to possess and do any act deed pleased by them to do with the same.

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2. The said Wanigasuriya Aratchige Somel Nona shall receive from the Colombo Electric Tramways Company the pension and gratuity due to me therefrom and out of same pay the principal and interest due from me the said Kurugamage Charlis Silva upon Mortgage bond, No. 25541, dated 10th November, 1939, attested by John S. Gunawardena of Talgasmote, Notary Public, and the two notes to Seena Sinnaiyapillai of Hiripitiya in Veyangoda and obtain a discharge of the property mortgaged thereby and if there is any balance left that may be expended towards the purposes of educating the said two children, Kurugamage Piyasena and Kurugamage Ariaratne.

3. The said Wanigasuriya Aratchige Somel Nona, the mother of the said Kurugamage Piyasena and Kurugamage Ariaratne shall be in charge of the income and produce of the two-third shares of the said immovable property till they attain their lawful age and expend the same towards their meals, drink, clothes *et cetera* and if there is any balance left have the same deposited in the post office Savings Bank in their names."

The material portions of the probate are as follows :—

" Be it known to all men that on the 17th day of November, 1942, the Last Will and Testament of Kurugamage Charlis Silva of Pattalagedara, deceased, a copy of which is hereunto annexed, was exhibited, read and proved before this Court, and administration of all the property and estate rights and credits of the deceased was and is hereby committed to Wanigasooriya Aratchige Somel Nona of Pattalagedera the executor in the Last Will and Testament named ; the said Wanigasooriya Aratchige Somel Nona being first affirmed faithfully to execute the said Will by paying the debts and legacies of the deceased Testator as far as the property will extend and the law will bind, and also to exhibit into this Court a true full and perfect Inventory of the said property on or before the 23rd day of March 1944, and to file a true and just account of her executorship on or before the 22nd day of June 1944.

" And it is hereby certified that the Declaration and Statement of Property under the Estate Duty Ordinance have been delivered, and that the value of the said estate on which estate duty is payable as assessed by the Commissioner of Stamps, amounts to Rs. 360/-."

It would appear from a comparison of mortgage bond No. 25541 of 10th November, 1939, and the inventory dated 1st November, 1944, filed by the executrix that two of the lands left by the deceased were subject to mortgage. From the description one of them appears to be the land in suit and the other is an undivided 1/4 share of the field called Godakumbura at Hiripitiya in extent 12 kurunies of paddy sowing extent. The present action for a partition of the field called Godakumbura in extent 10 kurunies is instituted by Kurugamage Piyasena, a minor son of the deceased Charlis Silva. He claims that he is entitled to an undivided 4/27 share of the land. The action is brought on the footing that the sale of the land in suit by the executrix is invalid. That land and three others left by the deceased were sold by the executrix for a sum of Rs. 1,700/- by deed No. 5496 of 27th October, 1944, to Notary Gunawardena, who by deed No. 6619 of 16th May, 1948, sold it and another for Rs. 5,000/- to the 2nd, 3rd and 4th defendants.

Those defendants resisted the action and claimed that they were the sole owners of the land by right of purchase. The 2nd defendant died in the course of the action and his elder brother, Malliya, was appointed as his legal representative. The learned district Judge held that as the authority of the District Court had not been obtained for the sale of their shares the deed of sale by the executrix did not pass the title of the plaintiff and his brother, Ariyaratne, who is named as the 5th defendant to this action. The present appeal is from that judgment.

To decide the main question involved in this appeal it is necessary to ascertain the powers of an executor in Ceylon. It has been repeatedly stated in judgments of this Court that the law that governs executors and administrators in this country is the English law ; but I have not been able to find any satisfactory statement of how the English law was introduced and whether by English law is meant the English law which obtained in England at the particular date or the English law both common and statute which obtains in England at the corresponding date at which the question arises for decision in this country. In the case of subjects to which the English law is made applicable by the Civil Law Ordinance there is no difficulty as that enactment is explicit. The material portion of it runs thus :

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"... the law to be administered shall be the same as would be administered in England in the like case, at the corresponding period, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any Ordinance now in force in this Island or hereafter to be enacted."

On account of the vagueness attending the introduction of the English law of executors and administrators it is necessary to examine at length the relevant judicial *dicta* in order to ascertain how much of the English law obtains in Ceylon. What appeared at the outset to be a simple matter has in the course of time proved to be full of difficult problems. Even at the risk of overburdening this judgment with well-known judicial pronouncements I shall set them out in chronological order so that the process of judicial evolution of the law of executors may be seen. The relevant portions of the Charters of 1801 and 1833 which are cited in them as the instruments by which the English law was introduced are reproduced in full in appendix "A" to this judgment as they are not readily available in many provincial libraries.

The first of the line of decisions is *Staples* v. *De Saram et al.* (Ramanathan's Reports, 1863-68, p. 265 at 275-276). In that case the Court proceeded to expound the law of executors and administrators—

"We think it right, however, to add some remarks of our own as to our law of executors and administrators being entirely a graft of English law, and not a mixture of the old laws of Holland and those of England. We take it that the Charter of 1801 introduced the English law on the subject here as to Europeans other than the Dutch inhabitants. Executors and administrators were to be appointed with respect to such Europeans' estates, and the testamentary law was to be followed, as is prescribed in the Diocese of London, in England. The same Charter provided that the Dutch inhabitants should, in such matters, retain their old laws and usages. Then came, in 1833, the Royal Charter, which is still in force, and which, by its 27th clause, empowers the district courts generally to appoint administrators to the estates of intestates, to grant probates to executors, and to exercise other powers in matters connected with such officers. The last-mentioned Charter is not, in this respect, limited to any class of persons here; but it applies to the estates of all and any persons dying within any of the respective districts of the District Courts of the Island. We think that these Charters introduced—the first as to one class of our population, the last as to the whole population of the Island—an entirely new law, and one that could never be blended, or co-exist, with the old Roman Dutch Law, which dealt with heirs *ex testamento* and heirs *sine testamento*. This old system was, in our opinion, entirely abrogated, as being quite incompatible with the English which was ordained.

"There was no such office as that of Administration under Roman-Dutch Law.

"In cases of intestacy, the heir by descent (or heir appointed by law, *heres legitimus*, as he was sometimes called) came in as heir ; and proceeded to "adiate" purely, or under benefit of inventory, or to take out the act of deliberation, just as the heir nominated by will. All this has ceased to exist, and the English forms and practices as to administrators are copied. So as to executors. Such an office was not wholly unknown to the Roman-Dutch Law in its later times ; but the Roman-Dutch executor was a very different functionary from the one who bears that name under the English system. He was little more than the agent of the heir appointed by the will. He could not alienate or sell without the heir's consent, and if the heir would not accept the inheritance the executorship became a nullity.

"It has been said that the English law as to executors and administrators could not be fully adopted here, on account of the peculiar distinctions which the English law makes as to real and personal property.

"But that has never been found to cause any difficulty or inconvenience. We recognize the same power of executors and administrators over land and other immovable property here which the English law gives them over chattels real ; and thus an entire estate, landed as well as personal, is administered."

It will be seen from what has been said in the last paragraph of the above quotation that, at the very outset, the English law obtaining at that time [The English law itself has undergone change since then (*vide* Land Transfer Act, 1897 and Administration of Estates Act)] in its application to our country underwent a very important

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modification in that immovable property was regarded as vesting in the executor in the same way as movable property. *Staples* v. *De Saram* (*supra*) is followed by *Ondaatjie* v. *Juanis* [(1888) 8 S.C.C. 192)] wherein Clarence, J., explained how the property of the testator is transmitted :

> " Under our law here, land passes to an executor exactly as personal property passes to an executor in England, and the same considerations will apply as would apply to the case of a bequest of a chattel real or a movable article under English Law. Now the law is, that the subject-matter of all such gifts vests in the executor ; and not until the executor has assented to the bequest—that is assented to the legatee's assuming and enjoying the gift, on the ground that the subject-matter is not required by the executor for any other purpose—can the legatee assume the gift. After that assent the legatee may recover the subject-matter by action, even from the executor himself. Until that assent has been given, he cannot retain it against the will of the executor, and the executor could recover it from him."

The view expressed in the above two cases that the property both movable and immovable left by the testator vested in the executor underwent a significant change in 1892 when a full bench of this Court in *Cassim* v. *Marikar* (1 S.C.R. 180) expressed the opinion that the title to immovable property specially devised passed not to the executor but to the devisee by virtue of the will subject to the testator's debts and that, only in due order of administration. Burnside, C.J., observed in that case—

> " It is only in my opinion when specially devised land is required by the executor for the purpose of administration that he acquired an interest in it, and that interest is an interest in land, which can only be divested in the way that the law requires. So that it is always safer that the executor should recognise the title of the special devisee, and join him in any conveyance he may make; yet if property be not required for the purpose of administration, then the special devisee of it would take a clean title unburdened by any right of executor or creditor."

Laurie, J., in the same case said—

> " The devise of this land to the plaintiff was made by the testator by a deed executed before a notary and witnesses. It fulfilled the requirements of the Ordinance No. 7 of 1840. That devise in my opinion passed the title to the land to the devisee, taking it away, on the one hand, from the heirs at law, and on the other, from the executor of the Will. Holding this opinion I differ from part of the opinion of my brother Clarence reported in the 8th volume of the Supreme Court Circular p. 192. But though the title passed to the devisee, the land so devised, like the whole property of the testator, was primarily liable for payment of his debts. The title of the devisee was liable to be defeated by the creditors or by the executor in the course of realizing the estate for the payment of debts.

> " Until these were paid, the devisee might be required either to relinquish the land or, if he preferred to keep it, to contribute to the payment of the debts to the extent of its value.

> " As between himself and the executor the devisee might terminate the suspense by obtaining assent to the devise.

> " In my opinion such assent need not be signified by deed notarially executed ; it need not be an express assent, for in some cases the assent may be presumed from the conduct of the executor. In other cases (and this is said to be one) the assent may be expressly given either verbally or in writing.

> " The question, in what way an executor can legally give his assent is a totally different question from whether, assuming the title to the land to be in the executor, he can pass that title in any other way than by notarial deed. It must at once be considered that if the title be in the executor, a deed is necessary ; but as my opinion is that the title passed by the Will to the devisee, no transfer is necessary from the executor."

Withers, J., the third member of the Bench, in the course of his judgment in the same case, referring to an observation in an earlier case that the Privy Council itself had accepted the view that all property vested in the executor observed that the words—

> " It is stated in the Judgment in Ceylon (and the form of the probate and all the proceedings in this case and in the other cases with which they have been furnished show Their Lordships that it has been correctly stated) that an executor in Ceylon has the same power as an English executor with this addition, that it extends over all real estate just as in England it extends over chattels personal."

in the judgment of the Privy Council in *Gavin* v. *Hadden* (8 Moore, P.C.N.S., p. 90, at 122 ; 17 E.R. 247, at 258) do not mean that the title to all property passes to the Ceylon executor in the same way as it does to the English Executor, and went on to point out the difference.

> " By the English law the executor's assent is necessary to give title to even a special legatee, and if our law is the same, the executor's assent, in order to give title to a special devisee, can only be given in the way required by our law, that is, by a duly executed notarial instrument. So it really comes to this, that if a man specifically devises parcels of land to several children, and there are no claims against the testator's estate, the executor is bound to assign each parcel to a particular devisee by a notarial instrument. What burden is thereby laid upon the inheritance ? "

and summed up his opinion in the following words :—

> " I humbly conceive that no assent of the Ceylon Executor or administrator is necessary to pass title to the heirs appointed in the Will or the heirs at law ; for

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they have this title on the death of the testator or intestate subject to suspension of enjoyment pending administration and subject to the limited estate or title of the executor and administrator which I have spoken of before. An executor's duties concluded, his powers and estate disappear, and what remains after liquidation is left free for enjoyment by the heirs."

Further difficulties in ascertaining the extent to which the English law of Executors obtained in Ceylon soon arose. In *Kulendoeveloe* v. *Kandeperumal* [(1905) 9 N.L.R. 350)] it was sought to call in aid section 6 of 3 and 4, William IV, c. 27, an Act enacted in the very year of our Charter of Justice, described as " an Act for the Limitation of Actions and Suits relating to Real Property, and for simplifying the Remedies for trying the Rights thereto ". That section provided :

" And be it further enacted, That for the Purposes of this Act an Administrator claiming the Estate or Interest of the deceased Person of whose Chattels he shall be appointed Administrator shall be deemed to claim as if there had been no Interval of Time between the Death of such deceased Person and the Grant of the Letters of Administration."

In rejecting the argument Layard, C.J., sought to explain to what extent the English Law had undergone modification in its application to Executors in Ceylon thus :

" I understand that what has been introduced into Ceylon is the English Law as regards executors and administrators, subject however to the provisions of our local statutes, and I find that our Ordinance of Prescription is silent in respect to executors and administrators, and no mention is made of them. For questions of prescription and of limitation we must look to our own Ordinance, and with regard to executors and administrators we are bound to administer the general law of England which affects them, or any Statute Law dealing generally with the rights of executors or administrators or treating of the manner in which property is vested in them. We are, however, not bound by the English Law, which lays down the limitation of causes of action in England, unless the Statutes dealing with them have been introduced into this Colony.

" Now 3 and 4, Will. IV, c. 27, is not in force in this Colony, and none of the provisions for the limitation of actions laid down in that statute are binding on us ; consequently section 6 of that statute will not be operative in this Colony, unless it in any way affects the English Law with respect to executors and administrators outside the provisions of 3 and 4, Will. IV, c. 27."

But his explanation does not solve the difficulties. He says :

" With regard to executors and administrators we are bound to administer the general law of England which affects them, or any statute law dealing generally with the rights of executors or administrators or treating of the manner in which property is vested in them."

With the greatest respect to so eminent a Judge as Layard, C.J., I find it difficult to see how it is possible to say that the English Law of Executors and Administrators was introduced to Ceylon by the Charter of 1833 and, at the same time, exclude a provision such as section 6, a provision affecting administrators, enacted in that very year. English law is not a static legal system and the law governing executors has undergone change since the Charter of 1833 and is now largely statute law. The latest legislation on the subject is the Administration of Estates Act, 1922 (15 Geo. 5, c. 23) which makes detailed provision as to the estates of deceased persons and their administration. It is sufficient to quote therefrom the following section which makes special provision in regard to the payment of the debts and liabilities of a deceased person :—

" 32. (1) The real and personal estate, whether legal or equitable, of a deceased person, to the extent of his beneficial interest therein, and the real and personal estate of which a deceased person in pursuance of any general power (including the statutory power to dispose of entailed interests) disposes by his will, are assets for payment of his debts (whether by specialty or simple contract) and liabilities, and any disposition by will inconsistent with this enactment is void as against the creditors, and the Court shall, if necessary, administer the property for the purpose of the payment of the debts and liabilities.

This sub-section takes effect without prejudice to the rights of incumbrancers.

(2) If any person to whom any such beneficial interest devolves, or is given, or in whom any such interest vests, disposes thereof in good faith before an action is brought or process is sued out against him, he shall be personally liable for the value of the interest so disposed of by him, but that interest shall not be liable to be taken in execution in the action or under the process."

Several questions arise for answer. What is the general law of England which affects executors and administrators ? Is it the common law ? Where may one find a statement of that law ? What are the statutes dealing generally with the rights of executors and administrators ? How do they become applicable to Ceylon ? Are the statutes that are applicable those dealing with the rights of executors and administrators obtaining at the time of the Charter of 1833 or those for the time being in force ? Is the Administration of Estates Act, 1925 (*supra*) applicable ? If the statutes introduced from time to time are to apply, to what extent is the prohibition in section 1 of the Ceylon Independence Act, 1947, in the way of such statutes being applicable ? If the English common law and statute law are replaced

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by a composite enactment enacted after 1947 what will our law be ?

With this brief digression I shall resume the examination of our judicial decisions. In 1906 in *Cantlay* v. *Elkington*, (1906) 9 N.L.R. 168, at 173, it was sought to call in aid the English Land Transfer Act, 1897, as being part of our law of Executors and Administrators. It would appear that Moncrieff, J., at the hearing of the appeal was inclined to favour the view that the English statute applied ; but at the hearing in review the argument was rejected. Lascelles, A.C.J., said :

"With regard to Moncrieff, J's. reference to the English Land Transfer Act, I desire only to state that I do not concur in the view that the English statutes relating to executors and administrators are in force in Ceylon."

Wood Renton, J., said :

" Again I cannot follow Moncrieff, J., in his references to the Land Transfer Act, 1897. If his remarks are intended only as a *reductio ad absurdum* of the argument of Burnside, C.J., in *Perera* v. *Silva*, (1893) 2 C.L.R. 159, as to 'walking abreast with the law as it now exists', I think he has misapprehended Sir Bruce Burnside's meaning. If they imply anything more, I can only respectfully dissent from them.

" When we speak of the introduction into Ceylon of the English law of executors and administrators we refer to the general law alone—to the English conception of executorship and administratorship as contrasted with that of the heir under the Civil and the Roman-Dutch Law. It does not follow—and in my opinion it is not the case—that every English statute dealing with executors and administrators and especially a statute so closely associated with the incidents of English real property law as the Land Transfer Act, 1897, have been incorporated into the law of the Colony."

Now the Land Transfer Act makes special provisions relating to the vesting of a deceased person's property as would appear from the provisions of the Act set out in appendix " B " to this judgment.

The provisions of the Act deal with very important aspects of the law of Executors and Administrators and if we are not to turn to them for the law on those matters we shall have to resort to our common law as the English Law is to be found in English Statutes which have no application here. When Wood Renton, J., says in *Cantlay* v. *Elkington* (*supra*) that it is not the case, " that every English statute dealing with executors and administrators and especially a statute so closely associated with the incidents of English real property law as the Land Transfer Act, 1897, have been incorporated into the law of the Colony", does he mean that there are English Statutes which would be applicable ? If so what are they ?

Having regard to the trend of decisions the answer is not easy to find and has not been given since that decision. Have any English statutes dealing with Executors and Administrators been incorporated in our law ? I, for one, know of none. Lascelles, A.C.J., was more critical than Wood Renton, J., of the situation caused by the introduction of the English law by a side wind as it were. He said :

" The difficulty of adapting the English system of administration to the principles of the Roman-Dutch Law has led to considerable confusion."

I have cited the earlier dicta *in extenso* in order to show the development of the law. The net result of the decisions is—

(*a*) that the executor has power over both movable and immovable property and may sell the property left by the testator in accordance with the directions in the will ;

(*b*) that the immovable property specially devised vests not in the executor but in the heir to whom it is devised subject to the executor's right to have recourse to it in its *due order* for the payment of the testator's debts ;

(*c*) that the executor's assent or a conveyance by him is not necessary to pass title to heirs appointed in the will or the heirs at law ;

(*d*) that the executor has power to sell the property left by the testator for the payment of his debts, but that power must be exercised with due regard to the provisions of our law.

I now come to the executor's power to sell fideicommissary property for the payment of the testator's debts. As that power has to be exercised with due regard to the provisions of our law we must turn to Roman-Dutch Law in order to ascertain in what circumstances, in what manner, and by whom fideicommissary property may be sold, especially as *fideicommissa* have no place in

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English law. When the Executor has to resort to the sale of the property of minors he must observe the law relating to the sale of such property. The District Court by virtue of its jurisdiction over the persons and estates of minors has a supervisory power over the sale of their property, and an executor cannot sell the property that has vested in minors on the death of the testator without submitting his decision to the scrutiny of the Court, even where he is authorised by the will to sell the property left by the deceased to pay his debts, as would appear from the cases that I shall refer to later in this judgment.

The general rule is that property subject to a *fideicommissum* cannot be alienated by the fiduciary. There are recognised exceptions to it. Fideicommissary property may be alienated—

(*a*) to pay the testator's debts and the legacies left by him provided that no other funds are available for the payment of these. (*Voet*, 36.1.62), Vander Linden Institutes, 1.9.8. Sande Restraints (Part 3, Ch. 8, secs. 2, 8) ;

(*b*) if all those who are interested give their consent ;

(*c*) *ob causam necessariam* ;

(*d*) to prevent destruction of the property ;

(*e*) in exchange for the benefit of the fideicommissary ;

(*f*) where the fideicommissary is expressly authorised by the fiduciary.

For the purpose of this judgment I shall confine myself to the exception for the payment of the testator's debts. On this topic Voet (*supra*) says, (Bk. 36, Tit. 1s.62, Gane, Vol. 5, p. 430), :

> " So often, however, as goods are liable to be handed over on the cause of *fideicommissum*, they cannot be alienated except to pay debts of the founder of the trust and legacies granted by him, when no other funds are found from which the payment of these things may be made ; or unless all those who have an interest in regard to the *fideicommissum* give their consent."

Van der Linden summarises the position thus (1.9.8) :

> " The person in possession of any fideicommissary property has, however, no power to pledge or alienate that property as he pleases, except for the payment of the debts with which the property itself is charged, or with the consent of all the remainder men, or for reasons of pressing necessity. In which case, however, the previous authority and release of the Court ought to be obtained."

Sande states the law in this wise [3.8.2 (8)] :

> " A necessary cause for alienating arises from the testator, if an hereditary creditor distrains, according to the right of creditors, goods pledged to him by the deceased, or if, on account of debts contracted by the testator, the inheritance is, under the Praetor's edict, sold by auction, owing to the impatience of creditors ; and among these goods the property prohibited from alienation outside the family is also sold. Such an alienation is binding, nor can it be set aside on account of the *fideicommissum*."

The matters that arise for decision before fideicommissary property can be legally sold are such as can only be decided by a Court. It would appear that from the earliest times the sale of fideicommissary property was subject to the authority of the Praetor, the State or a State Agency.

Apart from the provisions of Act, No. 2 of 1916, which provides for the removal or modification of restrictions on immovable property imposed by Will or other Instrument and is the South African counterpart of our Entail and Settlement Ordinance, the practice in South Africa as would appear from the decided cases has been to seek the authority of the Court whenever it became necessary to mortgage or sell fideicommissary property. It is sufficient to refer to the decisions of *Ex parte Biomerus*, (1936) C.P.D. 368, and *Ex parte Strauss and another*, (1949) 3 S.A.L.R. 929. In the latter case De Beer, J.P., after a review of all the available sources stated the conclusion that the Court has power to permit an alienation or mortgage of fideicommissary property only if such power is conferred by Statute or Common Law.

In our country, too, the practice has been the same and comes down from the earliest times. In the case of *Cassim* v. *Dingihamy* (3 Judges) [(1906) 9 N.L.R. 257, at 274)] which affirmed the earlier decision in *Marikar* v. *Casy Lebbe* (1863-68, Ramanathan 283), Middleton J., stated :

> " The law regulating *fidei commissa* is laid down by the Dutch jurists and collected by Burge, and it seems that property in *fidei commissum* can only be sold in cases of proved special circumstances rendering it necessary (Burge, Vol. II, p. 129), and in Ceylon by the authority of the Court (*Marshall's Judgments*, p. 191).
>
> " It has not been proved here to the satisfaction of the District Judge that any of these special circumstances existed or that the leave of our Court has been obtained.

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"The executor who in Ceylon has power to deal with immovable property in my opinion would only have a right to act according to the law in Ceylon affecting the property with which he was empowered under the Will to deal.

"If that property was saddled with a *fidei commissum*, it would be the executor's duty in dealing with it to observe the special rules of the Roman-Dutch Law which apply to *fidei commissa* in substance and in practice so far as his office is compatible therewith, and by English Law a purchaser from an executor is affected with notice of the contents of the Will."

In answering the precise question that arose for decision in the case Middleton, J., stated :

"On the first point, as to whether the sale by an executor of a property burdened with a *fidei commissum* is good without the leave of the Court on proof of special circumstances according to the blend of English and Roman-Dutch Law administered in Ceylon, I am of opinion that it would not be good."

The passage in Marshall's judgments referred to above is as follows :

"Thus, where, for want of other property, it becomes necessary to dispose of the *fidei commissum* in order to pay debts or legacies of the testator, etc., or the public taxes, Or, where the property would be deteriorated by being kept, Or, where it might be exchanged for other property, with advantage to the estate. Other circumstances may arise, which may make it necessary or beneficial to the estate, to dispose of the property so tied up. But in all instances, application should, in Ceylon, be made to the District Courts for authority so to dispose of it."

Apart from the requirement of the sanction of the Court laid down in the decisions above quoted we have had since 1876 the Entail and Settlement Ordinance under which the District Court is empowered to authorise the sale, lease or exchange of fideicommissary property. When it comes to the sale of fideicommissary property in which minors have interests the law is still more strict. It has been so in the times of the early Roman-Dutch Law and later in both Ceylon and South Africa. On this topic Sande says (1.1.4.51—Webber, p. 30) ; [I quote *in extenso* as this work is not available in most libraries].

"55. If the matter is one of the sale, or exchange, or giving in payment to a creditor, or incurring any obligation over the property of a pupil or minor, the ground for alienation should be one of necessity. A necessary ground for alienating is defined in the oration of *Severus Divus* thus, that the debt is so great that it cannot be paid from the remaining property.

"65. Again, a careful inquiry into the reason for alienation is required. And in this inquiry the Judge will observe the precepts laid down by Ulpian. 'For, first, the Judge should inquire who watches over the fortunes of the pupil ; and he should not too readily rely upon tutors and curators, who sometimes, for the sake of their own gain, are wont to assert that it is necessary that the pupil's property should be sold. He should therefore seek for the kinsmen of the pupil, or his parents, or someone else who has knowledge of the pupil's affairs ; or if they cannot be found, or those who are found are not trusted, he ought to order the reasons to be set forth and a *synopsis*.' *i.e.*, a short statement in writing and inventory of the pupil's property, to be made out. And on the authority of the same Ulpian 'It comes within the duty of a Judge to make careful inquiries whether money to pay the debt can be procured from any other source. He ought, therefore, to inquire whether the pupil has money, either in cash or in bonds, which can be sued upon, or in expectation of rents and income. Moreover, he should inquire whether there is any other property besides the landed property which can be sold, and with the price of which the debt can be paid. If then it shall be found that in no other way can the debt be paid, than by the sale of the landed property, then he will allow it to be sold, only if the creditor presses or the rate of interest should favour the payment of the debt.'

"66. In an inquiry into the cause of alienating he should also consider in what order the things are sold, namely, the movables, the less valuable, and the useless things first ; then rents from land ; and, lastly, the landed property ; and a large sale should not be made to pay a small debt, as the same Jurisconsult says. And Charondas bears witness that decrees have often been reversed by the Supreme Court, because an inquiry as to the movable property has not been held, the minor being allowed to refund the purchase price."

Now in regard to the sale itself Sande says (1.1.5.72, Webber, p. 38) :

"72. After the sanction of the Court has been obtained, and the decree has been granted, the property of the pupil ought to be sold at public auction, and be put up to bidding ; nor should private sales be allowed, lest it should be in the power of the tutor to cheat the pupil, for it is well known that some tutors are not inclined to act in good faith."

and the effect of a sale without good ground and an order of Court is stated thus :

"79. If the immovable property of a pupil, minor, or madman, or that movable property which can be safely kept, is sold without good grounds for alienation and without an order of Court, the alienation is *ipso jure* void ; nor does the dominium pass from the pupil or minor."

The same author says as to the minor's remedy :

"80. A pupil or minor, whose landed property has been alienated in spite of a prohibition, retains an *actio in rem*, that is, a vindication, which he can maintain not only against the purchaser, but also against any third person who has possession."

The view expressed by Sande has been adopted by the Courts both here and in South Africa.

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First as to the latter country. In *Ex parte Blomerus*, (1935) C.P.D. 368, the Court held that :

> " The principles upon which the Court will assent on behalf of minors to the mortgage or sale of property subject to a *fideicommissum* are the same as those upon which the Court will allow the property of minors to be sold. Before the Court will grant such assent it must be fully satisfied beyond all reasonable doubt that a mortgage or sale is to the advantage of such minors."

The position should not be different where the minor is only a fideicommissary heir to the property. The South African view is that no sale or mortgage of fideicommissary property by which minors are likely to be affected can take place without good ground and the authority of Court. In *Odendaal's* case, (1928) O.P.D. 218, De Villiers, J.P., said :

> " Now I take the position to be that when there is a *fideicommissum* on property, then the *fideicommissaries*, if they are actually in existence, can consent to the property being mortgaged by the fiduciary. Indeed, they can consent to the alienation of the property if they choose, and they can even extinguish their own *fideicommissary* rights altogether. Such consent can be given by the *fideicommissaries* themselves, if they are majors. If, however, the *fideicommissaries* are minors, their consent can only be given on their behalf by their guardians, if any, and, in addition to the consent of the guardians the authority of the Master, as upper guardian, and of the Court as uppermost guardian, is necessary, but in spite of that it remains a matter of consent. The position in law is still that the land is mortgaged by consent of the *fideicommissaries*, major or minor."

In *Ex parte Blomerus* (*supra*) Davis, J., in considering the question of the right of the Court to consent on behalf of minors and those yet unborn to the sale or mortgage of fideicommissary property said :

> " As a general rule, of course, the mortgage or alienation of *fideicommissary* property is prohibited (Voet 36.1.62) but there are exceptions. All the authorities, *e.g.*, Voet (*ibid*) ; Sande, *Restraints on Alienations* (3.8.27) ; van der Linden, *Institutes* (1.9.8), agree that the consent of those interested can make the mortgage or alienation valid. In a long and uninterrupted line of cases the Court as upper guardian of minors, when all the major heirs have consented, and where it has thought it right to do so, has interposed its consent also on behalf of the minors. Though, as far as I have been able to find, the Roman-Dutch authorities do not refer to the power of the Court to authorise the mortgage or sale of fideicommissary property where the fideicommissary heirs are minors this seems to follow from its power to authorise the guardians of minors to deal with the property actually belonging to them. The Court has evidently felt that the minor cannot be in a different position where he is only a fideicommissary heir to the property, that is to say when it may some day belong to him, from that which he is in when he in fact already owns the property himself."

The principles which govern the Court in giving its consent are the same as those governing the alienations of the immovable property of minors. But on this point there is no unanimity in South Africa for De Beer, J.P., says in *Ex parte Strauss and another* (*supra*) at p. 944 :

> " There is no express Roman Law authority which permits the removal of a *fideicommissum* in which minors are interested on consent being given by the Court on their behalf, and if the Court is to exercise this power it would seem that it should be conferred by the Legislature by an amendment of Act 2 of 1916. For the purpose of this application it is, however, not necessary to express a definite opinion on this point."

De Beer, J.P., proceeds to sum-up his review of the authorities thus :

> " On a review of the Roman-Dutch authorities and the decided cases in our Courts I am of opinion that the Court's power to authorise the mortgage of fideicommissary property *ob causam necessariam* is limited to the following :—
>
> (*a*) to pay the debts of the testator and to make provision for the legacies bequeathed by him, when there is no other property available for these purposes ;
>
> (*b*) To discharge statutory burdens imposed on the fideicommissary property where the fiduciary has not the means to do so ;
>
> (*c*) To provide necessary maintenance for the children of the fiduciary where the latter is indigent. I have grave doubt whether in view of *Voet's* and *Van der Keessel's* statement above referred to this is a good ground today. . . . .
>
> (*d*) To pay expenses which are necessary for the preservation and protection of the property."

Now turning to our law I find that the Courts have always maintained that the property of minors cannot be sold except on good grounds and then only with the sanction of the Court. The fact that it is the Executor that wants to sell does not affect that inflexible rule. The Executor in our country, even when exercising the rights of an executor under the English law, cannot do so in disregard of our law. If any of his rights *qua* executor under English law are in conflict with our law, they must yield to our law. In *Cassim* v. *Peria Tamby*, (1896) 2 N.L.R. 200, where the sale by an executor of immovable property devised by a Muslim to his minor children was challenged, the Court sent the case back for ascertaining the laws and usages of the Muslims. In doing so Bonser, C.J., observed :

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"The principal questions, it seems to me, on which it will be necessary to ascertain what the Mohammedan Law is, are, (1) as to whether, under the circumstances of the case, the executor had power to sell this property : it is quite clear that had it been a Will governed by the Roman-Dutch Law the executor would not have had power ; (2) to what extent, if any, the clause restricting alienation binds this property."

It would appear from the above remarks that an executor cannot exercise his powers without regard to our common law.

In the instant case we have not only to consider whether an executor may sell fideicommissary property in which minors are interested without the authority of the Court, but also whether an executor has power to sell property specially devised to minors without such authority. As indicated above an executor cannot do so even where there is good ground without the sanction of the Court. In the instant case the sale is not by the minor but by a third person. The greater is the need therefore for the sanction of the Court. Voet says of such a sale (Bk. IV, Tit. 4, s. 16) :

"But take the case where it is not the minor who has himself sold off his property, but another who has sold it and delivered it as his own. If the sale has, indeed, been made privately or even, indeed, by public auction, but has been followed by delivery made privately in free will without previous order of a judge and the formalities of such order, there appears to be no doubt that the minor does not even need restitution. An ordinary vindicatory action for the property will have to be raised against the buyer as the person in possession ; since my property cannot without act of mine be transferred to another at the mere whim of some other private person.

"But take the case where after a sale made publicly or privately the property (as for greater security is by present-day custom frequently wont to happen) has been delivered with the prefaced formalities of judicial orders, after the calling upon everyone who deems himself to enjoy a right of stopping the delivery to gainsay it if he can, and thus an order of Court has been passed. It is, indeed, certain nowadays that ownership has then transferred to the buyer because of the weight given to the formal order of Court. But it is also certain that through the hazards of his youth the minor could have missed intervening against the passing of the judge's order. There is, therefore, no reason why in this case, too, he should not have the assistance of the relief due to youth and, his ownership being restored, possession of the property also go back to him."

For the above reasons I am of opinion that the sale of the land called Godakumbura by the executrix of the last will of Charlis Silva without the authority of the District Court is not valid.

I would accordingly dismiss the appeal with costs.

H. N. G. Fernando, J.
I agree.

Appeal dismissed.

APPENDIX "A"

Charter of 1801 —

"LV. And We do hereby further grant, ordain, establish, and appoint, That the said Supreme Court of Judicature in the Island of *Ceylon*, shall grant Probates under the Seal of the said Court, of the Wills and Testaments of such Persons as are herein-before in that Behalf described, dying within the said Island of *Ceylon*, and commit Letters of Administration under the Seal of the said Supreme Court, of the Goods, Chattels, Credits, and other Effects whatsoever, of such Persons as herein-before in that Behalf described ; who shall die intestate within the said Island of *Ceylon* ; or who shall have left Goods, Chattels, Credits, and Effects within the said Town, Fort, or District of Colombo ; or who shall not have named an Executor resident within the Jurisdiction of the said Supreme Court ; or where the Executor, being duly cited according to the Form now used for that Purpose in the said Diocese of *London*, shall not appear, and sue forth such Probate ; annexing the Will to the said Letters of Administration, where such Persons shall have left a Will without naming any Executor who shall then be alive and resident within the said Island of *Ceylon*, and who, being duly cited thereto, will appear and sue forth Probate thereof ; and to sequester the Goods, Chattels, Credits, and other Effects whatsoever of such Persons so dying, in cases allowed by Law, as the same is and may now be used in the said Diocese of *London* ; and to demand, require, take, hear, examine, and allow, and if occasion require, to disallow and reject the Account of them, in such Manner and Form as is now used in the said Diocese of *London*, and to do all other Things whatsoever needful and necessary in that Behalf.

"LVI. Provided always, and We do hereby authorize and require the said Supreme Court of Judicature, in the Island of *Ceylon*, in such Cases, as aforesaid, where Letters of Administration shall be committed with the Will annexed, for want of an Executor appearing in due Time to sue forth the Probate, to reserve in such Letters of Administration full Power and Authority to revoke the same ,and to grant Probate of the said Will to such Executor whenever he shall duly appear and sue forth the same.

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" LVII. And We do hereby further authorize and require the said Supreme Court of Judicature in the Island of *Ceylon*, to grant and commit such Letters of Administration according to the Form now used, or which lawfully may be used, in the said Diocese of *London*, to the lawful next of Kin of such Persons so dying as aforesaid, being then residing within the jurisdiction of the said Court, and of the full Age of Twenty-one Years : And in the case no such Person then be residing within the Jurisdiction of Our said Supreme Court of Judicature in the Island of *Ceylon*, or being duly cited, shall not appear and pray the same and make out such their Claim to the Administration of the Effects of the Intestate deceased, to the Satisfaction of the said Court, it shall and may be lawful for the Registrar of the said Supreme Court of Judicature in the Jurisdiction aforesaid, and he is hereby required to apply for, and such Court is hereby required and directed to grant such Registrar, such Letters *ad Colligenda* or of Administration, as to such Court shall seem meet ; by virtue whereof such Registrar shall collect the Assets of the Deceased, and shall, under the Direction and subject to the Control of the said Supreme Court, bring in such Assets, or where it shall be necessary, shall sell and convert the same into Money, and from Time to Time, as often as the same shall amount to the Sum of Five hundred Rix Dollars of Current Money of *Ceylon*, or Fifty Pounds of lawful Money of *Great Britain*, shall pay the same into our Treasury in the said Island, in which proper and distinct and separate Books and Accounts thereof shall be regularly kept, and such Registrar shall regularly account for such Assets, and the Disposal thereof to the said Supreme Court of Judicature, at such Periods, and in such Manner, as the said Court shall direct ; and the said Supreme Court is hereby authorized and required to assign to the said Registrar, and the said Registrar shall be entitled to retain out of and from the Amount of such Assets, such Allowance or *per* Centage, as the said Court shall in their Discretion think reasonable for his Trouble, in the Collection and Administration of the Estates of such Persons dying Intestate as aforesaid : Provided always, That when any next of Kin, who, at the Time of the Return of the above-mentioned Citation, shall have been absent in *Europe* or elsewhere, shall make and establish his or their Claim to the Administration of the Assets of such Intestate, the Letters *ad Colligenda* or of Administration, so granted by virtue hereof to the said Registrar shall be recalled, and Administration in due Form granted to such next of Kin respectively."

Charter of 1833 —

" 27. And We do further give and grant to the said District Courts respectively in their said respective Districts full power and authority to appoint Administrators of the Estates and effects of any Persons dying within such respective Districts Intestate or who may not have by any Last Will or Testament appointed any Executor or Trustee for the Administration or execution thereof, and like power and authority to enquire into and determine upon the validity of any Document or Documents adduced before them as and for the Last Will and Testament of any Person who may have died within such Districts respectively, and to record the same and to grant Probate thereof with like power and authority to appoint Administrators for the Administration or execution of the trusts of any such Last Will or Testament as aforesaid in cases where the Executors or Trustees thereby appointed shall not appear and take out Probate thereof, or having appeared and taken out such Probate shall by Death or otherwise become incapable to carry any such trusts fully into execution. And We do further authorise and empower the said District Courts in their said respective Districts to take proper Securities from all Executors and Administrators of the Last Wills and Testaments of any deceased Persons or of the Estates and Effects of any Persons who may have died intestate for the faithful performance of such trusts and for the proper accounting to such Courts respectively for what may come to their hands or be by them expended in the execution thereof, with like power and authority to call all such Executors and Administrators to account and to charge them with any Balances which may be due to the Estates of any such deceased Persons, and to enforce the payment thereof and to take order for the secure investment of any such Balances, and such Executors and Administrators from time to time to remove and replace as occation may require."

APPENDIX "B"

Land Transfer Act 1897 —

"1. (1) Where real estate is vested in any person without a right in any other person to take by survivorship it shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time as if it were a chattel real vesting in them or him.

" (2) This section shall apply to any real estate over which a person executes by will a general power of appointment, as if it were real estate vested in him.

" (3) Probate and letters of administration may be granted in respect of real estate only, although there is no personal estate.

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" (4) The expression ' real estate ', in this part of this Act, shall not be deemed to include land of copyhold tenure or customary freehold in any case in which an admission or any act by the lord of the manor is necessary to perfect the title of a purchaser from the customary tenant.

" (5) This section applies only in cases of death after the commencement of this Act.

" 2. (1) Subject to the powers, rights, duties, and liabilities herein-after mentioned, the personal representatives of a deceased person shall hold the real estate as trustees for the persons by law beneficially entitled thereto, and those persons shall have the same power of requiring a transfer of real estate as persons beneficially entitled to personal estate have of requiring a transfer of such personal estate.

" (2) All enactments and rules of law relating to the effect of probate or letters of administration as respects chattels real, and as respects the dealing with chattels real before probate or administration, and as respects the payment of costs of administration and other matters in relation to the administration of personal estate, and the powers, rights, duties, and liabilities of personal representatives in respect of personal estate, shall apply to real estate so far as the same are applicable, as if that real estate were a chattel real vesting in them or him, save that it shall not be lawful for some or one only of several joint personal representatives, without the authority of the Court, to sell or transfer real estate.

" (3) In the administration of the assets of a person dying after the commencement of this Act, his real estate shall be administered in the same manner, subject to the same liabilities for debt, costs, and expenses, and with the same incidents as if it were personal estate ; provided that nothing herein contained shall alter or affect the order in which real and personal assets respectively are now applicable in or towards the payment of funeral and testamentary expenses, debts, or legacies, or the liability of real estate to be charged with the payment of legacies.

" (4) Where a person dies possessed of real estate, the Court shall, in granting letters of administration, have regard to the rights and interests of persons interested in his real estate, and his heir-at-law, if not one of the next-of-kin, shall be equally entitled to the grant with the next-of-kin, and provision shall be made by rules of Court for adapting the procedure and practice in the grant of letters of administration to the case of real estate.

" 3. (1) At any time after the death of the owner of any land, his personal representatives may assent to any devise contained in his will, or may convey the land to any person entitled thereto as heir, devisee, or otherwise, and may make the assent or conveyance, either subject to a charge for the payment of any money which the personal representatives are liable to pay, or without any such charge ; and on such assent or conveyance, subject to a charge for all moneys (if any) which the personal representatives are liable to pay, all liabilities of the personal representatives in respect of the land shall cease, except as to any acts done or contracts entered into by them before such assent or conveyance.

" (2) At any time after the expiration of one year from the death of the owner of any land, if his personal representatives have failed on the request of the person entitled to the land to convey the land to that person, the Court may, if it thinks fit, on the application of that person, and after notice to the personal representatives, order that the conveyance be made, or, in the case of registered land, that the person so entitled be registered as proprietor of the land, either solely or jointly with the personal representatives.

" (3) Where the personal representatives of a deceased person are registered as proprietors of land on his death, a fee shall not be chargeable on any transfer of the land by them unless the transfer is for valuable consideration.

" (4) The production of an assent in the prescribed form by the personal representatives of a deceased proprietor of registered land shall authorise the registrar to register the person named in the assent as proprietor of the land.

" 4. (1) The personal representatives of a deceased person may, in the absence of any express provision to the contrary contained in the will of such deceased person, with the consent of the person entitled to any legacy given by the deceased person or to a share in his residuary estate, or, if the person entitled is a lunatic or an infant, with the consent of his committee, trustee, or guardian, appropriate any part of the residuary estate of the deceased in or towards satisfaction of that legacy or share, and may for that purpose value in accordance with the prescribed provisions the whole or any part of the property of the deceased person in such manner as they think fit. Provided that before any such appropriation is effectual, notice of such intended appropriation shall be given to all persons interested in the residuary estate, any of whom may thereupon within the prescribed time apply to the Court, and such valuation and appropriation shall be conclusive save as otherwise directed by the Court.

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" (2) Where any property is so appropriated a conveyance thereof by the personal representatives to the person to whom it is appropriated shall not, by reason only that the property so conveyed is accepted by the person to whom it is conveyed in or towards the satisfaction of a legacy or a share in residuary estate, be liable to any higher stamp duty than that payable on a transfer of personal property for a like purpose.

" (3) In the case of registered land, the production of the prescribed evidence of an appropriation under this section shall authorise the registrar to register the person to whom the property is appropriated as proprietor of the land."

Present : **Sansoni, J.**

THE CEYLON TRANSPORT BOARD
vs.
SAMASTHA LANKA MOTOR SEWAKA SAMITHIYA

S.C. No. 31 *of* 1961—*Labour Tribunal*, 1/4118.

Argued on : 23.7.62.
Decided on : 26.7.62.

Industrial Disputes Act—Workman dismissed—Application to Labour Tribunal for relief on ground of discrimination on the part of employer—Tribunal ordering reinstatement of workman—Appeal to Supreme Court—President of Tribunal misdirecting himself on question of law—Order of dismissal restored.

A workman (mechanic) employed by the Ceylon Transport Board was dismissed because he had broken a rule which provided that any employee who removed a vehicle belonging to the Board either without authority or without a driving licence would be dismissed. He had, in fact, taken out a bus belonging to the Board out of the Piliyandala Depot and driven it without a licence and the bus had gone off the road.

He applied for relief to the Labour Tribunal and the main ground submitted on his behalf to the President of the Tribunal was that the Board had been guilty of discrimination. This was based on the fact that about an year later an assistant Foreman attached to the same Depot who drove a bus without authority and without possessing a driving licence, was not dismissed, but was only transferred with a final warning.

The President of the Tribunal, relying on a passage from a text book, held that the case of the assistant Foreman was proof of discrimination against the mechanic. The Board appealed.

Held : That the President had misdirected himself in law by thinking that the passage quoted or the assistant Foreman's case, which took place subsequently, applied to the present case.

A. Mahendrarajah with *P. Nagendra*, for the employer-appellant.

A. S. Wijetunga, for the applicant-respondent.

SANSONI, J.

This is an appeal by The Ceylon Transport Board from the order of the President of a Labour Tribunal directing that a workman who had been dismissed, be reinstated with back wages.

The workman concerned was an apprentice mechanic who had been about two years and nine months in service. He was dismissed because he had broken a rule which provided that any employee who removed a vehicle belonging to the Board, either without authority or without a driving licence, would be dismissed. It was found that this workman had taken a bus belonging to the Board out of the Piliyandala Depot and driven it a distance of about 3/4th mile without permission, and when he had no certificates of competence to drive a motor vehicle. The bus had gone off the road whereupon the workman returned to the Depot and took a breakdown van to tow the bus back to the Depot.

Before the Tribunal it was submitted that the punishment of dismissal was too severe, and also that the Board had been guilty of discrimination in dismissing the workman. There is no reference in the order to the severity of the punishment,

*For Sinhala translation, see Sinhala section, Vol. 4, part 3, p 9.

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perhaps because it was not pressed. It can hardly be argued that a breach of the rule in question, which has been framed in order to protect the property of the Board from damage and in the interests of other users of the road, does not warrant dismissal

What the President had to consider under the Act was whether the order of dismissal was "just and equitable". This involved the exercise by him of a judicial discretion ; but seeing that the workman had broken a very salutary rule framed in the interests of discipline and the safety of the public, I should have been surprised if he came to the conclusion that the order of dismissal was unreasonable or excessive. A judicial discretion must be exercised reasonably and not arbitrarily.

The submission that the Board was guilty of discrimination was based on something that happened about a year later. An Assistant Foreman attached to the same Depot drove a bus without authority and without possessing a driving licence. He was not dismissed, but he was transferred and given a final warning. I need only remark that he seems to have benefited by misplaced sympathy. The President of the Tribunal, however, has held that the case of the Assistant Foreman was proof of discrimination against the apprentice mechanic who was dismissed. In support of this finding he has cited a passage from Volume 2, page 845, of Labour Disputes and Collective Bargaining by Ludwig Teller which reads : "The credibility of an employer who invokes a company rule as the basis for a discharge is impaired by evidence of uneven application of the rule or the anti-union origin thereof. Thus an employer's invoking of a company rule as a ground of discharge will constitute evidence of an intent to discriminate where prior infractions of the rule went unnoticed."

It seems to me that this passage has no relevance in the present case, for it does not depend on the credibility of an employer, nor was the Assistant Foreman's case prior to the present case. With respect, I think the President misunderstood the passage which I have quoted, and thereby convinced himself that he had no option but to order that the workman be reinstated.

I can only interfere in this appeal on a question of law. The President has, in my opinion, misdirected himself in law by thinking that the passage quoted applied to the present case. His decision is based on a misconception of what constitutes discrimination, and is therefore erroneous in point of law.

I allow this appeal and direct that the order of dismissal of the employee be restored.

Appeal allowed.

Present : **Herat, J.**

AUTO INSURANCE CO., LTD. *vs.* P. M. KULAS, P. S. 245, & ANOTHER

Application for Revision in M.C., Hambantota, Case No. 35873.—*S.C.* 25/1962.

Argued and decided on : 23rd March, 1962.

Poisons, Opium and Dangerous Drugs Ordinance (Cap. 172), *section 77*—Forfeiture of car used to commit offence under such Ordinance—Application by absolute owner of car to have order set aside—No order of forfeiture to be made unless such owner was convicted or is shown to have been implicated in such offence*

Held : (1) That in the present case although the 2nd respondent was the registered owner of the car in question, it was the petitioner who had hired it to the 2nd respondent under a hire-purchase agreement and who was the absolute owner at the relevant time.

(2) That an order of forfeiture under section 77 of the Poisons Ordinance should not be made unless the absolute owner was convicted of or in some way implicated in the commission of the offence.

Followed : *Mercantile Credit, Ltd.* v. *S.I., Peliyagoda and Another*, LXI C.L.W. 56.

* Now section 79 of Cap. 218 in the 1956 Edition.

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G. D. C. Weerasinghe with *J. E. P. Deraniyagala*, for the petitioner.

No appearance for the 1st respondent.

D. H. Balachandra, for the 2nd respondent.

HERAT, J.

In this case, which comes up by way of revision, the circumstances are as follows: Car No. 3 Sri 8978 had been used for carrying *Canabis Sativa* or ganja by certain three persons. These persons were charged under the Poisons Ordinance, Chapter 172, and were convicted and the learned Magistrate under section 77 of that Ordinance forfeited the motor car as being a vehicle used for or in commission of the offence. Now this motor car was not in the ownership of the three persons who were convicted. It was the subject-matter of a hire purchase agreement which has been filed in these proceedings. That agreement shows that the absolute owner of the car was the present petitioner, namely, the Auto Insurance Company, Limited. It also shows that under this hire purchase agreement the car had been hired by the present 2nd respondent. All instalments under the hire purchase agreement had not been paid by the 2nd respondent and he had not become the owner as contemplated by the hire purchase agreement. Although he is the registered owner, that ownership is only meant for purposes of the Motor Traffic Act and does not mean that dominion is vested in the 2nd respondent.

It is argued by Mr. G. D. C. Weerasinghe, learned counsel for the petitioner, that the learned Magistrate could not make an order of forfeiture under the said section 77 unless the owner was a party to the offence or at least that he was in some way implicated in the commission of the offence. He cites in support, the judgment of Mr. Justice Weerasooriya in "Application for Revision in M.C., Colombo, 1246/C, S.C. Application, No. 301, *vide* S.C. Minutes of 25th July, 1961"* He has read to me extracts from a copy of that judgment which he states from the Bar is an accurate copy which I accept on his statement. That judgment deals with an order of forfeiture made under section 51 (2) of the Excise Ordinance, Chapter 42, which contains a similar provision under section 77 of the Poisons Ordinance. Mr. Justice Weerasooriya in that judgment states that no order of forfeiture could be made under section 51 (2) of the Excise Ordinance as against the real absolute owner of the car unless that owner was convicted of the offence or was in some way implicated in the commission of that offence. I have examined the provisions of section 77 of the Poisons Ordinance, Chapter 172, with the provisions of section 51 (2) of Chapter 42 of the Excise Ordinance and such comparison shows me that the reasoning of Mr. Justice Weerasooriya is equally applicable to a case of forfeiture under the Poisons and Opium Ordinance, Chapter 172. It would be extremely unreasonable, for instance, if one's chauffeur without one's knowledge or acquiescence in any way, takes one's car and commits an offence under the Poisons Ordinance, Chapter 172, and on being convicted of that offence one has to suffer forfeiture of one's car. The reasoning of Mr. Justice Weerasooriya appeals to me and I follow it.

I am satisfied that the present petitioner is the absolute owner under the hire purchase agreement and that ownership or dominion was vested in him at the relevant time. There is nothing to indicate that the petitioner was, in the slightest manner, implicated in the commission of the offence.

Notice of this application was served on the 1st respondent who was the complainant in the Magistrate's Court Case but no appearance has been entered on his behalf or on behalf of the Attorney-General.

I quash the order of forfeiture made by the learned Magistrate and direct that the car be forthwith restored to the present petitioner.

Application allowed.

*See 61 C.L.W. 56

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IN THE SUPREME COURT OF CEYLON

TRIAL-AT-BAR, No. 1 OF 1962

Present : **T. S. Fernando, J., L. B. de Silva, J., and Sri Skanda Rajah, J.**

THE QUEEN *vs.* LIYANAGE AND OTHERS

Criminal Procedure Code, section 440A—Trial-at-Bar—Direction and nomination by Minister of Justice under Criminal Law (Special Provisions) Act, No. 1 of 1962—Whether such nomination and direction valid.

Official Language Act, No. 33 of 1956 read with Language of the Courts Act, No. 3 of 1961—Whether nomination and direction should be in Sinhala—Validity of sections 8 and 9 of Criminal Law (Special Provisions) Act.

Constitution Order-in-Council, 1946, section 88(1)—Effect thereof—Whether judges assembled pursuant to the Minister's nomination and direction constitute the Supreme Court—Scope of section 29 (1) of the Constitution Order-in-Council—" Peace, Order and Good Government "—Mala fides of Minister in making direction—Whether ascertainable by proceedings in Court.

Criminal Law (Special Provisions) Act—Whether it offends against principle of the separation of powers in the Constitution—Whether Minister's power of nomination was in pith and substance a power of appointment—Section 52 (1) of Constitution Order-in-Council—Unity of Supreme Court—Whether nomination was a violation thereof.

Courts Ordinance, section 6—Whether power of nomination constituted an exercise of judicial power—If so, whether it can be vested in the Minister—Is such vesting " ultra vires " the Constitution—Principle that justice should not be done, but should manifestly and undoubtedly be seen to be done—Whether nomination by Minister offends against this principle.

On the 23rd June 1962 the Minister of Justice, purporting to act under section 440 A of the Criminal Procedure Code as amended by section 4 of the Criminal Law (Special Provisions) Act, No. 1 of 1962, filed document " A " in the Registry of the Supreme Court, and informed the Court that he directed that the trial of twenty-four persons named therein in respect of three specified offences all falling under Chapter VII of the Penal Code be held before the Supreme Court at Bar by three judges without a jury. Later that same day the Attorney-General exhibited to the Court an Information—document " B " and informed the Court that the same twenty-four persons had committed the offences which had been specified therein, and sought the issue by the Court of lawful process against the said persons. Thereafter, the Minister of Justice, again on the same day, purporting to act under section 9 of the Criminal Law (Special Provisions) Act, No. 1 of 1962, filed in the Court document " C " nominating T. S. Fernando, L. B. de Silva and Sri Skanda Rajah, JJ., as the three judges who were to preside over the trial of the persons referred to above to be held in pursuance of the direction contained in document " A ". Acting upon the said direction and nomination the aforementioned judges ordered summons to issue on the twenty-four persons named in the afore-mentioned documents. On 30th July, 1962, all the defendants being present and represented by Counsel, the judges called upon the defendants to make their pleas in answer to the charges contained in the Information. The following preliminary objections were then raised to the trial proceeding before the judges, and are stated in the order in which they are dealt with in the judgment : —

1. That " the nomination of judges is contrary to law and that the Court has no jurisdiction " and that " (*a*) The direction by the Minister is null and void ; and (*b*) The nomination of the Judges by the Minister is null and void ". The basis of this objection was that the direction and nomination were not in Sinhala, and, therefore, were not valid by reason of section 2 of the Official Language Act, No. 33 of 1956, read with the Language of the Courts Act, No. 3 of 1961.

2. That " this Court cannot take cognizance of the Information laid against the defendants, and it has no jurisdiction to try the case because it is not a validly or properly or lawfully constituted Court ; nor it is competent to hold a Trial-at-Bar ". In pursuance of this objection, it was argued—

   (*a*) That the substitution of the Minister of Justice for the Governor in section 440A of the Criminal Procedure Code was not competent, and that, therefore, the direction given by the Minister of Justice was of no effect ;

   (*b*) That the Judges being assembled to hear this case in pursuance of the direction made by the Minister, they constituted a Special Court or Tribunal and not the Supreme Court ;

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(*c*) That section 8 of the Criminal Law (Special Provisions) Act 1 of 1962, was *ultra vires* the Legislature, inasmuch as by section 29 (1) of the Constitution Order-in-Council Parliament is only given power to make laws " for the peace, order and good government of the Island " and that this section did not, in fact, promote the peace, order, and good government of the Island.

3. That "(*a*) The constitution of this Court is contrary to law, and, therefore, the Court has no jurisdiction to try the case ;

(*b*) In any event, the direction under section 440A of the Criminal Procedure Code and the nomination under section 9 of the Criminal Law (Special Provisions) Act are bad in law. "

(i) In pursuance of this objection, it was argued that even if the power conferred on the Minister to issue a direction is *intra vires* the powers of the legislature under the constitution, or is not in conflict with them, *mala fides* of the Minister in making this particular direction vitiated it ;

(ii) In pursuance of this objection, and of objection 2, it was argued that the Constitution of Ceylon embodied a Separation of Powers, and that section 9 of the Criminal Law (Special Provisions) Act 1 of 1962 was invalid inasmuch as it violated this principle ;

(iii) In pursuance of this objection it was further argued that section 9 was invalid inasmuch as it was in pith and substance a power of appointing Judges of the Supreme Court, and contravened section 52 (1) of the Constitution Order-in-Council ;

(iv) In pursuance of this objection, and objection 2 above, it was further argued that the Supreme Court was one and indivisible, and that the power of nomination given to the Minister by section 9 violated the unity and indivisibility of the Court, and thereby was in contravention of section 52 (1) of the Constitution Order-in-Council which impliedly entrenched the existence of the Supreme Court ;

(v) In pursuance of this objection, and objection 2 above, it was further argued that the nomination of the three Judges for this Trial-at-Bar effected by the Minister of Justice was an exercise of the Judicial power of the State, and was invalid. The Attorney-General did not contest that judicial power in the sense of the judicial power of the State is vested in the Judicature, *i.e.*, the established Civil Courts of this country.

4. It was also objected that, even if the power of nomination was *intra vires* the Constitution, it offended, in the context of this particular case against the cardinal principle in the administration of justice that justice should not only be done, but should manifestly and undoubtedly be seen to be done.

Held : (1) With regard to objection (1), that as English was still admittedly the language of the Court, the communication by the Minister, to the Court by documents made out in English, of the direction and nomination by him, was a sufficient compliance with the existing law.

(2) With regard to objection (2) (*a*), that having regard to the language of section 88 (1) of the Constitution Order-in-Council, 1946, which empowered the Governor to modify, add or adapt the provisions of any law " *as appears to him necessary or expedient* ", the Minister of Justice could be substituted for the Governor.

With regard to objection (2) (*b*), that the fact that the Judges had assembled to hear this case in pursuance of the direction made by the Minister did not by itself have the effect of constituting the Judges a Special Court or Tribunal and not the Supreme Court.

With regard to objection (2) (*c*), that the power given to Parliament " to make laws for the peace, order, and good government of the Island " authorized the utmost discretion of enactment for the attainment of the objects pointed to, and that the Court would not inquire whether any particular enactment did, in fact, promote the peace, order, or good government of the Island.

(3) With regard to objection (3) (*b*) (i), that inasmuch as section 8 of the Criminal Law (Special Provisions) Act provided that " any direction issued by the Minister of Justice under section 440A of the Criminal Procedure Code shall be final and conclusive, and shall not be called in question in any Court, whether by way of Writ or otherwise ", no proceedings could be entertained by a Court to test the validity of a direction ; and inasmuch as the direction did not on the face of it contain evidence of *mala fides*, and no proceedings could be entertained which sought to establish *mala fides*, the direction could not be attacked on that ground.

With regard to objection (3) (*b*) (ii), that if by a separation of powers or functions of Government was meant a mutually exclusive separation of such powers or functions as obtains in the American Constitution or even in the Constitution of the Commonwealth of Australia, which was itself based on the American Constitution, there was no such mutually exclusive separation of governmental functions in our Constitution.

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With regard to objection (3) (*b*)(iii), that inasmuch as the Judges nominated by the Minister were already Judges of the Supreme Court, and in holding a Trial-at-Bar under section 440A of the Criminal Procedure Code they functioned as Judges of the Supreme Court and in no other capacity, the nomination of the Judges by the Minister did not constitute an appointment to any new office or even to any office as such.

With regard to objection (3) (*b*) (iv), that if the vesting of the power of nomination in a person outside the membership of the Supreme Court is not *ultra vires* the Constitution on the ground that the power is to be exercised by a person in whom judicial power cannot be vested, the nomination by such a person to constitute the Bench to hear a Trial-at-Bar under section 440A was no different from the nomination by the Chief Justice of such a Bench prior to the enactment of Act, No. 1 of 1962, and that, therefore, the fact of nomination or selection did not violate the concept of the oneness of the Supreme Court.

With regard to objection 3 (*b*)(v), that because—

(*a*) the power of nomination conferred on the Minister was an interference with the exercise by the Judges of the Supreme Court of the strict judicial power of the State vested in them by virtue of their appointment in terms of section 52 of the Ceylon (Constitution) Order-in-Council, 1946, or was in derogation thereof ; and

(*b*) the power of nomination was one which had hitherto been invariably exercised by the Judio cature as being part of the exercise of the judicial power of the State, and could not be reposed in anyone outside the Judicature, section 9 of the Criminal Law (Special Pro- visions) Act, No. 1 of 1962, was *ultra vires* the Constitution and, therefore void.

(4) With regard to objection 4, that even if a different conclusion had been reached regarding the validity of section 9 of the Criminal Law (Special Provisions) Act, the Judges would have been compelled to give way to this principle which has now become ingrained in the administration of common justice in this country.

Cases referred to : *The Queen* v. *Justices of County of London and London County Council*, L.R. (1893) 2 Q.B., 476.
Ross-Clunis v. *Papadopoullos*, (1958) 2 A.E.R. 23; (1958) 1 W.L.R. 546
The Queen v. *Theja Gunawardene*, (1954) 56 N.L.R. 193.
Chenard & Co. v. *Joachim Arissol*, (1949) A.C. 127; 65 T.L.R. 72
Smith v. *East Elloe Rural District Council*, (1956) 1 A.E.R. 855; 1956 A.C. 736; (1956) 2 W.L.R. 888
Kodakan Pillai v. *Mudannayake*, (1953) 54 N.L.R. 433; XLIX C.L.W. 33
Attorney-General for Ontario v. *Attorney-General for Canada*, (1925) 94 L.J. P.C. 132; 1925 A.C. 750; 133 L.T. 434
Huddart Parker Pty., Ltd. v. *Moorehead*, (1909) 8 Commonwealth L.R. 330
Labour Relations Board of Saskatchewan v. *John East Iron Works, Ltd.*, 1949 A.C. 134
Queen Victoria Memorial Hospital v. *Thornton*, (1953) 87 Commonwealth L.R. 144
Attorney-General of Australia v. *The Queen* (*The Boilermakers' Case*), (1957) 2 A.E.R. 45; 1957 A.C. 288; (1957) 2 W.L.R. 607
Federal Commissioner of Taxation v. *Munro*, (1926) 38 Commonwealth L.R. 153.
The Shell Co. of Australia, Ltd. v. *Federal Commissioner of Taxation*, 1931 A.C. 275 ; 144 L.T. 421; 47 T.L.R. 115; 100 L.J.P.C. 55.
The Queen v. *Davison*, (1954) 90 Commonwealth L.R., 353.
Prentis v. *Atlantic Coast Line Co.* (1908) 211 U.S. 210
Rode v. *Bawa*, (1896) 1 N.L.R. 373.
R. v. *Sussex Justices, ex parte McCarthy*, (1924) 1 K.B. 256 ; 40 T.L.R. 80; 130 L.T. 510 ; 93 L.J.K.B. 129
R. v. *Essex Justices, ex parte Perkins*, (1927) 2 K.B. 475 ; 137 L.T. 455 ; 43 T.L.R. 415 ; 96 L.J.K.B. 530.
Cottle v. *Cottle*, (1939) 2 A. E.R. 541.
The King v. *Beyal Singho*, (1946) 48 N.L.R. 25
Eckersley v. *Mersey Docks and Harbour Board*, (1894) 2 Q.B. 667; 71 L.T. 308
Dingiri Mahatmaya v. *Mudiyanse*, (1922) 24 N.L.R. 377
Ruthira Reddiar v. *Subba Reddiar*, (1937) 39 N.L.R. 14
The King v. *Caldera*, (1938) XI C.L.W. 1
Kandasamy v. *Subramaniam*, (1961) 63 N.L.R. 574

Douglas St. C. B. Jansze, Q.C., Attorney-General, with *V. Tennekoon, Deputy Solicitor-General, Ananda Pereira, L. B. T. Premaratne, T. A. de S. Wijesundera, V. S. A. Pullenayagum* and *Noel Tittawella, Crown Counsel*, for the prosecution.

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G. G. Ponnambalam, Q.C., with *S. J. Kadirgamar, E. A. G. de Silva* and *K. N. Choksy* instructed by *C. J. Oorloff*, for the 1st defendant.

G. G. Ponnambalam, Q.C., with *S. J. Kadirgamar, E. A. G. de Silva* and *K. N. Choksy*, instructed by *Andrew G. M. de Silva* and *F. J. de Saram*, for the 2nd defendant.

G. G. Ponnambalam, Q.C., with *S. J. Kadirgamar, E. A. G. de Silva, R. A. Kannangara* and *K. N. Choksy*, instructed by *F. J. de Saram* and *L. D. S. Gunasekera*, for the 3rd defendant.

E. G. Wikramanayake, Q.C., with *A. C. M. Ameer, R. A. Kannangara* and *George Samarawickrema* instructed by *A. L. Gunasekera*, for the 4th defendant.

G. G. Ponnambalam, Q.C., with *Stanley de Zoysa, S. J. Kadirgamar, A. C. M. Ameer, E. A. G. de Silva, Neville de Jacolyn Seneviratne* and *M. Underwood*, instructed by *N. Kadirasaswamy* and *Ralph Samarasinghe*, for the 5th defendant.

G. G. Ponnambalam, Q.C., with *S. J. Kadirgamar, E. A. G. de Silva, R. A. Kannangara, K. N. Choksy* and *R. Eliyaperuma* instructed by *Felix Perera* and *F. J. de Saram*, for the 6th defendant.

G. G. Ponnambalam, Q.C., with *S. J. Kadirgamar, E. A. G. de Silva, G. F. Sethukavalar* and *R. R. Nalliah* instructed by *C. J. Oorloff*, for the 7th defendant.

G. G. Ponnambalam, Q.C., with *S. J. Kadirgamar, E. A. G. de Silva* and *R. R. Nalliah* instructed by *C. J. Oorloff*, for the 8th defendant.

G. G. Ponnambalam, Q.C., with *S. J. Kadirgamar, A. C. M. Ameer, E. A. G. de Silva, R. R. Nalliah* and *E. Cooray* instructed by *C. J. Oorloff*, for the 9th defendant.

G. G. Ponnambalam, Q.C., with *S. J. Kadirgamar, E. A. G. de Silva, Lucian Weeramantry* and *K. Viknarajah* instructed by *Herbert Weerappura*, for the 10th defendant.

S. J. Kadirgamar, with *E. A. G. de Silva, L. Kadirgamar* and *R. L. Jayasuriya* instructed by *J. A. R. Perera*, for the 11th defendant.

S. J. Kadirgamar with *A. C. M. Ameer, E. A. G. de Silva* and *K. Viknarajah* instructed by *Ralph Samarasinghe*, for the 12th defendant.

G. G. Ponnambalam, Q.C., with *S. J. Kadirgamar, A. C. M. Ameer, E. A. G. de Silva, G. F. Sethukavalar* and *R. R. Nalliah* instructed by *C. J. Oorloff*, for the 13th defendant.

G. G. Ponnambalam, Q.C., with *S. J. Kadirgamar, A. C. M. Ameer, E. A. G. de Silva, R. R. Nalliah* and *E. Cooray* instructed by *C. J. Oorloff*, for the 14th defendant.

G. G. Ponnambalam, Q.C., with *S. J. Kadirgamar, E. A. G. de Silva* and *R. A. Kannangara*, instructed by *F. J. & G. de Saram*, for the 15th defendant.

E. G. Wikramanayake, Q.C., with *M. Tiruchelvam, Q.C., J. A. L. Cooray, G. T. Samarawickrema* and *R. A. Kannangara*, instructed by *A. L. Gunasekera*, for the 16th defendant.

G. G. Ponnambalam, Q.C., with *S. J. Kadirgamar, E. A. G. de Silva* and *Sunil Rodrigo*, instructed by *Mervyn Cassie Chetty* and *Prosper de Costa*, for the 17th defendant.

E. G. Wikramanayake, Q.C., with *J. V. C. Nathaniels* and *A. W. N. Sandrapragas*, instructed by *B. R. Rajaratnam*, for the 18th defendant.

H. W. Jayawardena, Q.C., with *R. A. Kannangara, L. C. Seneviratna*, and *P. N. Wikramanayake*, instructed by *Kingsley Wijesinghe* and *Ralph Samarasinha*, for the 19th defendant.

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A. H. C. de Silva, Q.C., with *Stanley Alles* and *K. C. Kamalanathan*, instructed by *M. P. P. Samarasinghe*, for the 20th defendant.

A. H. C. de Silva, Q.C., with *Stanley Alles* and *K. C. Kamalanathan*, instructed by *D. F. de Silva*, for the 21st defendant.

G. G. Ponnambalam, Q.C., with *S. J. Kadirgamar, E. A. G. de Silva, Izadeen Mohamed* and *H. D. Thambyah*, instructed by *F. J. & G. de Saram*, for the 22nd defendant.

G. G. Ponnambalam, Q.C., with *Stanley de Soyza, S. J. Kadirgamar, E. A. G. de Silva, Neville de Jacolyn, K. Viknarajah*, and *R. Eliyaperuma*, instructed by *N. Cathereswamy* and *Ralph Samarasinghe*, for the 23rd defendant.

G. G. Ponnambalam, Q.C., with *S. J. Kadirgamar, E. A. G. de Silva* and *Cecil de S. Wijeratna*, instructed by *Andrew M. G. de Silva* and *F. J. de Saram*, for the 24th defendant.

ORDER OF COURT

October 3, 1962.

On the twenty-third of June, 1962, the Minister of Justice, purporting to act under section 440 A of the Criminal Procedure Code as amended by section 4 of the Criminal Law (Special Provisions) Act, No. 1 of 1962, by filing document " A " in the Registry of this Court, informed the Court that he directs that the trial of twenty-four persons named therein in respect of three specified offences all falling under Chapter VI of the Penal Code be held before the Supreme Court at Bar by three Judges without a jury. Later that same day the Attorney-General exhibited to the Court an Information — document " B " — informing the Court that the same twenty-four persons had committed the offences which had been specified therein and seeking the issue by the Court of lawful process against the said persons. Thereafter, the Minister of Justice, again on the same day, purporting to act under section 9 of the Criminal Law (Special Provisions) Act, No. 1 of 1962, filed in the Court document " C " nominating us as the three Judges who shall preside over the trial of the persons referred to above to be held in pursuance of the direction contained in document " A ".

Acting upon the said direction and nomination we ordered summons to issue on the twenty-four persons named in the afore-mentioned documents. On 30th July, 1962, all the defendants being present and represented by counsel, we called upon the defendants to make their pleas in answer to the charges contained in the Information. Counsel then raised certain preliminary objections to the trial proceeding before us, and it becomes necessary to set out hereunder the objections as formulated by counsel.

Mr. Ponnambalam who appeared for seventeen of the twenty-four defendants framed his objections in the following form :—

> " This Court cannot take cognizance of the Information laid against the defendants, and it has no jurisdiction to try the case because it is not a validly or properly or lawfully constituted Court ; nor is it competent to hold a Trial-at Bar."

Mr. Wikremanayake who appeared for two of the other seven defendants objected on the ground that " the nomination of judges is contrary to law and that the Court has no jurisdiction." He raised an additional objection which was split up by him as follows :—" (*a*) The direction by the Minister is null and void ; and (*b*) The nomination of the Judges by the Minister is null and void. "

Counsel for the remaining five defendants, except counsel for the 19th defendant, did not raise any separate objections themselves but indicated that they would be supporting the objection raised by Mr. Ponnambalam. Counsel for the 19th defendant informed Court that he would formulate his objections as follows :—

> " (*a*) The constitution of this Court is contrary to law, and, therefore, the Court has no jurisdiction to try the case ;
>
> (*b*) In any event, the direction under section 440A of the Criminal Procedure Code and the nomination under section 9 of the Criminal Law (Special Provisions) Act are bad in law."

He further moved for summons on certain persons whose testimony, he stated, would be required to establish an allegation of *mala fides* on the part of the Minister of Justice in issuing the direction and making the nomination of

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Judges proof of which was necessary to maintain his objections. We intimated to counsel for the 19th defendant that we would consider the question of ordering summons to issue if he could satisfy us that the evidence he contemplated obtaining was relevant and admissible.

Of these several objections, it seems to us that the additional objection raised by Mr. Wikremanayake requires first consideration as the sustaining of that objection would have the result of terminating the present proceedings. The substance of this additional objection that (*a*) the direction, and (*b*) the nomination made by the Minister are null and void was based on an interpretation he sought to place on section 2 of the Official Language Act, No. 33 of 1956, read with the Language of the Courts Act, No. 3 of 1961. He contended that, as a result of the enactment of the Official Language Act, the Sinhala language has on and after the 1st day of January, 1961, become the only language of Ceylon, and that the direction and nomination made by the Minister, being official acts of an official, were required to be done in the Sinhala language. The Language of the Courts Act is designed to provide for the use of the Sinhala language for recording the proceedings and for pleadings filed of record. No Order as contemplated in section 2 of that Act has hitherto been made in respect of any of the Courts and English still continues as the language of the Courts. The direction and nomination of the Judges by the Minister, not being acts constituting proceedings in Court nor forming pleadings filed of record, so Mr. Wikremanayake argued, could only have been validly done in the Sinhala language. While he conceded that English was still the language of the Courts and, therefore, that the communication to Court of the direction and the nomination could have been validly done in English, he contended that communication can take place only after the performance of the acts and that there is an admission that the direction and nomination had been effected only in the English language.

Act No. 33 of 1956 is intituled " An Act to prescribe the Sinhala language as the one official language of Ceylon and to enable certain transitory provisions to be made. " Section 2 of the Act enacts :—

> " The Sinhala language shall be the one official language of Ceylon :
>
> Provided that where the Minister considers it impracticable to commence the use of only the Sinhala language for any official purpose immediately on the coming into force of this Act, the language or languages hitherto used for that purpose may be continued to be so used until the necessary change is effected as early as possible before the expiry of the thirty-first day of December, 1960, and, if such change cannot be effected by administrative order, regulations may be made under this Act to effect such change."

This Act became law on 7th July, 1956, and on that same day the appropriate Minister published a notification in the *Gazette*—(see *Government Gazette Extraordinary*, No. 10,949 of 7th July, 1956)—in the following terms :—

> By virtue of the powers vested in me by the proviso to section 2 of the Official Language Act, No. 33 of 1956, I, Solomon West Ridgeway Dias Bandaranaike, Prime Minister, being the Minister in charge of the subject of the said Act, do hereby declare that where any language or languages has or have hitherto been used for an official purpose, such language or languages may by continued to be so used until the necessary change is effected in accordance with the provisions of the aforesaid section."

It is common ground that no regulations have been made as permitted by this Act, and Mr. Wikramanayake contended that, as the time limit permitted by the proviso has now passed, the proviso itself has now ceased to have any force. He argued that the transitory provisions themselves must cease on the expiry of the thirty-first day of December, 1960, and the use of the language prescribed by section 2 as the one official language which meant the only official language must prevail over the use of any other language.

It may be mentioned here that Mr. Wikramanayake did not contend that section 2 warranted the proposition that Sinhala became on and after 1st January, 1961, the only language in which the acts of all the functions of Government in this country could have been or can be performed. He was content for the purpose of this case to argue that it was the intention of the legislature to confine the operation of section 2 to official acts in the sense of acts of officials as distinguished from acts of the legislature or acts done in Court proceedings. The learned Attorney-General himself submitted that the expression " official " in section 2 signified no more than authorised for official use, but he relied on the absence of any provision in Act No. 33 of 1956 in respect of the consequences of a failure to use the Sinhala language as the only official language as indicative of the intention of the legislature deliberately to refrain from providing any sanction in the event of such a failure. He submitted, further, that the legislature recognised that the change could not

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be effected immediately and that a period of transition was necessary, but that no limit was placed by the Act on the duration of the period of transition. He was compelled to advance the argument that the effect of the proviso was to retain the period of transition until a change is, in fact, effected.

Relying upon certain observations contained— in the judgment of Bowen, L.J., in *The Queen* v. *Justices of County of London and London County Council*, L.R. (1893) 2 Q.B., at 491, he submitted that the expression " Before the expiry of the thirty-first day of December, 1960 ", is nothing more than a counsel of perfection involving no consequences if the counsel is not heeded, and that the proviso in effect permitted the Minister to ensure that the language or languages used up to the date of the enactment of Act No. 33 of 1956 may be continued to be so used until the necessary change is effected, although the intention and direction of the legislature was that it be effected as early as possible. He argued that the Act must be read, as all enactments are, subject to their not being made absurd by matters which never could have been within the calculation or consideration of the legislature, and that if two possible interpretations can be placed of which one is likely to bring about a mischievous result while the other is conducive to peace, order and good government, the Court must lean towards the latter interpretation.

It appears to us unnecessary to pronounce on the merits of these respective contentions. Even if one were to assume the correctness of Mr. Wikremanayake's contention that on and after 1st January, 1961, official acts of officials could have been or can be performed only in the Sinhala language, as English is still admittedly the language of the Court, the communication by the Minister to the Court by documents made out in English of the direction and nomination of Judges by him is, in our opinion, a sufficient compliance with the existing law. We are, therefore, unable to sustain the additional objection and, accordingly, overrule it.

We can now turn our attention to the main objections which have been already specified. Although stated in varying forms by the several counsel for the defendants they raise in substance the unconstitutionality of certain provisions of the Criminal Law (Special Provisions) Act, and are designed to obtain from this Court a declaration that sections 8 and 9 of that Act which relate to the powers of the Minister of Justice to issue respectively a direction that persons accused of certain offences be tried before the Supreme Court at Bar by three Judges without a jury and to nominate those three Judges are *ultra vires* the powers of the Legislature as granted by the Ceylon (Constitution) Order-in-Council, 1946. It will be convenient to deal with the alleged invalidity of the power to issue a direction separately from the alleged invalidity of the power to nominate as the relevant considerations applicable appear to us to differ materially in the two cases.

First, as to the direction. Section 8 of the Criminal Law (Special Provisions) Act provides as follows :—

" Any direction issued by the Minister of Justice under section 440A of the Criminal Procedure Code shall be final and conclusive, and shall not be called in question in any Court, whether by way of Writ or otherwise."

This objection to the power of the Minister conferred on him by section 440A of the Criminal Procedure Code (as now amended by section 4 of Act No. 1 of 1962) to direct that these defendants be tried before the Supreme Court at Bar by three Judges, although outlined by counsel for all the defendants, was finally persisted in only by Mr. Ponnambalam. He pointed to the history of section 440A, and explained that while the Code always contained provision—Section 216—whereby the Chief Justice may in his discretion order that any trial before the Supreme Court be a Trial-at-Bar by jury before three Judges, it was only after the religious riots of 1915 that the Legislature introduced provision for Trial-at-Bar without a jury, and that until the introduction of the 1946 Constitution the power to direct such a Trial-at-Bar rested with the Governor. The reason for the introduction into our law of the system of trial without jury in cases which up to that time had been triable by jury was understandable as the chances of ensuring an unbiassed jury at times when public feeling is profoundly disturbed, whatever be the cause, are considerably lessened. Mr. Ponnambalam was inclined to question whether the Governor himself could have been granted that power, but it seems to us quite unnecessary to go into that question here. He certainly argued that the substitution of the Minister of Justice in place of the Governor in 1947 was not competent. This argument is, in our opinion, sufficiently repulsed by a reference to section 88 of the Constitution Order-in-Council, 1946, itself, which embodied the following transitory provisions relating to the modification of existing laws :—

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88.—"(1) The Governor may by Proclamation at any time before the first meeting of the House of Representatives under this Order make such provision as appears to him necessary or expedient, in consequence of the provisions of this Order, for modifying, adding to, or adapting the provisions of any written law which refer in whatever terms to the Governor, the State Council, the Board of Ministers, the Officers of State, a Minister, an Executive Committee or a public officer, or otherwise for bringing the provisions of any written law into accord with the provisions of this Order or for giving effect thereto.

(2) Every Proclamation under sub-section (1) of this section shall have the force of law and may be amended, added to or revoked by further Proclamation within the period specified in that sub-section."

Acting under section 88 the Governor by Proclamation of 18th September, 1947, published in *Government Gazette Extraordinary*, No. 9773 of September 24, 1947, directed the substitution for the word " Governor " in section 440A of the words " Minister of Justice ". It would be wholly unprofitable to attempt to assess, as Mr. Ponnambalam invited us to do, whether the Minister of Justice could have been so substituted for the Governor because the paramount law, the Constitution itself, empowered the Governor to modify, add or adapt the provisions of any law " *as appears to him necessary or expedient* ". In view of the consistent interpretation language such as this has received in recent times in Courts of the highest authority, it is now too late in the day to argue that, when the Legislature confers power on an indivdual by employing expressions such as " as appear to (the designated individual) necessary " or " as (the designated individual) considers sufficient ", that is not enough warrant to constitute such designated individual the sole judge of what is necessary or sufficient. See, for instance, the Privy Council decision in *Ross-Clunis* v. *Papadopoullos*, L.R. (1958) A.C., at 559. Nor do we think that by itself the fact that we have assembled to hear this case in pursuance of the direction made by the Minister has the effect of constituting us a special Court or Tribunal and not the Supreme Court. We need only refer to the admittedly sole previous instance after the introduction of the 1946 Constitution of a Trial-at-Bar held before the Supreme Court by three Judges without a jury, viz., *The Queen* v. *Theja Gunawardene*, (1954) 56 N.L.R. 193, at 205, where the Court stated that " the circumstance that the Minister purported to direct that an Information shall be tried before the Supreme Court at Bar by three judges without a jury does not, in our opinion, have the effect that a Bench of three judges which assembles to hear the Information ceases to be the Supreme Court and becomes a different tribunal created by the Minister ".

Another argument for invalidating section 8 (an argument which extended in respect of section 9 as well) advanced by Mr. Ponnambalam was based on the contention that the Legislature of this Country not being sovereign it was competent to a Court to examine legislation to decide whether it was actually for the peace, order, and good government of the country, and, if it was not, to pronounce it void. Section 29 (1) of the Order-in-Council provides that " subject to the provisions of this Order, Parliament shall have the power to make laws for the peace, order, and good government of the Island ". Such a power has been held " to authorise the utmost discretion of enactment for the attainment of the objects pointed to ", and a Court will not inquire whether any particular enactment of this character does, in fact, promote the peace, order or good government of the Colony—see *Chenard & Co.* v. *Joachim Arissol*, L.R. (1949) A.C., at 132. Mr. Ponnambalam sought to read section 29 (1) as a limiting clause whereas it appears to us clearly as an empowering clause. Cases decided in Ceylon or other countries of the British Commonwealth at a time when the Colonial Laws Validity Act applied would be without application today. To agree with the submission made by learned counsel would be to negative the Sovereignty of Parliament which in this country is now limited only in the manner set out in the other sub-sections of section 29. To extend the scope of judicial review beyond that would appear to us to place in the Courts a new power unrecognized by the Constitution at the expense of a power vested in Parliament by the Constitution. We find ourselves unable to uphold any of the arguments raised by Mr. Ponnambalam in order to impugn section 8 of Act No. 1 of 1962.

What we have stated above do not, however, dispose of all the objections centering round the direction that a Trial-at-Bar be held by three Judges without a jury. Counsel for the 19th defendant has raised the objection that, even assuming that the power conferred on the Minister to issue a direction is *intra vires* the powers of the Legislature under the Constitution or is not in conflict with them (since it was a power that existed even before the Order-in-Council of 1946 was made by His Majesty in Council), *mala fides* of the Minister in making the particular direction in this case vitiates it.

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We had intimated to learned counsel that evidence to establish the existence of *mala fides* in the Minister of Justice would have been permitted to be led only if he could have satisfied us that such evidence was relevant and admissible. The learned Attorney-General has, in respect of this question, brought to our notice a decision in an English case, undoubtedly of the highest authority, which appears to us to be an effective bar to our sustaining this particular objection outlined on behalf of the 19th defendant. No attempt was made on behalf of the defendants to distinguish this authority in any way and it affords a complete answer to the point raised. We refer to the case of *Smith* v. *East Elloe Rural District Council*, L.R. (1956) A.C. 736, where the House of Lords was called upon to consider the interpretation to be placed on paragraph 16 of Part IV of Schedule I of the Acquisition of Land (Authorisation Procedure) Act, 1946, which was in the following terms :—

> 16.—" Subject to the provisions of the last foregoing paragraph, a compulsory purchase order or a certificate under Part III of this Schedule shall not, either before or after it shall be confirmed, made or given, *be questioned in any legal proceedings whatsoever* . . ."

The House of Lords held, by a majority, that the jurisdiction of the Court was ousted by reason of the plain prohibition in paragraph 16. Viscount Simonds, who was one of the judges comprising the majority,— at p. 750—expressed himself thus :—

> " My Lords, I think that anyone bred in the tradition of the law is likely to regard with little sympathy legislative provisions for ousting the jurisdiction of the Court, whether in order that the subject may be deprived altogether of remedy or in order that his grievance may be remitted to some other tribunal. But it is our plain duty to give the words of an Act their proper meaning and, for my part, I find it quite impossible to qualify the words of the paragraph in the manner suggested . . . What is abundantly clear is that words are used which are wide enough to cover any kind of challenge which any aggrieved person may think fit to make. I cannot think of any wider words. Any addition would be mere tautology. But, it is said, let those general words be given their full scope and effect, yet they are not applicable to an order made in bad faith. But, My Lords, no one can suppose that an order bears upon its face the evidence of bad faith. It cannot be predicted of any order that it has been made in bad faith until it has been tested in legal proceedings, and it is just that test that paragraph 16 bars."

On the same point, Lord Radcliffe, another of the judges who comprised the majority, stated—at p. 769 :—

> " At one time the argument was shaped into the form of saying that an order made in bad faith was in law a nullity and that, consequently, all references to compulsory purchase orders in paragraphs 15 and 16 must be treated as references to such orders only as had been made in good faith. But this argument is in reality a play on the meaning of the word nullity. An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders. And that brings us back to the question that determines this case : Has Parliament allowed the necessary proceedings to be taken ? "

We hold that all the objections taken in respect of the direction issued by the Minister fail, and that section 8 of Act No. 1 of 1962 is *intra vires* the Legislature.

Next, as to the nomination. Much of the argument before us was centred on an attack on section 9 of Act No. 1 of 1962 as being *ultra vires* the Legislature's power to make law by a simple majority. It is a novel provision of law raising in this case an interesting but difficult question of law.

Section 9 may conveniently be reproduced here :—

> 9. " Where the Minister of Justice issues a direction under section 440A of the Criminal Procedure Code that the trial of any offence shall be held before the Supreme Court at Bar by three Judges without a jury, the three Judges shall be nominated by the Minister of Justice, and the Chief Justice if so nominated or, if he is not so nominated, the most senior of the three Judges so nominated, shall be the president of the Court.
>
> The Court consisting of the three Judges so nominated shall, for all purposes, be duly constituted, and accordingly the constitution of that Court and its jurisdiction to try that offence, shall not be called in question in any Court, whether by way of writ or otherwise."

The decision in *Smith* v. *East Elloe Rural District Council* (*supra*) would become applicable even in regard to the attempt to impugn the nomination under section 9 only if this section is itself *intra vires* the Legislature. It has not been disputed by the Crown that this Court has, notwithstanding the wording of section 9, jurisdiction to consider whether the section is *intra vires*. In order to found this attack all counsel who addressed us on behalf of the defendants contended that the Constitution of Ceylon recognised a separation of powers of Government. We were referred to the Constitutions of many countries, notably those of the United States of America,

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Australia, Canada, South Africa and India. On the other hand, the Attorney-General contended that no separation of powers exists under our Constitution, and that, if a separation of powers exists dehors the written Constitution, it is a separation after the British method because we had been accustomed to that kind of separation throughout the British occupation of this country.

In view of the fact that the Ceylon (Constitution) Order-in-Council of 1946 itself recites that His Majesty's Government have reached the conclusion that a Constitution on the general lines proposed by the Soulbury Commission (which also conforms in broad outline, save as regards the Second Chamber, with the Constitutional scheme put forward by the Ceylon Ministers themselves) will provide a workable basis for constitutional progress in Ceylon, we permitted counsel on both sides to make reference to the text of parts of the report of the Soulbury Commission itself, a course which Their Lordships of the Judicial Committee approved in somewhat similar circumstances in *Kodakan Pillai* v. *Mudannayake*, (1953) 54 N.L.R., at 438. Counsel for the defendants referred us to paragraphs 395 and 396 of that Report (Ceylon—Report of the Commission on Constitutional Reform, Cmd. 6677, September, 1945), wherein the Commissioners state :—

395. " In making these recommendations, we have fully considered the objections usually raised by those trained in the English tradition to the establishment of a Ministry of Justice, on the ground that a Ministry so designated is apt to blur—at least in the public mind—the line of demarcation prescribed under English practice between the Judiciary and the Executive. We realise that Ceylon is accustomed to the British system and that any departure from British principles would be likely to meet with widespread oppposition."

396. " We would, therefore, make it amply clear that in recommending the establishment of a Ministry of Justice we intend no more than to secure that a Minister shall be responsible for the administrative side of legal business, for obtaining from the Legislature of justice, and for answering in the Legislature on matters arising out of it. There can, of course, be no question of the Minister of Justice having any power of interference in or control over the performance of any judicial or quasi-judicial function, or the institution or supervision of prosecutions . . ."

The learned Attorney-General, on the other hand, referred us to the Epilogue to the Report—Paragraphs 408 to 410—wherein the Commissioners state that—

" The Constitution we recommend for Ceylon reproduces in large measure the form of the British Constitution, its usages and conventions and may on that account invite the criticism so often and so legitimately levelled against attempts to frame a government for an Eastern people on the pattern of Western democracy . . . It is easier to propound new constitutional devices and fresh constructive solutions than to foresee the difficulties and disadvantages which they may develop. At all events, in recommending for Ceylon a Constitution on the British pattern, we are recommending a method which is the result of very long experience, which has been tested by trial and error and which works, and, on the whole, works well. Be that as it may, the majority—the politically conscious majority of the people of Ceylon —favour a Constitution on British lines. Such a Constitution is their own desire, and is not being imposed on them . . . But we think that Ceylon is well qualified for a Constitution framed on the British model, and we regard our proposals as a further stage in the evolution of the system under which Ceylon was governed prior to 1931—an evolution to some extent interrupted by the experiment of the Donoughmore Constitution of that year . . . We think that it should be well within the capacity of a future Government of Ceylon to operate a form of Constitution which does not represent a novel and strange creation, but is the natural evolution of a type of government with which the Ceylonese had for some time been familiar."

While we have referred to the Report of the Soulbury Commission, the question raised as to whether a separation of the three powers or functions of Government is embodied in our Constitution must ultimately be answered by an examination of the provisions of the Order-in-Council itself. The learned Attorney-General pointed out that under our Constitution the Cabinet of Ministers who are all members of the Legislature (*i.e.*, of the Senate or the House of Representatives) are all executive officers and direct the executive functions of Government. The Chief Justice and at least one other judge of the Supreme Court are members of the Judicial Service Commission, a body performing executive functions. It must, however, not be overlooked that these are functions assigned to them under the paramount law, the Constitution itself. It appears to us unnecessary to go into this question at any length except to say that if by a separation of powers or functions of Government is meant a mutually exclusive separation of such powers or functions as obtains in the American Constitution or even in the Constitution of the Commonwealth of Australia, which was itself based on the American Constitution, there is no such mutually exclusive separation of governmental functions in our Constitution. Nor, on the other hand, do we have a sovereign Parliament in the sense in which that expression is used in reference to the Parliament of the United Kingdom. That a division of

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the three main functions of Government is recognised in our Constitution was indeed conceded by the learned Attorney-General himself. For the purposes of the present case it is sufficient to say that he did not contest that judicial power in the sense of the judicial power of the State is vested in the Judicature, *i.e.*, the established Civil Courts of this country.

There is no dispute that the three of us, as constituting, for the purposes of this Trial-at-Bar, the Supreme Court are called upon to exercise the strict judicial power of the State, and, in fact, we have, all three of us, received at one time or another, but in each case before the Supreme Court was so called upon to exercise judicial power, appointment by the Governor-General acting under section 52 (1) of the 1946 Order-in-Council.

It was strongly urged on behalf of the defence that the power of nomination reposed by the impugned section 9 in the Minister is, in pith and substance, a power of appointment of Judges of the Supreme Court in contravention of the said section 52 (1), and that the three of us constituted neither the Supreme Court nor a bench of Judges of the Supreme Court but merely a tribunal appointed by the Minister from the panel of Supreme Court Judges.

Whether or not the power of nomination granted to the Minister is *intra vires* the Constitution, there is, in our opinion, no doubt that this Court is assembled as the Supreme Court holding a Trial-at-Bar in terms of section 440A of the Criminal Procedure Code and not as a separate Court or tribunal. We have so assembled by virtue of a nomination made by the Minister, and if that nomination be *ultra vires* the Constitution we are agreed that this Court is not a duly constituted panel of Supreme Court Judges to hold a Trial-at-Bar as representing the Supreme Court.

In support of the argument that this nomination is an appointment, the defence, apart from leaning on a dictionary meaning of the word—" appoint (a person) by name to some office or duty "—relied on the decision of the Privy Council in *Attorney-General for Ontario* v. *Attorney-General for Canada*, (1925) 94 L.J. (P.C.) 132 ; L.R. (1925) A.C. 750. That case related to a conflict between the powers of the Governor-General of Canada to appoint Judges vested in him under section 96 of the Canadian Constitution and a certain provision in the Judicature Act of Ontario of 1924 passed by the Legislature of the Province of Ontario which had been empowered by section 92 of the Dominion Constitution to make laws for the administration of Justice in the Province, including the Constitution, maintenance and organisation of the Provincial Courts.

By the Judicature Act of 1924, the Legislature of Ontario established in lieu of the then existing Supreme Court a Supreme Court of Ontario consisting of 19 Judges to be appointed by the Governor-General as provided in the Constitution. This Court was divided into two Divisions—the Appellate Division and the High Court Division. The rights of the existing Judges were safeguarded, but the Act empowered the Lieutenant-Governor of Ontario to assign some of the Supreme Court Judges to the Appellate Division and some to the High Court Division. He was also authorised to designate the Presidents of the two Divisions and they were to be called the Chief Justice of Ontario and the Chief Justice of the High Court Division, respectively.

The powers conferred on the Lieutenant-Governor by this Judicature Act were challenged as being *ultra vires* the Canadian Constitution. Upholding the challenge, Viscount Cave, L.C., stated in the Judicial Committee :—

> " What is the effect of these provisions ? It can hardly be doubted that the result of these was to authorise the Lieutenant-Governor of the Province to assign—that is to say, to appoint certain Judges of the High Court to be judges of the Appellate Division of the Supreme Court, and also to designate—that is to say, to appoint certain Judges to hold the offices of Chief Justice of Ontario and Chief Justice of the High Court Division. If that is the real effect of the Statute, as it appears to be, there can be no doubt that the effect of the Statute, if valid, would be to transfer the right to appoint the two Chief Justices and Judges of Appeal from the Governor-General of Canada to the Lieutenant-Governor of Ontario in Council ; and if so, it must follow that the Statute is to that extent inconsistent with section 96 of the Act of 1867 and beyond the power of the Legislature of Ontario."

It is evident that in spite of the use of the words " assign " and " designate " the effect of the 1924 Act was to restrict the powers of appointment given to the Governor-General by the Constitution to an appointment of the Judges to the Supreme Court generally without allowing him the right to appoint them to the two Divisions of that Court. Clearly the Act purported to give the Lieutenant-Governor the right to appoint Judges to particular offices as such, though his field of selection was limited.

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In the case before us the nomination of the Judges by the Minister does not constitute an appointment to any new office or even to any office as such. The Judges nominated by the Minister were already Judges of the Supreme Court, and in holding a Trial-at-Bar under section 440A of the Criminal Procedure Code they function as Judges of the Supreme Court and in no other capacity.

The power of nomination conferred on the Minister is no different in substance from the power exercised by the Chief Justice to nominate a Bench of Judges to hear and determine a cause either by virtue of his statutory power under section 51 of the Courts Ordinance or by virtue of his conventional function in nominating Judges to hear certain other matters. There are various provisions in the Courts Ordinance for the hearing of appeals, applications and other cases in the exercise of the original criminal jurisdiction of the Supreme Court by one, two, three or more Judges. The power to nominate the judges in cases where no express statutory provision has been made therefore appears to us to reside in the Court, although it is correct to say that by convention it is the Chief Justice who, for purposes of convenience, exercises such power. Can it be seriously contended that every time the Chief Justice so nominates a judge or judges, whether by virtue of his statutory or his conventional powers, he is appointing judges to particular offices as distinct and separate from the offices to which they were appointed by the Governor-General ? Had the Minister, of course, purported to nominate any person who did not hold the office of a Judge of the Supreme Court to officiate as a Judge at this Trial-at-Bar, he would undoubtedly have been purporting to appoint a person to the office of a Judge in contravention of section 52 (1) of the Order-in-Council. We, therefore, think that the nomination of the judges by the Minister in this instance is not an appointment by him of any person to the office of a Judge of the Supreme Court. The nomination is not *ultra vires* on that ground. Nor do we think that it is possible for us to uphold the defence contention that the Minister, by this act of nomination, has constituted or created a new tribunal distinct and separate from the Supreme Court.

Another argument advanced by the defence was that the Supreme Court is one and indivisible and that the power of nomination given to the Minister by section 9 violated the unity and indivisibility of the Court. There can be no doubt that the existence of the Supreme Court is impliedly entrenched by section 52 of the Order-in-Council. The entrenched provisions in the Constitution in respect of the appointment, tenure, salary and removal of Judges of the Supreme Court will have no meaning if the Supreme Court is abolished. We are, however, unable to accept the proposition that the entire jurisdiction vested in the Supreme Court by the Courts Ordinance and other Statutes at the time of the coming into force of the 1946 Constitution is also entrenched as part of the Constitution or that no part of that jurisdiction can be removed and vested in a judicial officer or otherwise abolished by Parliament by law passed by a simple majority.

Section 6 of the Courts Ordinance enacts that there shall continue to be within Ceylon one Supreme Court which shall be called "The Supreme Court of the Island of Ceylon". There was a similar provision in section 5 of the Charter of 1833 which established the Supreme Court. Under the Courts Ordinance judges sitting apart singly or in various combinations are empowered to exercise the several jurisdictions of the Supreme Court. The fact of nomination or selection does not violate the concept of the oneness of the Supreme Court. Section 21 provides for the several Judges to sit apart and contemplates some power of nomination or selection of Judges to exercise the several jurisdictions of the Court. If the vesting of the power of nomination in a person outside the membership of the Supreme Court is not *ultra vires* the Constitution on the ground that the power is to be exercised by a person in whom judicial power cannot be vested, the nomination by such a person to constitute the Bench to hear a Trial-at-Bar under section 440A is no different from the nomination by the Chief Justice of such a Bench prior to the enactment of Act No. 1 of 1962. The argument based on the violation of the oneness of the Supreme Court must, in our opinion, fail.

The next, and in this case the important, point for consideration is whether the nomination of the three Judges for this Trial-at-Bar effected by the Minister of Justice is an exercise of the judicial power of the State.

A great deal of time was naturally devoted by both sides to an attempt to define, describe or explain what is meant by judicial power. For the purposes of this case we are content to accept a broad classification of judicial power attempted by the learned Attorney-General himself. He

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stated that "Judicial power" is used in three senses :—

(1) in the sense of the essence of judicial power, the strict judicial power ;

(2) in the sense of the power of judicial review ;

(3) in a loose sense, as meaning the powers of a judge, *e.g.*, disciplinary powers and powers ancillary to the judicial power.

"Judicial power" may be broadly defined as the power to examine questions submitted for determination with a view to the pronouncement of an authoritative decision as to the rights and liabilities of one or more parties. No inclusive and exclusive definition of the concept has been formulated and under the changing conditions of modern government it is doubtful whether a complete definition is possible—*see* Legislative, Executive and Judicial Powers in Australia by Wynes (Third Edition), p. 556. Judicial power in the first sense referred to above is best described in the oft-quoted definition of Griffiths, C.J., to be found in his judgment in *Huddart Parker Pty., Ltd.* v. *Moorehead*, (1909) 8 C.L.R., at 357, which was accepted by Their Lordships of the Privy Council in *Labour Relations Board of Saskatchewan* v. *John East Iron Works, Ltd.*, (1949) A.C., at 149, as an accurate statement of the broad features of the concept. Said Griffiths, C.J. :—

> "The words 'judicial power' as used in section 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action."

It can hardly be doubted that the power of nomination of judges is not part of the exercise of judicial power in the sense embodied in the above definition. Nor obviously does this power of nomination form part of the power of judicial review. The question calling for our determination at this stage, therefore, is whether this power granted to the Minister under the new legislation falls within judicial power in the third sense referred to above.

In this third and loose sense of judicial power the Attorney-General included powers both ancillary to judicial power and powers not ancillary to judicial power. Both kinds of powers he designated as being non-judicial power. He contended that powers ancillary to judicial power are themselves not judicial power, but were given to judges or officers performing judicial functions. Powers not ancillary, he claimed, were purely non-judicial powers, and in this category he sought to include the power to nominate judges to sit to hear particular cases. Such power to nominate, he claimed, was a purely administrative power and could be reposed in a person who formed no part of the Judicature.

Mr. Jayawardene, appearing for one of the defendants, contended that, where a power which would ordinarily fall into the third and loose category in the Attorney-General's classification is consistent with executive or administrative power and is consistent also with judicial power, the matter has to be considered further in order to see whether that particular power falls actually within judicial power itself or outside it.

In the case of power falling definitely outside judicial power, as, for example, in a definite administrative power of a Court, it is indisputable that the legslature by a simple majority can vest that power in a body or an individual outside the judicature. It is claimed by the defence, however, that the power to nominate judges, although it may have the appearance of an administrative power, is itself so inextricably bound up with the exercise of strictly judicial power or the essence of judicial power that it is itself part of the judicial power.

The power of nomination or selection of the judges to hear particular cases or to constitute particular Benches of the Supreme Court has up to the time of the enactment of Act No. 1 of 1962 been invariably reposed in the Court or a part thereof.

In *Queen Victoria Memorial Hospital* v. *Thornton*, (1953) 87 C.L.R. 144, the High Court of Australia stated :—

> "Many functions perhaps may be committed to a Court which are not themselves exclusively judicial, that is to say, which considered independently might belong to an administrator. But that is because they are not independent functions but form incidents in the exercise of strictly judicial power."

This statement was indorsed by the Privy Council in *Attorney-General of Australia* v. *Reginam* (*The Boilermakers' Case*), (1957) 2 A.E.R., at 56, Viscount Simonds, on behalf of Their Lord-

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ships, stating that " the true criterion is not that powers are expressly or by implication excluded from the scope of Chapter III (The Judicature) but what powers are expressly or by implication included in it ". Is the power of nomination or selection of judges to hear a particular cause an implied power, in this sense, of the judicature. On such occasions as our law (except in this impugned instance) has made express provision therefor it has been reposed in a member of the Judicature, and where no express provision has been made the implication is strong that it is the Court itself that can effect the nomination or selection. That, indeed, has been the unquestioned practice for about a century and a half in this Country.

The impugned section seeks to change this consistent and long-established practice. Is the change *intra vires* the Legislature's powers ? " It is always a serious and responsible duty ", said Isaacs, J., in *Federal Commissioner of Taxation* v. *Munro*, (1926) 38 C.L.R., at 180, " to declare invalid, regardless of consequences, what the national Parliament representing the whole people of Australia, has considered necessary or desirable for the public welfare. The Court charged with the guardianship of the fundamental law of the Constitution may find that duty inescapable. Approaching the challenged legislation with a mind judicially clear of any doubt as to its propriety of expediency—as we must, in order that we may not ourselves transgress the Constitution or obscure the issue before us—the question is : Has Parliament, on the true construction of the enactment, misunderstood and gone beyond its constitutional powers ? It is a received canon of judicial construction to apply in cases of this kind with more than ordinary anxiety the maxim '*ut res magis valeat quam pereat*'. Unless, therefore, it becomes clear beyond reasonable doubt that the legislation in question transgresses the limits laid down in the organic law of the Constitution, it must be allowed to stand as the expression of the national will ".

Bearing this principle in mind and recalling also that the judicial power of the State is vested in the Judicature (in which is included the Supreme Court), let us examine the question whether the nomination or selection of judges to hear a particular case, while itself not a part of the strict judicial power or the essence of judicial power in the sense of the definition of Griffiths, C.J., is yet so much incidental to the exercise of that power or an incident in the exercise of that power as to form part of that power itself.

The Privy Council in the case of *The Shell Co. of Australia, Ltd.* v. *Federal Commissioner of Taxation*, (1931) A.C., at 275, expressed itself in agreement with Isaacs, J., when he stated in *Federal Commissioner for Taxation* v. *Munro* (*supra*) that " there are many functions which are either inconsistent with strict judicial action, as the arbitral function in *Alexander's case*, or are consistent with either strict judicial or executive action. If inconsistent with judicial action the question is at once answered. If consistent with either strictly judicial or executive action, the matter must be examined further ".

Then again, in *The Queen* v. *Davison*, (1954) 90 C.L.R., at 369, Dixon, C.J., and Mc Tiernan, J., in the High Court of Australia, in referring to the observation of the Court in *Queen Victoria Memorial Hospital* v. *Thornton* (*supra*), which we have already reproduced earlier, stated that " it is this double aspect which some acts or functions may bear that makes it so difficult to define the judicial power . . . . . An extreme example of a function that may be given to courts as an incident of judicial power or dealt with directly as an exercise of legislative power is that of making procedural rules of court. The proper attribution of this power is a matter that has received much attention in the United States ", where, according to Dean Roscoe Pound's thesis on the subject, historically and analytically it is the function of the Courts to regulate their procedure. Said Dean Pound :—

" In doubtful cases, however, we employ a historical criterion. We ask whether, at the time our Constitutions were adopted, the power in question was exercised by the Crown, by Parliament, or by the Judges. Unless analysis compels us to say in a given case that there is a historical anomaly, we are guided chiefly by the historical criterion."

Said Dixon, C.J., and Mc Tiernan, J., in *Davison's case* (*supra*), at p. 369 :—

" The truth is that the ascertainment of existing rights by the judicial determination of issues of fact or law falls exclusively within the judicial power so that Parliament cannot confide the function to any person or body but a Court constituted under sections 71 and 72 of the Constitution, and this may also be true of some duties or powers hitherto invariably discharged by Courts under our system of jurisprudence but not exactly of the foregoing description."

In a case arising upon an interpretation of the American Constitution, where the difficulty was in distinguishing between a legislative and a judicial proceeding, it was held that the end accomplished may be decisive. Said Holmes, J., in *Prentis* v.

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Atlantic Coast Line Co., (1908) 211 U.S. 210, " the nature of the final act determines the nature of the previous inquiry ". Though the purpose to which this test was put by Holmes, J., was to distinguish a judicial from a legislative function, Dixon, C.J., and Mc Tiernan, J., thought, and we respectfully agree with them, that it may usefully be applied by analogy to ascertain whether a thing is done administratively or as an exercise of judicial power.

A somewhat different approach to the problem appealed to Kitto, J., in the same case—at pp. 381-2—when he stated :—

> "It is well to remember that the framers of the Constitution, in distributing the functions of government amongst separate organs, were giving effect to a doctrine which was not a product of abstract reasoning alone, and was not based upon precise definitions of the terms employed . . . and it is safe to say that neither in England nor elsewhere had any precise tests by which the respective functions of the three organs might be distinguished ever come to be generally accepted. The reason, I think, is not far to seek . . . the separation of powers doctrine is properly speaking a doctrine not so much about the separation of functions as about the separation of functionaries . . . For it still remains true firstly, that different skills and professional habits are needed at the different levels of law-making ; and secondly, that concern for individual liberty will always see one of its chief safeguards in the precautionary disposal of law-making power. It may accordingly be said that when the Constitution of the Commonwealth prescribes as a safeguard of individual liberty a distribution of the functions of government amongst separate bodies, and does so by requiring a distinction to be maintained between powers described as legislative, executive and judicial, it is using terms which refer, not to fundamental functional differences between powers, but to distinctions generally accepted at a time when the Constitution was framed between classes of powers requiring different " skills and professional habits " in the authorities entrusted with their exercise.
>
> For this reason it seems to me that where the Parliament makes a general law which needs specified action to be taken to bring about its application in particular cases, and the question arises whether the Constitution requires that the power to take that action shall be committed to the judiciary to the exclusion of the executive, or to the executive to the exclusion of the judiciary, the answer may often be found by considering how similar or comparable powers were, in fact, treated in this Country at the time the Constitution was, in fact, prepared. Where the action to be taken is of a kind which had come by 1900 to be so consistently regarded as peculiarly appropriate for judicial performance that it then occupied an acknowledged place in the structure of the judicial system, the conclusion, it seems to me, is inevitable that the power to take that action is within the concept of judicial power as the framers of the Constitution must be taken to have understood it."

As we have already stated, section 9 of Act, No. 1 of 1962, is a novel provision of law the like of which does not hitherto appear to have found a place in any recognised system of law. We find ourselves echoing here the words of Bonser, C.J., used, in another context, in an old Ceylon case, *Rode* v. *Bawa*, (1896) 1 N.L.R., at 374, that " there is no case exactly like this to be found in the books, for I suppose such a case never happened before ". The right of a judge to exercise judicial power is so inextricably bound up with the actual exercise of the power and is such an essential step in the exercise of the strictly judicial power that it must, in our opinion, be considered part of the power itself. Unless the Legislature has vested the exercise of any strictly judicial power in the entire Supreme Court, it is necessary that a Bench of Judges should be nominated to exercise that judicial power vested in the Supreme Court. If the power of nomination is completely abolished, no judicial power vested in the Court can be exercised. If that power is vested in an outside authority, it will legally be open to such authority to exercise that power to prevent a particular judge or judges from exercising any part of the strictly judicial power vested in them by the Constitution as judges of the Supreme Court. The absurdity of such a possible result will be more marked if, instead of the position of a Puisne Justice of the Court, the position of the Chief Justice himself be considered. Under a provision of law of this nature it seems to us legally possible to exclude the Chief Justice himself from presiding in the Court of which he is the constitutionally appointed Head. The exercise of the power to nominate can then in practice result in a total negation of the judicial power of a judge or judges vested in them by the Constitution.

Then, again, if the power to nominate or select judges can be constitutionally reposed in the Minister on the ground that it is no more than an exclusively administrative act, we can see nothing in law to prevent such a power being conferred on any other official, whether a party interested in the litigation or not. The fact that the power of nomination so conferred is capable of abuse so as to deprive a judge of the entrenched power vested in him by virtue of his appointment under section 52 of the Order-in-Council, or at least to derogate from that power, is a consideration which is not an unimportant one in deciding whether the conferring of this power by section 9 on a person who is not a judge of the Supreme Court is *ultra vires* the Constitution. It may, of course, be contended that the power is capable of abuse

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if it is granted to a Judge of the Supreme Court or, for that matter, to the entire Court. However, the proper authority under the Constitution to exercise this power appears to be the Judicature itself.

Although the cases to which we have made reference in this Order have been decided in Australia or the United States of America against the background of their respective Constitutions, it does not appear to us to be illegitimate to apply the tests referred to therein in a solution of the problem with which we are confronted in this case.

Applying the historical test indicated by Dean Pound or following the approach approved in the judgment of Kitto, J., we have referred to, we are met with the fact that at all times prior to the enactment of the Criminal Law (Special Provisions) Act, No. 1 of 1962, this power of nomination was invariably vested in the Judicature. Whenever there was no express vesting of this power it was always exercised by Her Majesty's Courts and the Judges thereof. As we have already stated, no instance has been cited either in this Country or in any country of the British Commonwealth of Nations where such a right of nomination or selection has been granted to anyone outside the judicature.

On the other hand, if we were to apply what may be termed, for brevity, as the *Holmes test* and inquire what is the end or purpose in view in making this nomination there can be only one answer, viz., to exercise the strictly judicial power of the State. In this sense too, the Statute has purported to confer judicial power on the Minister.

For reasons which we have endeavoured to indicate above, we are of opinion that because—

(*a*) the power of nomination conferred on the Minister is an interference with the exercise by the Judges of the Supreme Court of the strict judicial power of the State vested in them by virtue of their appointment in terms of section 52 of the Ceylon (Constitution) Order-in-Council, 1946, or is in derogation thereof, and

(*b*) the power of nomination is one which has hitherto been invariably exercised by the Judicature as being part of the exercise of the judicial power of the State, and cannot be reposed in anyone outside the Judicature,

section 9 of the Criminal Law (Special Provisions) Act, No. 1 of 1962, is *ultra vires* the Constitution.

This conclusion we have reached on the validity of the law conferring the power of nomination on the Minister deprives us of jurisdiction to enter upon a Trial-at-Bar of these defendants. In ordinary circumstances, therefore, there would have been nothing more to be said at this stage. We, nevertheless, propose to refer to another objection of a fundamental character raised by Mr. Ponnambalam and supported by other counsel for the defence. Even if the power of nomination is *intra vires* the Constitution, does it offend, in the context of this particular case, against that cardinal principle in the administration of justice which has been repeatedly stated by Judges and which was restated in 1924 by Lord Hewart, C.J., in *R. v. Sussex Justices, ex parte Mc Carthy*, (1924) 1 K.B., at 259, as follows :—

> " It is not merely of some importance, but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done . . . Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice."

Under section 440A of the Criminal Procedure Code as it stood prior to 1962 the Minister had merely the right to direct that the trial be held before the Supreme Court by three Judges without a jury. But the new legislation, passed, with retroactive effect, after the commission of the offences alleged, has purported to vest in the Minister, a member of the Government which the defendants are alleged to have conspired to overthrow by unlawful means and who, it was not disputed, had participated in the investigation and interrogation of some of the defendants, the additional power to nominate the three judges. This power, as indicated already, had hitherto been vested in the Supreme Court as a body or in the Chief Justice, but certainly in no person or body outside the Judicature. This is the first occasion on which an attempt has been made to vest this power in such an outsider, and that too in circumstances where the propriety of the nomination becomes, by reason of the doctrine of ministerial responsibility, discussable in Parliament involving, perhaps, the merits and demerits of respective judges, whereas under the previous law the judges enjoyed freedom from being the subject of such a discussion.

A Court cannot inquire into the motives of legislators. The circumstances set out above are, however, such as to put this Court on enquiry as to whether the ordinary or reasonable man

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would feel that this Court itself may be biassed. What is the impression that is likely to be created in the mind of the ordinary or reasonable man by this sudden and, it must be presumed, purposeful change of the law, after the event, affecting the selection of judges ? Will he not be justified in asking himself, " Why should the Minister, who must be deemed to be interested in the result of the case, be given the power to select the judges whereas the other party to the cause has no say whatever in a selection ? Have not the ordinary canons of justice and fairplay been violated ? " Will he harbour the impression, honestly though mistakenly formed, that there has been an improper interference with the course of justice ? In that situation will he not suspect even the impartiality of the Bench thus nominated ?

Examining previous instances where this principle has been applied, we find Swift, J., in *R.* v. *Essex Justices, ex parte Perkins*, (1927) 2 K.B., at 488, stating that " it is essential that justice should be so administered as to satisfy reasonable persons that the tribunal is impartial and unbiassed ", and Bucknill, J., observing in *Cottle* v. *Cottle*, (1939) 2 A.E.R. 541, that the test to be applied is " whether or not a reasonable man in all the circumstances might suppose that there was an improper interference with the course of justice ". Our own Court of Criminal Appeal has, in *The King* v. *Beyal Singho*, (1946) 48 N.L.R., at 27, formulated the rule thus :—"Nothing is to be done which raises a suspicion that there has been an improper interference with the course of justice ".

Guiding ourselves by these tests and those applied in *other cases** we have examined, we find it difficult to resist the conclusion that the power of nomination conferred on the Minister offends the cardinal principle as restated by Lord Hewart. For that reason, even had we come to a different conclusion regarding the validity of section 9 of the Criminal Law (Special Provisions) Act, we would have been compelled to give way to this principle which has now become ingrained in the administration of common justice in this Country.

Objections to jurisdiction upheld.

DOCUMENT " A "

Direction under Section 440 *A of the Criminal Procedure Code as amended by Section* 4 *of the Criminal Law* (*Special Provisions*) *Act, No.* 1 *of* 1962.

TO THE HONOURABLE THE CHIEF JUSTICE OF THE SUPREME COURT OF THE ISLAND OF CEYLON.

I, SAMUEL PETER CHRISTOPHER FERNANDO, Minister of Justice, by virtue of the power vested in me by Section 440 A (1) (*a*) of the Criminal Procedure Code, as amended by Section 4 of the Criminal Law (Special Provisions) Act, No. 1 of 1962, do hereby direct that the trial of the following persons, to wit :—

1. DON JOHN FRANCIS DOUGLAS LIYANAGE
2. MAURICE ANN GERARD DE MEL
3. FREDERICK CECIL DE SARAM
4. CYRIL CYRUS DISSANAYAKA
5. SIDNEY GODFREY DE ZOYSA
6. GERARD ROYCE MAXWELL DE MEL
7. WILMOT SELVANAYAGAM ABRAHAM
8. BASTIANPILLAI IGNATIUS LOYOLA
9. WILTON GEORGE WHITE
10. NIMAL STANLEY JAYAKODY
11. ANTHONY JOHN BERNARD ANGHIE
12. DON EDMOND WEERASINGHE
13. NOEL VIVIAN MATHYSZ
14. VICTOR LESLIE PERCIVAL JOSEPH

*(a) *Eckersley* v. *Mersey Docks and Harbour Board*, (1894) 2 Q.B. 670; (b) *Rode* v. *Bawa* (*supra*); (c) *Dingiri Mahatmaya* v. *Mudiyanse*, (1922) 24 N.L.R. 377 ; (d) *Ruthira Reddiar* v. *Subba Reddiar*, (1937) 39 N.L.R. 14 ; (e) *The King* v. *Caldera*, (1938) 11 C.L.W. 1 ; (f) *Kandasamy* v. *Subramaniam*, (1961) 63 N.L.R. 574.

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15. BASIL RAJANDIRAM JESUDASAN
16. VICTOR JOSEPH HAROLD GUNASEKERA
17. JOHN ANTHONY RAJARATNAM FELIX
18. WILLIAM ERNEST CHELLIAH JEBANESAN
19. TERRENCE VICTOR WIJESINGHE
20. LIONEL CHRISTOPHER STANLEY JIRASINGHE
21. VITHANAGE ELSTER PERERA
22. DAVID SENADIRAJAH THAMBYAH
23. SAMUEL GARDNER JACKSON
24. RODNEY DE MEL

in respect of the following offences under Chapter VI of the Penal Code, to wit :—

1. That on or about the 27th day of January, 1962, at Colombo, Kalutara, Ambalangoda, Galle, Matara and other places, they with others did conspire to wage war against the Queen and thereby committed an offence punishable under section 115 of the Penal Code as amended by section 6 (2) of the Criminal Law (Special Provisions) Act, No. 1 of 1962, read with section 114 of the Penal Code.

2. That on or about the 27th day of January, 1962, at Colombo, Kalutara, Ambalangoda, Galle, Matara and other places, they with others did conspire to overthrow otherwise than by lawful means the Government of Ceylon by law established and thereby committed an offence punishable under section 115 of the Penal Code as amended by section 6 (2) of the Criminal Law (Special Provisions) Act, No. 1 of 1962,

3. That on or about the 27th day of January, 1962, at Colombo, Kalutara, Ambalangoda, Galle, Matara and other places, they with others did prepare to overthrow otherwise than by lawful means the Government of Ceylon by law established and thereby committed an offence punishable under section 115 of the Penal Code as amended by section 6 (2) of the Criminal Law (Special Provisions) Act, No. 1 of 1962.

be held before the Supreme Court at Bar by three Judges without a Jury.

Given under my hand this 23rd day of June, 1962, at Colombo.

(Sgd.) SAM P. C. FERNANDO,
Minister of Justice.

DOCUMENT "B"

IN THE SUPREME COURT OF THE ISLAND OF CEYLON

INFORMATION

Information exhibited by Her Majesty's Attorney-General

THE QUEEN

vs.

1. DON JOHN FRANCIS DOUGLAS LIYANAGE

(*For the names of the 2nd to 24th defendants, see Document "A" on pages 65-66*)

This 23rd day of June, 1962.

BE it remembered that Douglas St. Clive Budd Jansze', Esquire, Queen's Counsel, Her Majesty's Attorney-General for the Island of Ceylon, who for Her Majesty in this behalf prosecutes, gives the Court to understand and be informed that—

1. On or about the 27th day of January, 1962, at Colombo, Kalutara, Ambalangoda, Galle, Matara and other places within the jurisdiction of this Court, the defendants abovenamed with others did conspire to wage

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war against the Queen and did thereby commit an offence punishable under section 115 of the Penal Code as amended by section 6 (2) of the Criminal Law (Special Provisions) Act, No. 1 of 1962, read with section 114 of the Penal Code.

2. At the time and places aforesaid and in the course of the same transaction the defendants abovenamed with others did conspire to overthrow otherwise than by lawful means the Government of Ceylon by law established and did thereby commit an offence punishable under section 115 of the Penal Code as amended by section 6 (2) of the Criminal Law (Special Provisions) Act, No. 1 of 1962.

3. At the time and places aforesaid and in the course of the same transaction the defendants abovenamed with others did prepare to overthrow otherwise than by lawful means the Government of Ceylon by law established and did thereby commit an offence punishable under section 115 of the Penal Code as amended by section 6 (2) of the Criminal Law (Special Provisions) Act, No. 1 of 1962.

WHEREUPON Her Majesty's Attorney-General prays the consideration of the Court here in the premises, and that due process of law may be awarded against the defendants abovenamed, in this behalf to make them answer to Our Sovereign Lady the Queen touching and concerning the premises aforesaid.

(Sgd.) D. JANSZE,
Attorney-General.

DOCUMENT "C"

Nomination made by the Minister of Justice under Section 9 of the Criminal Law (Special Provisions) Act, No. 1 of 1962.

WHEREAS I, SAMUEL PETER CHRISTOPHER FERNANDO, Minister of Justice, have on the Twenty-third day of June, 1962, issued a direction under section 440 A of the Criminal Procedure Code as amended by section 4 of the Criminal Law (Special Provisions) Act, No. 1 of 1962, requiring that the trial of the following persons, to wit—

1. DON JOHN FRANCIS DOUGLAS LIYANAGE

(For the names of the 2nd to 24th defendants see Document "A" on pages 65-66.)

in respect of the following offences under Chapter VI of the Penal Code, to wit :—

1. That on or about the 27th day of January, 1962, they with others did conspire to wage war against the Queen and thereby committed an offence punishable under section 115 of the Penal Code as amended by section 6 (2) of the Criminal Law (Special Provisions) Act, No. 1 of 1962, read with section 114 of the Penal Code.

2. That on or about the 27th day of January, 1962, they with others did conspire to overthrow otherwise than by lawful means the Government of Ceylon by law established and thereby committed an offence punishable under section 115 of the Penal Code as amended by section 6 (2) of the Criminal Law (Special Provisions) Act, No. 1 of 1962.

3. That on or about the 27th day of January, 1962, they with others did prepare to overthrow otherwise than by lawful means the Government of Ceylon by law established and thereby committed an offence punishable under section 115 of the Penal Code as amended by section 6 (2) of the Criminal Law (Special Provisions) Act, No. 1 of 1962,

be held before the Supreme Court at Bar by three Judges without a Jury :

NOW THEREFORE, I, SAMUEL PETER CHRISTOPHER FERNANDO, Minister of Justice, in pursuance of the power vested in me by section 9 of the Criminal Law (Special Provisions) Act, No. 1 of 1962, do hereby nominate—

(1) THE HONOURABLE THUSEW SAMUEL FERNANDO, C.B.E., Q.C.
(2) THE HONOURABLE LEONARD BERNICE DE SILVA
(3) THE HONOURABLE PONNUDURAISAMY SRI SKANDA RAJAH

Judges of the Supreme Court of the Island of Ceylon, to be the three Judges who shall preside over the trial of the aforementioned persons to be held in pursuance of the aforementioned direction.

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Given under my hand this 23rd day of June, 1962.

(Sgd.) SAM P. C. FERNANDO
Minister of Justice.

TO THE HONOURABLE THE CHIEF JUSTICE,
COLOMBO.

Privy Council Appeal, No. 66 *of* 1960.

Present : **Lord Denning, Lord Hodson, Lord Guest, Lord Devlin, Mr. L. M. D. de Silva.**

A. M. LAIRIS APPU *vs.* TENNAKOON KUMARIHAMY AND OTHERS

From
THE SUPREME COURT OF CEYLON

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

DELIVERED ON : 4TH APRIL, 1962.

Registration of Documents Ordinance, section 7—Fraud or Collusion—Whether deed of gift obtained by these means—" Fidei commissum "—Acceptance of—Whether acceptance by fiduciary alone sufficient.

In 1919 the plaintiff's grandfather by deed of gift donated the land to the plaintiff's father, whereby (*inter alia*) the plaintiff's father obtained a life-interest, after the termination of which the land was to devolve on the plaintiff and her brother. In April, 1945, the plaintiff's father sold the land to the defendant, in breach of the *fidei commissum* created by the deed of gift. In August, 1945, the plaintiff obtained her brother's interests in the land by virtue of a deed of partition entered into between them. In May, 1951, the plaintiff's father died, and in September, 1951, the plaintiff brought this action to obtain possession of the land from the defendant. The original deed of gift executed in 1919 was never registered, but the deed of transfer executed in April, 1945, was registered in that month. The defendant therefore argued that the unregistered deed of gift was void as against him in terms of section 7 (1) of the Registration of Documents Ordinance. The plaintiff in reply submitted that fraud and collusion existed in obtaining the deed of transfer, and that this operated to defeat the defendant's priority in terms of section 7 (2) of the Registration of Documents Ordinance.

There was evidence to the effect—

(*a*) that the plaintiff's father accepted the Deed of Gift as fiduciary and gave it to his wife for safe-keeping ;

(*b*) that he had written a letter to the Commissioner of Stamps in April, 1935, in which he had stated that he had only a life-interest ;

(*c*) that he was generally short of money and wanted to raise some money on the land and obtained possession of the Deed of Gift from his wife ;

(*d*) that, in 1944, he leased the land to the defendant (a rich man who had taken part in some questionable deals) for ten years, although the power to lease was limited to four years and describing the land as one in which he held only a life-interest ;

(*e*) that shortly after, the plaintiff's husband unsuccessfully attempted to obtain an assignment of the said lease from the defendant urging that the father could not have leased it for more than four years and that there was a *fidei commissum* ;

(*f*) that, thereafter, in April, 1945, *i.e.*, four months after the execution of the said lease bond, the father executed in favour of the defendant the transfer deed, (the material document in the case) through the same notary, who attested the lease and describing himself as being entitled to the land " by right of paternal inheritance " from his deceased father.

The District Judge found for the plaintiff on the ground that fraud and collusion had been established, but the Supreme Court on appeal upheld the judgment, but not the finding of fraud and collusion.

Held : That there was sufficient evidence to establish that the deed of transfer had been obtained by fraud and collusion, and that the District Judge's finding should be restored.

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Per Curiam— " It is now agreed that the dictum cited from *Carolis* v. *Alwis*, cannot stand as good law in the light of the Board's decision in *Abeyawardene* v. *West.* "

Construction of section 7 of the Registration of Documents Ordinance in *Appusingho* v. *Leelawathie*, 60 N.L.R. at 413, dissented from.

Cases considered : *Carolis* v. *Alwis*, (1944) 45 N.L.R. 156.
Appusingho v. *Leelawathie*, (1958) 60 N.L.R. 409.

Cases referred to : *James* v. *Carolis* (1919) 17 N.L.R. 76.
Abeyawardene v. *West*, (1957) A.C. 176 ; 58 N.L.R. 313 ; LIV C.L.W. 33.
Ceylon Exports, Ltd. v. *Abeysundere*, (1933) 35 N.L.R. 417.
Abeysundere v. *Ceylon Exports, Ltd.*, (1936) 38 N.L.R. 117 ; VI C.L.W. 69.

Walter Jayawardene for the defendant-appellant.

E.F.N. Gratiaen, Q.C., with *A.R.B. Amerasinghe* for the plaintiff-respondent.

LORD DEVLIN

This is an appeal from a judgment of the Supreme Court of Ceylon upholding a judgment of the District Court of Kurunegala, whereunder the plaintiff in the action, the respondent before the Board, obtained an order of ejectment of the defendant from a piece of land, the ownership of which was in dispute between them.

The history of the matter stretches from 1919 to 1951 and involves three generations of the family of Tennekoon—the plaintiff's grandfather, her father and mother, her husband (for although when the story begins she was a child, long before the end of it she was grown up and married) and her brother. On 29th January, 1919, the grandfather by Deed of Gift donated the land to the plaintiff's father, subject to a life interest reserved for himself, the grantor, and subject also to his right of revocation ; and finally subject to a proviso whereunder the father was not to alienate the land or lease it for a term of more than four years but to hold it only during his lifetime so that after his death it devolved on the plaintiff and her brother. Thus there was created a *fidei commissum* in favour of the plaintiff and her brother with the father as fiduciary. The grandfather died on the 17th September, 1932. By his will, after a number of specific bequests, he left all his " remaining movable and immovable property " to the plaintiff and her brother. On 12th April, 1945, the father, in breach of the *fidei commissum* sold the land to the defendant for Rs. 10,000. On 18th August, 1945, the plaintiff and her brother entered into a Deed of Partition of their various interests with the result that the plaintiff obtained the brother's interest in the land in question in this case and so he drops out of the story. On 21st May, 1951, the father died and his life-interest thus ended. On 20th September, 1951, the plaintiff brought this action of ejectment to obtain possession of the land from the defendant.

The Deed of Gift of 29th June, 1919, has never been registered, while the Deed of Transfer of 12th April, 1945, by which the defendant bought the land was registered on 19th April, 1945. The Registration of Documents Ordinance, section 7, provides that an instrument shall, unless duly registered, " be void as against all parties claiming an adverse interest thereto on valuable consideration by virtue of any subsequent instrument which is duly registered . . . but fraud or collusion in obtaining such subsequent instrument or in securing the prior registration thereof shall defeat the priority of the person claiming thereunder. " The main question now left in this case is whether this section provides the defendant with a good defence to the plaintiff's claim.

On 21st December, 1954, the District Judge gave judgment in favour of the plaintiff holding that there was fraud and collusion between the father and the defendant and accordingly that the Deed of Gift prevailed. In the Supreme Court on 28th November, 1958, this decision was upheld but not the finding of fraud and collusion. Basnayake, C.J. held that fraud or collusion had not been established and Sinnetamby, J. found it unnecessary to go into that question.

On the footing that there is no fraud or collusion the legal situation is one of some complexity. Mr. Gratiaen has conceded that the plaintiff's claim under the Deed of Gift would then be defeated. But can she then rely on the residuary bequest in the will of all remaining immovable property ? Section 10 of Registration of Documents Ordinance provides that " a will shall not as against a disposition by any heir of the testator of land affected by the will, be deemed to be void

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or lose any priority or effect by reason only that at the date of the disposition by the heir the will was not registered." This must be a good answer to any defence based on the Ordinance. But then the question arises, did the residuary bequest cover this land? If at the time of the death the land had been alienated by a valid deed of gift, the grandfather could not dispose of it by will. Was there a valid deed of gift? The defendant gets rid of the deed of gift, which would otherwise defeat his claim, by means of an enactment which says that it is to "be void as against him." Can he maintain that the deed of gift is to be treated as void as against him when the Court is considering the effect of his deed of purchase, but valid when the Court is considering the effect of the will? The Chief Justice thought not. Moreover, the Chief Justice held that the residuary bequest in the will was an exercise of the power of revocation in the Deed of Gift. As to this, Mr. Jayawardena for the defendant contended before the Board that while a specific bequest might amount to a revocation, a general residuary bequest should be construed as excluding land which the testator had already donated.

Another point much discussed before the Supreme Court was the precise effect of section 7 of the Ordinance. Clearly it applies to two deeds made by the same grantor. But suppose a purchaser relies upon a deed from a man who never had any title to the land; clearly he cannot merely by registration obtain a title which his vendor never had. Can it then be said that the father, having only a life-interest, had no larger title to grant to the defendant? In *James* v. *Carolis*, (1919) 17 N.L.R. 76, the Supreme Court of Ceylon held that where the two deeds proceeded from the same source—in the present case the source would be the grandfather's title—section 7 applied.

The Judges in the Supreme Court answered enough of these questions in favour of the plaintiff to enable them to sustain the judgment which she had obtained below. But the difficulties to which some parts of the judgments give rise were sufficient to lead Mr. Gratiaen for the plaintiff to place in the forefront of his argument before the Board a submission that the judgment of the District Court on the issue of fraud and collusion should be restored. Their Lordships accept this submission. They will not, therefore, express any opinion on the other matters discussed before the Supreme Court but will proceed to examine the facts which in their opinion prove fraud or collusion within the meaning of section 7 of the Ordinance.

When the father received and accepted the Deed of gift as fiduciary he gave it to the plaintiff's mother for safe-keeping. He was, however, well aware that under it he had only a life-interest arising on the grandfather's death. There has been exhibited a letter written by him on 1st April, 1935, to the Commissioner of Stamps in which he states that he has only a life-interest.

The District Judge has described the father as a "thriftless drink addict". While this language is perhaps rather stronger than the facts warrant, there is acceptable evidence from the mother that the father drank a good deal and was generally short of money. In 1944 he wanted to raise some money on the land and there can be little doubt that it was for this purpose that he obtained possession from the mother of the Deed of Gift. The defendant is a rich man who had been engaged, the District Judge said, in some questionable deals. The father got money from him in the first instance by means of a lease of the land, made on 19th December, 1944, for ten years. This was a breach of the *fidei commissum* under which his power of leasing was limited to four years. The consideration for the lease was a lump sum of Rs. 2,000 of which Rs. 1,000 was payable forthwith. The defendant employed his regular notary to prepare the lease. The description of the land in the schedule to the lease is followed by the words "to which premises the lessor is entitled to a life-interest only."

The plaintiff's husband got to hear of the lease and had a conversation about it with the father and the defendant. His object was to get an assignment of the lease from the defendant to the plaintiff since she was eventually to come into the property. In this he was not successful as they could not agree upon terms. However, he told the defendant that there was a *fidei commissum* and that under it the father could not grant a lease for more than four years.

The lease had run only for four months when on 12th April, 1945, the Deed of Transfer, the material document in this case, was executed. Presumably the father wanted more money and he, in fact, obtained a further Rs. 10,000 as the sale price. The same notary who had prepared the Deed of Lease for the defendant and attested it attested also the Deed of Transfer. In the Deed of Transfer the father is described as being entitled to the land "by right of paternal inheritance from my deceased father."

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On these facts there appears to Their Lordships to be a perfectly clear case of fraud. It has however been urged upon them that these are not the full facts and that Their Lordships ought to fill out the story with the following suppositions. Fraud, it is said, ought not lightly to be attributed to a dead man and any sinister inference from the facts as stated above can be explained away if their Lordships were to suppose that between the granting of the lease and the execution of the Deed of Transfer the father took legal advice. As a result of that advice he would have learned that, so far from having only a life-interest as stated in the lease and as up till then he had believed, he was in truth the absolute owner of the land. The lawyer who would have given him this advice would have based it on the case of *Carolis* v. *Alwis*, (1944) 45 N.L.R. 156. It is undoubtedly the law that a *fidei commissum* to be effective must be accepted ; and in the case referred to it was held by the Supreme Court of Ceylon that an acceptance by the immediate donee, the daughter of the donor, was not a sufficient acceptance on behalf of her brother and sister who were *fidei* commissaries. On this authority it is said that the acceptance by the father (which is now admitted) in the present case was not a sufficient acceptance for his children ; accordingly the *fidei commissum* in favour of the plaintiff fails, leaving the donation to the father to operate without curtailment.

Of course, if *Carolis* v. *Alwis* and the conclusions which are supposed to have been drawn from it were good law, they would provide a complete answer to the plaintiff's claim. Their Lordships were not invited to say that. An argument of a similar sort, based on non-acceptance by the father, was originally advanced but abandoned in the Supreme Court. It is now agreed that the dictum cited from *Carolis* v. *Alwis* cannot stand as good law in the light of the Board's decision in *Abeyawardene* v. *West*, (1957) A.C. 176. But it is argued that before 1957 it would have been believed to be good law and therefore would have formed the basis of advice tendered to the father.

It can and has been objected that all this is very speculative. Their Lordships will go further than that and say that even as a hypothesis it will not stand cursory examination. The father is dead and cannot speak, but the defendant is alive and can. What does he say caused him to buy land, which he had been told was subject to a *fidei commissum*, from the fiduciary who a few months before had been described in the lease as having only a life-interest ? Before he put down his money, he must at least have been told by the father that he had consulted a lawyer and been advised that the *fidei commissum* was ineffective. One would have expected the defendant to consult his own lawyer and that his notary would have obtained at least the name of the hypothetical lawyer whose evidence could have turned the hypothesis into fact. But the defendant in the witness box, so far from supporting the hypothesis now advanced, testified that he never knew that the father had not complete power of disposition. He denied any conversation about the matter with the plaintiff's husband and his denial was disbelieved. He said that his notary, who read through the lease to him, must have omitted to read the reference in it to the father's life-interest. The notary, although present throughout the trial, was not called to give evidence.

That is one ground for dismissing the hypothesis. The second is that if the supposed advice has been given and taken, the defendant would have based his title as vendor of the land on the deed of donation, freed from the *fidei commissum*. In fact, he based it on his " right of paternal inheritance from my deceased father ". This is the point that it was attempted to argue in the Courts below. It was said, not that the donation remained effective without the *fidei commissum* but that it was altogether invalid for want of acceptance ; and that in some way, which Their Lordships do not understand, the land was not covered by the general residuary bequest in the will but passed to the father as on an intestacy.

Finally, it is not suggested that the father, although he lived for six years after the transfer, ever asserted to anyone that the *fidei commissum* was ineffective. The plaintiff came to hear of the transfer and on 17th September, 1945, her proctors wrote to the defendant to say that his vendor had had only a fiduciary interest in the property due to be determined at his death and that the plaintiff could not accept the defendant's *bona fides* in the matter. There was no reply to this letter. Their Lordships have no doubt at all that the father and the defendant throughout knew of and accepted the plaintiff's title and were relying solely on prior registration to defeat it.

While the main weight of the argument for the defendant before the Board was put on the hypothesis which Their Lordships have rejected, reliance was also placed on the reasons given by

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the Chief Justice for setting aside the finding of fraud and collusion. The Chief Justice said :—

" For the purpose of bringing a deed within the ambit of section 7 (2) it is not sufficient to establish that the person who obtained the deed was an unscrupulous person who would take undue advantage of any situation for the purpose of gain or that he had been punished for evasion of revenue laws or that he had committed fraud on previous occasions. Fraud or collusion in obtaining the particular deed in question must be established. It is contended on his behalf that neither fraud nor collusion has been established. I have in my judgment in S.C. 688, D.C. Tangalla, L-393, delivered on 13th November, 1958, dealt with the meaning of fraud and collusion in this context. Learned Counsel's contention that fraud or collusion within the meaning and content of those expressions in section 7 (2) has not been established is in my view correct and must be upheld."

Their Lordships respectfully agree with the opening observations in this passage and consider, as the Chief Justice evidently did, that the District Judge has somewhat exaggerated the importance of material whose only relevance was to discredit the defendant as a witness. But that does not affect the really significant finding of fact by the District Judge—a finding which was not challenged on appeal—that the defendant was told of the *fidei commissum* in the terms of the conversation that Their Lordships have recorded.

There was another finding by the District Judge on this topic which was attacked in the argument before the Board and which it is convenient to consider here. That is the finding that the consideration of Rs. 10,000 was altogether inadequate. The learned Judge appears to have based that finding on his own estimate that the land in question was worth three or four times that sum. It was proved that the defendant had mortgaged the land for Rs. 15,000 and that at first sight makes it look as if Rs. 10,000 was too low a price. But none of these matters was put to the defendant in cross-examination and there was no proper evidence of value. Accordingly, Their Lordships cannot accept the finding that the consideration was inadequate. But while inadequacy of consideration is good evidence of collusion, it is not an essential element ; *Ceylon Exports Ltd.* v. *Abeysundere*, (1933) 35 N.L.R. 417, at 428.

Dalton, A.C.J., in the case just cited reviews all the important decisions on the meaning of fraud and collusion in section 7 and his judgment was upheld by the Board in 38 N.L.R. 117. Mere notice of a prior unregistered instrument is not enough. There must be actual fraud in the sense of dishonesty. In this sense of the term the father was unquestionably defrauding his daughter and the defendant was aware of it. Moreover, the defendant was aware that the father was a fiduciary and that therefore it was his duty, both as father and fiduciary to protect his daughter's interests by registering the instrument by which she derived her title. If at any time before 19th April, 1945, the father had registered that title as he should have done, the common purpose of the father and the defendant, namely, the exchange of land (which the defendant wanted) for money (which the father wanted) would have been frustrated. It is impossible to suppose that it was not implicit in the negotiation between the two that the father, in breach of his duty and in fraud of the plaintiff, would refrain from taking any steps to secure prior registration of the deed under which she claimed. Thus there was collusion in the fraud.

In the case which he mentioned in his judgment, *Appusingho* v. *Leelawathie*, (1958) 60 N.L.R. 409, the Chief Justice was applying to the facts of that case the well-established principles to which Their Lordships have referred ; and Their Lordships do not doubt that on the facts of that case he did so correctly. But Their Lordships with respect reach a different conclusion upon the application of those principles to the facts of this case.

In the course of his judgment in the earlier case the Chief Justice said at 413 :—

" The words ' in obtaining such subsequent instrument ' exclude the case of a collusion between transferor and transferee, because the transferor cannot be said to be a party to obtaining the subsequent instrument ; but to granting or giving it. The ' collusion ' must, therefore, be between persons other than the transferor who combine to obtain the subsequent instrument."

If this construction of section 7 is correct, it would provide an answer to the charge of collusion in the present case ; and it may be that the Chief Justice was proceeding on this view of the law when he held in the present case that the District Judge's finding should be set aside. Counsel for the defendant did not in his argument before the Board seek to uphold this construction and Their Lordships with respect think it to be wrong.

Their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellant must pay the costs.

Appeal dismissed.

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

PIYADASA *vs.* THE BRIBERY COMMISSIONER

S.C. 3/'62—Bribery Tribunal, Case No. 30/I 307/60.

Argued on : 8th October, 1962.
Decided on : 31st October, 1962.

Bribery Act, No. 11 *of* 1954, *as amended by the Bribery (Amendment) Act, No.* 40 *of* 1958—*Charges of bribery under—Conviction by Tribunal constituted under Bribery Act—Provisions of Act challenged as being unconstitutional—Appeal to Supreme Court—Right of appeal—Duty of Supreme Court to consider merits of appeal even though appellant unrepresented—Section* 69*A of Bribery Act, as amended.*

Ceylon Constitution (Orders-in-Council) 1946 *and* 1948—*Sections* 29, 39 *and* 52 *of the Order-in-Council of* 1948—*Power of Parliament to take away judicial power vested in Supreme Court and officers appointed by Judicial Service Commission and confer it on tribunals appointed otherwise—Validity of Bribery Act, as amended by Act No.* 40 *of* 1958.

Held : (1) That the provisions of the Bribery Act, No. 11 of 1954, as amended by the Bribery (Amendment) Act, No. 40 of 1958, which give a right of appeal from the decisions of the Bribery Tribunal to the Supreme Court are *intra vires.* Hence a person convicted on charges of bribery under the Act has a right of appeal even though some of the other provisions of the Bribery Act are *ultra vires.*

(2) That, notwithstanding the absence of the appellant or of counsel representing him at the hearing of an appeal from a conviction under the Bribery Act, it is the duty of the Supreme Court to consider the appeal on its merits, as if it were an appeal from a decision of the District Court, in view of section 69*A* of the Act as amended by Act, No. 40 of 1958, which brings sections 339 to 352 of the Criminal Procedure Code into operation.

(3) That a consideration of the relevant provisions of the Ceylon Constitution (Order-in-Council) 1948 and other statutes shows that the judicial powers exercised by the Civil Courts of this country, when the Order-in-Council came into operation were, in fact, conferred on the Judges of the Supreme Court and the judicial officers appointed by the Judicial Service Commission, although no special mention has been made therein to this effect. (*Vide* Senadhira's case, 60 C.L.W. 65 ; *Regina* v. *Liyanage and Others*, 62 C.L.W. 49).

(4) That the Ceylon Constitution (Order-in-Council) 1948, created the Judicial Service Commission and empowered only this statutory body to appoint judicial officers.

(5) That the legislature could not take away the "judicial power" vested by our constitution in the Supreme Court and officers appointed by the Judicial Service Commission, and confer the same on tribunals otherwise appointed, without amending the constitution.

(6) That an examination of the provisions of the Bribery Act as amended clearly shows that the legislature has purported to create a tribunal and has conferred upon it the judicial power exercised by the Supreme Court and other minor Courts presided over by judicial officers appointed by the Judicial Service Commission. Hence the Tribunals constituted under the Bribery Act are unconstitutional. There is no provision in the Act which gives them power even to act as a fact finding commission.

Per TAMBIAH, J— "In *Senadhira's Case*, the judges applied the test of execution as the hall-mark of judicial power (*vide* 63 New Law Reports, at p. 319, *per* Sansoni, J.). But Wynes states (*vide* Legislative, Executive and Judicial power by Wynes (2nd Edition), The Law Book Co. of Australasia Pty., Ltd., p. 562) that 'enforcement would not be a necessary attribute of a Court exercising judicial power.' For example, the power of execution might not belong to a tribunal yet its determination might amount to the exercising of a judicial power. In the United States, it does not appear that a power of enforcement is regarded as an essential element of judicial power (*vide Nashville C. & St. L. Railway Co.* v. *Wallace*, (1933) U.S. 249 ; *United States* v. *West Virginia*, (1935) U.S. 463 ; *Tutan* v. *United States*, (1926) U.S. 270.)"

Per SRI SKANDA RAJAH, J— "When by section 68 of the Bribery Act the Legislature purported to empower the Bribery Tribunal to punish any act of contempt committed in the course of the hearing of any charge of bribery as provided by section 57 of the Courts Ordinance and Chapter LXV of the Civil Procedure Code, *i.e.*, as a contempt of Court, a power which hitherto resided solely in the Judicature, it is intended in unmistakable terms, to vest the Bribery Tribunal with judicial power even at the stage it tries an accused and/or convicts him. This is clearly a violation of section 55 of the Ceylon (Constitution) Order-in-Council. Therefore, the Bribery Tribunal is an unconstitutional body and all proceedings before it are null and void."

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Dissented from : *Don Anthony* v. *The Bribery Commissioner*, (1962) 64 N.L.R. 93; LXI C.L.W. 100.

Distinguished : *The King-Emperor* v. *Benoari Lal Sarma*, (1945) A.C. 14; (1945) 1 A.E.R. 210

Cases referred to : *P. S. Bus Co., Ltd.* v. *Members and Secretary of Ceylon Transport Board*, (1958) 61 N.L.R. 491
Harris v. *Minister of the Interior*, (1952) 2 South African Law Reports, 428.
Shell Co. of Australia v. *Federal Commissioner of Taxation*, (1931) A.C. 275; 144 L.T. 421; 47 T.L.R. 115
Martineau v. *City of Montreal*, (1932) A.C. 113.
Labour Relations Board of Saskatchewan v. *John East Iron Works, Ltd.*, (1949) A.C. 134
Lois Myers v. *United States*, (12.10.1926) United States Reports, p. 52
Senadhira v. *The Bribery Commissioner*, (1961) LX C.L.W. 65; 63 N.L.R. 313.
The Waterside Workers' Federation of Australia v. *J. W. Alexander, Ltd.*, (1918) 25 Commonwealth Law Reports 434
Attorney-General for Australia v. *The Queen & The Boiler-makers' Society of Australia* (1957) A.C. 288; (1957) 2 A.E.R. 45; (1957) 2 W.L.R. 607
Huddart, Parker & Co. v. *Moorehead*, 8 Commonwealth Law Reports, 330
Nashville C. & St. L. Railway Co. v. *Wallace*, (1933) 288 U.S. 249.
United States v. *West Virginia*, (1935), U.S. 463
Tutan v. *United States*, (1926) U.S. 270.
Toronto Corporation v. *York Corporation*, (1938) A.C. 415.
The Queen v. *Liyanage & Others*, LXII C.L.W. 49

No appearance for the appellant.

H.B. White, Crown Counsel, for the respondent.

M. Tiruchelvam, Q.C., as *amicus curiae.*

TAMBIAH, J.

The appellant was prosecuted before the Bribery Tribunal, constituted under the Bribery Act, No. 11 of 1954, as amended by the Bribery (Amendment) Act, No. 40 of 1958, on four counts involving charges of bribery and was convicted on all four counts and sentenced to three months' rigorous imprisonment, the sentences to run concurrently. At the hearing of the appeal, the appellant was neither present nor was he represented by counsel. Mr. Basil White, Crown Counsel, appeared for the respondent and at the invitation of this Court, Mr. M. Tiruchelvam, Q.C., was kind enough to assist, as *amicus curiae*,

Mr. White contended that in view of the decision in *Don Anthony* v. *The Bribery Commissioner*, (1962) 64 New Law Reports, p. 93, the appellant had no right of appeal. He further contended that if this Court should hold that the Bribery Tribunal had no jurisdiction to pass the sentence, then it must also go to the extent of holding that it has no power to try and convict the appellant in this case. Mr. Tiruchelvam submitted that the case of *Don Anthony* v. *The Bribery Commissioner* (*supra*) was wrongly decided and urged that this Court could entertain this appeal. He also submitted that the Bribery Tribunal is an unconstitutional body which had no power to try, convict or punish persons charged before it.

In *Don Anthony* v. *The Bribery Commissioner* (*supra*) the Supreme Court held that no appeal lies from the order of the Bribery Tribunal to an appellant who contends that the Act itself is *ultra vires*. The learned judges in that case relied on the ruling of Their Lordships of the Privy Council in the case of *The King-Emperor* v. *Benoari Lal Sarma*, (1945) Appeal Cases, at 20. In the latter case, it was held that the Special Criminal Courts Ordinance (Indian), No. 2 of 1942, which purported to create special criminal Courts during a period of Emergency, was *ultra vires* since the provisions of that Act were in conflict with the provisions of the Indian Constitution. This special Ordinance did not give a right of appeal to the High Court. From the decision of the special tribunal the matter was brought by way of revision to the High Court and from thence there was an appeal to the Judicial Committee of the Privy Council. In repelling an argument that a special Court had no jurisdiction since all the provisions of Special Criminal Courts Ordinance (Indian) (*supra*) were *ultra vires*, their Lordships of the Privy Council rightly took the view that if the provisions of the

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statute were invalid, then that provisions which constituted the special tribunal was also null and void and, consequently, the judge, who sat in that Court, did so in his capacity of a private citizen. Further, since revisionary powers were given, under the general statutes of India, to High Courts to revise only errors committed by Courts of law, no revisionary power existed in the High Court to revise the orders of the persons who purported to act as judges. Another distinguishing feature in Benoari's Case was that there was no right of appeal given by the special statute to the High Court. The present case, however, is distinguishable from Benoari's case. The sections of the Bribery Act (*supra*) which gives a right of appeal from the decisions of the Bribery Tribunal to the Supreme Court are *intra vires*. The Legislature, having constituted the Bribery Tribunal, made its orders justiciable by the Supreme Court (*vide* section 86A). We see no reason why this Court should be deprived of the right of hearing this appeal from an order of a statutory body when such a right has been conferred by the Bribery Act.

The objection taken in the case of *Senadhira* v. *The Bribery Commissioner* (*supra*) was of a similar nature. The counsel for the appellant in that case made it clear that he was not attacking all the provisions of the Bribery Act, as amended, as *ultra vires*, but was only submitting that the provisions of this Act empowering the tribunal to pass sentence on persons charged before it were *ultra vires* as they conflicted with the constitution of Ceylon. The learned judges in *Senadhira's case* agreed with the contention of the respondent's counsel and held that they had jurisdiction to hear the appeal.

A Legislature can pass an enactment, some of the provisions of which are *ultra vires*, while others are *intra vires*. The contention that all the provisions of the Bribery Act, as amended, are null and void must therefore necessarily fail. We hold that the appellant has a right of appeal in the instant case.

Although the appellant was not present at the hearing of the appeal, nor was he represented, nevertheless it is the duty of this Court to consider the appeal on its merits as if it is an appeal from the decision of a District Court in Criminal Cases *vide* section 69*A* of the Bribery Act, No. 11 of 1954, as amended by Act, No. 40 of 1958, which brings into operation sections 339-352 of the Criminal Procedure Code (Chapter 20).

The competency of the Bribery Tribunal, consisting of members not appointed by the Judicial Service Commission, to try persons charged before it, convict and to sentence them received the earnest consideration of the judges in the case of *Senadhira* v. *The Bribery Commissioner* (*supra*). In that case, Sansoni, J., (with whom T. S. Fernando, J., agreed) held that the power given to the Bribery Tribunal by section 66 (1) of the Bribery Act (as amended) to inflict a fine, convict and imprison a person charged before it, was unconstitutional since such power, being exclusively a judicial power, can only be exercised by the Supreme Court or by a judicial officer appointed by the Judicial Service Commission, in terms of section 55 of the Ceylon Constitution (Order-in-Council) 1946. The learned judges, however, were of the opinion that the Bribery Tribunal could investigate and pronounce a judgment on a question of fact as such an investigation and pronouncement is the exercise of an arbitral power.

This case raises a constitutional point of great importance. It is hardly necessary to state that the Ceylon Constitution, being a written constitution, is paramount legislation which can only be amended (and that, too, only in certain respects) by a two-thirds majority of the members of the House of Representatives, as provided by section 29 (4) of the Ceylon Constitution (Order-in-Council) 1948 (hereinafter referred to as the Order-in-Council).

The legislative powers of the Ceylon Parliament, as contained in section 29 of the Order-in-Council, is not that of a sovereign legislature (*vide* The Constitution of Ceylon—Sir Ivor Jennings (Oxford Press) p. 22 and 23), inasmuch as it derives its authority from the Order-in-Council which imposes certain fetters on its powers of legislation (*vide* also observations of Sinnetamby, J., in *P. S. Bus Co., Ltd.* v. *Members and Secretary of Ceylon Transport Board*, (1958) 61 New Law Reports, p. 491 at 493). When a statute creates a Parliament, it cannot act contrary to the terms of the statute (*vide Harris* v. *Minister of the Interior*, (1952) South African Law Reports, p. 428). Section 29 (2) and (3) prohibit the Parliament from passing certain discriminatory legislation, except by a two-thirds majority of the members of the House of Representatives. Section 39 of the Order-in-Council states that every measure passed by the Parliament will have to be assented to by the Governor-General, who is the representative of Her Majesty, the

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Queen. As the constitutional monarch, the Queen, through her representative seldom withholds her assent, but if it appears to Her Majesty's Government in the United Kingdom that " any law which has been assented to by the Governor-General and which appears to Her Majesty's Government in the United Kingdom—(*a*) to alter, to any Ceylon Government stock specified in the Second Schedule to this Order ; or (*b*) to involve a departure from the original contract in respect of any of the said stock ", then the assent given by the Governor-General may be disallowed by Her Majesty through a Secretary of State, and ceases to have the force of law (*vide* section 39 (1) of the Order-in-Council).

The question in whom the judicial power of the State is vested by the Order-in-Council, could only be looked for in the entrenched provisions of the said statute. English decisions throw little light on this question as the legal position in England is different [*vide* Courts and Judgments, (Presidential Address of Sir Carleton Allen) published by the Holdsworth Club of the Birmingham University, 1959, p. 2, *et seq*].

The three functions of a government, legislative, executive, and judicial, first adumbrated by Aristotle, and later developed by other jurists, are clearly recognised in the Order-in-Council, though no rigid partitions have been built to separate these functions from one another. (Compare, however, the positions in America and Australia ; *vide Shell Co. of Australia* v. *Federal Commissioner of Taxation*, (1931) Appeal Case, 275 ; *Marthineau* v. *City of Montreal*, (1932) Appeal Cases, 113 ; *Labour Relations Board of Saskatchewan* v. *John East Iron Works, Ltd.*, (1949) Appeal Cases, 134).

Part II of the Order-in-Council deals with the appointment and functions of the Governor-General. He is authorised to execute all powers, authorities and functions of Her Majesty, as she may be pleased to assign to him. These powers are exercised, subject to the provisions of the Order-in-Council and any other law for the time being in force, as far as may be in accordance with the constitutional conventions applicable to the exercise of similar powers, authorities and functions in the United Kingdom. Part III of the Order-in-Council deals with the Legislature and confers on it the legislative powers of the State. This function again, has to be exercised subject to the provisions of the Order-in-Council.

The first schedule of the Order-in-Council states that the Colonial Laws Validity Act, 1865, does not apply to any law made after the appointed day by the Ceylon Parliament. It also empowers the latter to make laws having extra-territorial application. These provisions are taken almost verbatim from the Statute of Westminister (*vide* Constitution of Ceylon, Sir Ivor Jennings, p. 129).

Part V deals with the Executive. Section 45 states that " the executive power of the Island shall continue to be vested in His Majesty and may be exercised on behalf of His Majesty by the Governor-General in accordance with the provisions of this Order-in-Council and any other law for the time being in force ". This section is based on section 42 of the Minister's Draft and was re-drafted. Neither in Part III nor in Part IV is judicial power conferred on the Legislature or Executive.

The provisions of the Order-in-Council, which vests the executive power in Her Majesty, enshrines the well-known principle that executive power is vested in Her Majesty throughout the Commonwealth. In Ceylon, however, as well as in other Dominions, Her Majesty exercises these executive powers through her representatives (*vide* Constitution of Ceylon by Sir Ivor Jennings, p. 192). The Letters Patent of 1947 determine the distribution of powers between the Queen and the Governor-General and empowers the Governor-General " to appoint all such judges, Commissioners, Justices of the Peace and other officers as may lawfully be constituted or appointed by us ". This power, again, has to be exercised subject to the provisions of the Order-in-Council.

Part VI of the Order-in-Council deals with the Judicature. Section 52 (1) empowers the Governor General to appoint a Chief Justice, Puisne Justices of the Supreme Court and Commissioners of Assize. It states that the judges of the Supreme Court hold office during " good behaviour " (not " at pleasure ") and can only be removed for misconduct by the Governor-General on an address by the Senate and the House of Representatives (*vide* section 52 (2)). The age of retirement of a Supreme Court judge is fixed by Statute at sixty-two years (*vide* section 52 (3)). The salaries of the Supreme Court judges have to be determined by the Parliament and is charged on the Consolidated Fund (*vide* section 52 (4)), and cannot be diminished during their terms of office (*vide* section 52 (6)).

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These statutory provisions, ensuring the independence of the judiciary, are based on the English practice that the judiciary should not be subjected to any extraneous interference, Blackstone, as early as 1768, (*vide* Blackstones' Commentaries of 1768) states that the "legislative power" is vested by the English constitution in Parliament, "the executive power in the King or Queen". With regard to the judicial power, he said, "By long and uniform usage of many ages, our Kings have delegated their whole power to the Judges of their several Courts . . . And, in order to maintain both the dignity and independence of the judges in the superior Courts, it is enacted by the statute (13 Will, III, c. 2) that their commissions shall be made (not as formerly *durante bene placito*, but) *Quamdiu bene se gesserint*, and their salaries ascertained and established ; but it may be lawful to remove them on the address of both Houses of Parliament. And now, by the noble improvements of that law, in the statute of 1 Geo. III, c. 23, enacted at the earnest recommendation of the King himself during their good behaviour, notwithstanding any demise of the Crown (which was formerly held immediately to vacate their seats), and their full salaries are absolutely secured to them during the continuance of their commissions ; His Majesty having been pleased to declare, 'that he looked upon the independence and uprightness of the Judges as essential to the impartial administration of justice, as one of the best securities of the rights and liberties of his subjects ; and as most conducive to the honour of the Crown'."

A consideration of the relevant portions of the Order-in-Council and other statutes shows that the judicial power exercised by the Civil Courts of this country, when the Order-in-Council came into operation, were, in fact, conferred on the Judges of the Supreme Court and the judicial officers appointed by the Judicial Service Commission, although no special mention has been made therein to this effect (*vide Senadhira's case* (*supra*) and *Regina* v. *Liyanage and others*, Trial-at-Bar, No. 1 of 1962*).

At the time the Order-in-Council came into operation, a Supreme Court, already clothed with certain powers, rights and duties, existed. It had original jurisdiction to try offences, appellate jurisdiction to correct errors of the lower Courts and, *inter alia*, jurisdiction to issue prerogative writs. It was not necessary, therefore, for a re-definition or re-statement of these general powers, rights and duties of the Supreme Court, in the Order-in-Council. The Ceylon Independence Act, 1947, adopted the provisions of the Order-in-Council of 1946, with certain changes, as the Constitution of Ceylon.

The Order-in-Council created the Judicial Service Commission and empowered only this statutory body to appoint judicial officers. A constitution must be interpreted by attributing to its words the meaning which they bore at the time of its adoption and in view of the commonly accepted canons of construction, its history, early and long-continued practices under it (vide *Lois Myers* v. *United States* (12.10.1926) United States Reports, p. 52, at 237).

When section 52 of the Order-in-Council made it obligatory for the Governor-General to appoint the Chief Justice, Puisne Justices and the Commissioners of Assize, it recognised the existence of the Supreme Court which was first created by the Charter of 1801 and later continued by the Charters of 1833 and the Courts Ordinance (Cap. 6).

The precise question for decision in this case is whether the Legislature could take away the "judicial power", vested by our constitution on the Supreme Court and officers appointed by the Judicial Service Commission, and formerly exercised by the Civil Courts, and confer the same on tribunals otherwise appointed, without amending the Constitution. We are of the opinion that the Legislature cannot do so, or, for that matter, even create tribunals presided by persons not appointed by the Judicial Service Commission, which have concurrent jurisdiction with the Supreme Court or Courts presided over by Judicial Officers appointed by the Judicial Service Commission. Indeed, if such a course was open to the Legislature, then it would venture to create tribunals with greater powers and jurisdiction than those of the abovementioned Court. If judicial power could be conferred on persons other than judicial officers appointed by the Judicial Service Commission then the provisions in the Order-in-Council relating to the Judicial Service Commission would be rendered nugatory. Any departure from these salutary provisions of the Order-in-Council, ensuring to the citizen the independence of the Judiciary, will, no doubt, lead to malpractices. As Blackstone states (*vide* Blackstones' Commentaries, Vol. I, at p. 269). "In this distinct and separate existence of the judicial power in a peculiar body of men, nominated, indeed, but not removable at pleasure by the

* 62 C.L.W. 49

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Crown, consists one main preservative of the public liberty which cannot subsist long in any state, unless the administration of common justice be, in some degree, separated both from the legislative and also from the executive power. Were it joined with the legislative, the life, liberty and property of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their opinions, and not by any fundamental principles of law; which though legislators may depart from, yet judges are bound to observe. Were it joined with the executive, this union might soon be an over-balance for the legislative ", (cited with approval by Sansoni, J., in *Senadhira's case*, 63 New Law Reports, at p. 318).

The expression " judicial power " needs elucidation The definition of this term has caused much difficulty and has been the subject-matter of controversy both among jurists and judges. (*Vide* Courts and Judgments—Presidential Address of Sir Carleton Allen—published by the Holdsworth Club of the Birmingham University, (1959)). In *The Waterside Workers' Federation of Australia* v. *J. W. Alexander, Ltd.*, (1918) 25 Commonwealth Reports, 434, at 463, Isaac and Rich, JJ., referring to arbitral power said as follows :—

> " That is essentially different from judicial power. Both of them rest for their ultimate validity and efficiency on the legislative power. Both presuppose a dispute, and a hearing of investigation, and a decision. But the essential difference is that *judicial power is concerned with the ascertainment, declaration and enforcement of the rights and liabilities of the parties as they exist, or are deemed to exist, at the moment the proceedings are instituted; whereas the function of arbitral power is to ascertain and declare*, but not to enforce, what, in the opinion of the arbitrator *ought to be the respective rights and liabilities of the parties in relation to each other*."

This dictum has been approved by the Judicial Committee of the Privy Council (vide *Attorney-General for Australia* v. *The Queen and The Boiler-Makers' Society of Australia*, (1957) Appeal Cases, p. 288, at 310,) and also by our Courts (vide *Senadhira* v. *The Bribery Commissioner* (supra) per Sansoni, J., at page 319).

In the *Shell Company of Australia* v. *The Federal Commissioner of Taxation*, (1931) Appeal Cases, p. 275, at 295, Lord Sankey, L.C., having posed the question what is judicial power, answered it as follows : " Their Lordships are of opinion that one of the best definitions is that given by Griffiths, C.J. in *Huddart, Parker & Co.* v. *Moorhead*, (8 Commonwealth Law Reports, p. 330, at 357), where he says, ' I am of opinion that the words " judicial power " as used in section 71 of the Constitution, mean *the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property*. The exercise of this power does not begin until some tribunal *which has power to give a binding and authoritative decision*, (whether subject to appeal or not) is called upon to take action' ."

In *Senadhira's Case*, the judges applied the test of execution as the hall-mark of judicial power (*vide* 63 New Law Reports, at p. 319, *per* Sansoni, J.). But Wynes states (*vide* Legislative, Executive and Judicial Power by Wynes (2nd Edition) The Law Book Co. of Australasia Pty.,Ltd., p. 562) that " enforcement would not be a necessary attribute of a Court exercising judicial power ". For example, the power of execution might not belong to a tribunal yet its determination might amount to the exercising of a judicial power. In the United States, it does not appear that a power of enforcement is regarded as an essential element of judicial power [*vide Nashville C. & St. L. Railway Co.* v. *Wallace*, (1933) U.S. 249; *United States* v. *West Virginia*, (1935) U.S. 463) ; *Tutan* v. *United States*, (1926) U.S. 270.]

We shall proceed to examine the relevant provisions of the Bribery (Amendment) Act, (No. 40 of 1958), with the view of determining whether the Legislature had overstepped, perhaps by an oversight, the limitation prescribed by the Order-in-Council. Section 5 of the Bribery Act, as unamended, empowers the Attorney-General, if he was satisfied that there was a *prima facie* case of bribery, to indict the offender, if he was not a public servant, before the Supreme Court, or the District Court. When the alleged offender is a public servant, two courses were open to the Attorney-General. He could either indict the alleged offender before the Courts abovementioned, or arraign him before the Board of Inquiry, constituted under the Bribery Act.

Far-reaching changes were brought about by the Bribery (Amendment) Act, No. 40 of 1958. This Act abolished trials before the Supreme Court and the District Courts and also inquiries before Boards of inquiry ; it established what are known as " Bribery Tribunals ", presided over by officers not appointed by the Judicial Service Commission but by the Governor-General on the advice of

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the Minister of Justice. These " Bribery Tribunals " were constituted for " trials of persons for bribery " (*vide* section 42) " with power to hear, try and determine any prosecution for bribery made against any person before the tribunal " (*vide* section 47). The offences of bribery specified in Part II of the Act are punishable with rigorous imprisonment for a term not exceeding seven years or a fine not exceeding five thousand rupees, or both, and these offenders are no longer triable by the Supreme Court or the District Court.

Section 28 of the same Act, as amended, provides that the sentence of imprisonment passed by a Bribery Tribunal on a person found guilty by it, would be treated as if the sentence was one which was passed by a Court of law. The Bribery Tribunals could also inflict a fine or penalty ; such a fine or penalty could be recovered by the Attorney-General by an application made by him to the District Court. Section 68 of the Bribery (Amendment) Act (*supra*) empowers the Bribery Tribunal to enforce its authority and obedience. Any disregard or disobedience to its authority, committed in its presence, or in the course of the proceedings before it, is declared punishable for contempt. For this purpose, it has been conferred with the same powers as those conferred on a Court of law by section 57 of the Courts Ordinance and Chapter 65 of the Civil Procedure Code.

A brief survey of the abovementioned and other provisions of the Bribery Act, as amended, clearly show that the Legislature has purported to create a tribunal and has conferred upon it the judicial power exercised by the Supreme Court and the minor Courts presided over by Judicial officers appointed by the Judicial Service Commission.

Lord Atkin, commenting on the British North America Act of 1887, which protected the independence of the judges of Canada by making provisions that judges of the superior, district and county Courts should be appointed by the Governor-General and that by enacting that judges of the superior Courts should hold office during good behaviour and also their salaries should be fixed by Parliament and not reducible uttered the following pregnant words : " These are three pillars in the temple of justice and they are not to be undermined " (*vide Toronto Corporation* v. *York Corporation,* (1938) Appeal Cases, at page 415).

Sansoni, J., in *Senadhira's Case* proceeded to add a fourth pillar to the temple of justice in our legal system, namely, the Judicial Service Commission (*vide* 63 New Law Reports, at page 318). Could this Court, which has jealously guarded the rights of the citizen for so long, allow the erection of another " temple of justice " which is unauthorised by the Order-in-Council.

The Bribery Tribunals were constituted under the amending Act (No. 40 of 1958) for the " trials of persons for bribery " (*vide* section 42) " with powers to hear, try and determine any prosecution for bribery made against any person before the tribunal " (*vide* section 47). If no judicial power could be conferred on the Bribery Tribunal, except by an amendment of the Order-in-Council, then we fail to see how it could try and hear persons charged for bribery and determine the issue therein.

There is no provision in the Bribery Act, as amended, which states that it can inquire and come to a finding. There is no provision in its constitution for us even to construe it as a fact finding commission. Bribery is an offence still justiciable and punishable by the Supreme Court and the minor Courts under the Penal Code.

In *Senadhira's Case* (*supra*), the question whether the Bribery Tribunal can try persons charged before it for bribery was not fully investigated as this point was conceded by the counsel for the respondent in that case. A " trial " is the conclusion, by a *competent* tribunal of questions in issue, in legal proceedings whether civil or criminal (*vide* Stroud's Judicial Dictionary (3rd Edition) Vol. IV, page 3092).

In view of our finding that the Bribery (Amendment) Act (No. 40 of 1958) conferred no judicial power on the Bribery Tribunal, we are of opinion that it has no power to try persons for offences of bribery as the word " try " and other words used in this context, can only be used where a tribunal is vested with judicial power.

Therefore, we are in agreement with Mr. White's contention that the Bribery Tribunal has no jurisdiction to try and find the accused guilty of the offence of bribery. For these reasons we set aside the conviction and acquit the accused.

Sri Skanda Rajah, J.

I have had the advantage of reading the judgment prepared by my brother Tambiah, and I agree that the conviction should be set aside and the accused acquitted.

As the questions which we are called upon to decide are of some importance I wish to add a few observations.

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Crown Counsel submitted that, in the event of our holding that the accused has a right of appeal, the Bribery Tribunal had no power not only to impose a sentence on the appellant but even to try and/or convict him.

When we saw Mr. Tiruchelvam, who appeared for the appellant in the *Don Anthony Case* (61 C.L.W. 100) and whose argument in that case was "not without attraction" to the learned judges who decided that case, we invited him to assist us. He submitted that the preliminary objection, based on the observations of Their Lordships of the Privy Council, (1945 Appeal Cases 14), raised by Crown Counsel both in the *Senadhira* (60 C.L.W. 65) and *Don Anthony* cases, were untenable and that the Bribery Tribunal is an unconstitutional body.

In the *Senadhira Case*, counsel for the appellant contented himself in limiting his submission to the power of the Bribery Tribunal to pass sentence as being *ultra vires*. He indicated that he was not going to argue that the Bribery Tribunal was an unconstitutional body.

By the very terms of the Ordinance under which *Benoari Lal Sarma*, (1945) Appeal Cases 14, was charged and tried by a Special Magistrate there was no right of appeal to the High Court. The matter was taken to the High Court by way of revision under the provisions of the Code of Criminal Procedure. It was pointed out by Their Lordships of the Privy Council that this could have been done only on the assumption that the Court below was a valid Court and, therefore, having moved the High Court on that assumption it was not open to the accused to challenge the Ordinance, which brought into existence such Court, as invalid.

That is not the position in this case. Here the Bribery Act itself gives the accused the right to appeal to the Supreme Court. In my view, therefore, the preliminary objection, based on the passage in the *Benoari Lal Sarma Case*, raised in the two cases under reference, if I may say so with respect, is untenable. The accused has the right to appeal.

I may add that even when an Act expressly provides that the jurisdiction of a Court to try an offence shall not be called in question in any Court whether by way of writ or otherwise it is still open to this Court to consider whether that particular provision is *ultra vires* the Legislature (*vide The Queen* v. *Liyanage, et al*; Trial-at-Bar, No. 1 of 1962, S.C. Minutes of 3.10.1962).*

In the *Senadhira Case* as the appellants' counsel did not argue that the Bribery Tribunal was an unconstitutional body the Court was not called upon to consider that question.

I would respectfully agree with the finding in that case that the Bribery Tribunal was not validly constituted to receive judicial authority and any exercise of judicial power by it is invalid, being in breach of section 55 of the Ceylon (Constitution) Order-in-Council, 1946.

When by section 68 of the Bribery Act the Legislature purported to empower the Bribery Tribunal to punish any act of contempt committed in the course of the hearing of any charge of bribery as provided by section 57 of the Courts Ordinance and Chapter LXV of the Civil Procedure Code, *i.e.*, as a contempt of Court, a power which hitherto resided solely in the Judicature, it is intended in unmistakable terms, to vest the Bribery Tribunal with judicial power even at the stage it tries an accused and/or convicts him. This is clearly a violation of section 55 of the Ceylon (Constitution) Order-in-Council. Therefore, the Bribery Tribunal is an unconstitutional body and all proceedings before it are null and void.

Appeal allowed.

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

W. H. C. FERNANDO *vs.* H. D. P. JAYATILLAKA (INSPECTOR OF POLICE, NARAMMALA)

S.C. 34/1962—*M.C. Kuliyapitiya*, 10457.

Argued on: 19th July, 1962.
Decided on: 24th July, 1962.

* 62 C.L.W. 49

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Criminal Procedure Code, sections 167, 168, 169, 171—*Penal Code, section* 398—*Accused charged with offence of* " *cheating* "—*Particulars required to be set out in charge—Need the elements of the offence as set out in section* 398 *of the Penal Code also be set out in charge.*

Held : (1) That where an accused is charged with the offence of cheating it is not obligatory to refer in the charge to the elements constituting such offence as the offence defined in section 398 of the Penel Code is given the specific name of "cheating". The fact that the charge did not contain the words by "deceiving" was, therefore, not material.

(2) That the charge in the present case also complied with section 168 of the Criminal Procedure Code by setting out the manner of cheating and the person cheated. It could thus not be attacked as defective on this ground either.

(3) That the decision in *Zahir* v. *Cooray*, 19 C.L.W. 104, had no application to the present case as: (*a*) there was no difference in the manner of cheating as set out in the charge and the evidence led by the prosecution at the trial ; (*b*) the appellant's own account of the transaction showed that he had in no way been misled by the charge.

(4) That having regard to the evidence in the case, it was clear that there was no substance in the submission that the prosecution had failed to prove that the appellant had a dishonest intention at the time he received the money.

Cases referred to : *Meera Natchiya* v. *Marikar*, (1940) 41 N.L.R. 319.
Zahir v. *Cooray*, (1941) XIX C.L.W. 104.

Colvin R. de Silva with *M. T. M. Sivardeen*, for the accused-appellant.

T. D. Bandaranayake, C.C., for the Attorney-General.

SRI SKANDA RAJAH, J.

In this case the appellant, who is the headmaster of a school, was convicted and sentenced to one week's simple imprisonment and to pay a fine of Rs. 100/- and in default a further period of one month's rigorous imprisonment.

The charge was worded as follows :—

" . . . did cheat E. M. Menikhamy of Ganangamuwa by falsely representing to her that he could get her daughter, R. M. Podi Menike, employed as a nurse and thereby dishonestly induce the said E. M. Menikhamy to deliver to him a sum of Rs. 150/- as an advance and there committed an offence punishable under section 403 of the Penal Code."

The offence of "cheating" is defined in section 398 of the Penal Code.

The appellant complains that the element necessary to constitute cheating as defined by section 398 have not been set out in the charge and, in particular, the charge did not contain the words "by deceiving", which is a necessary element.

Now, the relevant portions of section 167 (2) of the Criminal Procedure Code and of illustration (*c*) to section 167 run as follows :—

"(2) If the law which creates the offence gives it any specific name, the offence may be described in the charge by that name only."

"Illustration (*c*). A is accused of . . . cheating . . . The charge may state that A committed . . . cheating . . . without reference to the definition of that crime in the Penal Code."

This is obviously because the offence defined in section 398 is given the specific name "cheating". It is not obligatory to refer in the charge to the elements constituting the offence of cheating, the necessary elements being implicit in the word "cheat". Therefore, this complaint of the appellant is without substance.

In the case of *Meera Natchiya* vs. *Marikar*, (1940) 41 N.L.R. 319, Howard, C.J., held that in view of the provisions of section 167 (2) of the Criminal Procedure Code a reference in the charge to the name of the offence as specified in the Penal Code is sufficient to give an accused notice of the matter with which he is charged.

The charge in that case was as follows :—

" . . . did voluntarily cause hurt to the complainant, Sego Meera Natchiya, by striking her with a wooden sandal."

It will be noticed that the elements necessary to constitute the offence of voluntarily causing hurt—an offence under section 314 of the Penal Code—were not set out.

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It is, also, relevant to point out that indictments on charges of murder run thus :—

> "... You did commit murder by causing the death of *A.* and that you have thereby committed an offence punishable under section 296 of the Penal Code."

without setting out the necessary elements. That is, again, for the reason that an offence under section 296 of the Penal Code is given the specific name of "murder".

Section 168 of the Criminal Procedure Code requires that particulars as to time and place of cheating and the person cheated should be specified in the charge so that the accused may have reasonably sufficient notice of the matter with which he is charged.

Section 169 reads thus :—

> "When the nature of the case is such that the particulars mentioned in that last two preceding sections do not give the accused sufficient notice of the matter with which he is charged, the charge shall also contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose."

Illustration (*b*) to this section reads :—

> "(*b*) *A.* is accused of cheating *B.* at a given time and place. The charge should set out the manner in which *A.* cheated *B.*"

The charge under consideration complies with the requirements of this provision, too ; for, it sets out the manner in which the appellant cheated Menikhamy. Therefore, the charge is not defective as contended by the appellant.

Further the relevant portions of section 171 and illustration (*b*) to it read as follows :—

> "No error in stating either the offence or the particulars required to be stated in the charge and no omission to state the offence or those particulars shall be regarded at any stage of the case as material, unless the accused was misled by such error or omission.
>
> (*b*) *A.* is charged with cheating *B.* and the manner which he cheated *B.* is not set out in the charge or is set out incorrectly. *A.* defends himself, . . ., and gives his own account of the transaction. The Court may infer from this that the omission to set out the manner of cheating is not material."

On the authority of the case of *Zahir* vs. *Cooray*, (1941) 19 C.L.W. 104, it is contended that the defects in this charge had not been cured by section 171, illustration (*b*) of the Criminal Procedure Code. At p. 105, Howard, C.J., said :

> "In this case it was alleged that the deceit of the appellant induced the complainant to enter up payment of the appellant's April account in his books. It was not established that such entering of payment had caused or was likely to cause damage to the complainant. The Magistrate in his judgment, realizing that the charge as framed did not disclose an offence, agreed with the counsel for the appellant that it was defective. He held, however, that an offence under the section of "cheating" had been established inasmuch as the complainant in his evidence had stated that as the result of receiving the appellant's cheque he was induced to give further goods on credit, a thing that he would never have done but for this dishonest inducement. The Magistrate further held that such giving of further goods on credit had caused definite damage and harm to the complainant."

At page 106 the learned Chief Justice continued :—

> "It would appear that such defects were not apparent to the parties and the Magistrate until the latter had embarked on the preparation of his judgment . . . Having regard to the fact that the case was contested on the assumption that the appellant had to meet the charge as originally framed, I do not think it can be said that he has not been misled by the error in stating the particulars."

Suffice it to say that such a situation has not arisen in this case. For, in this case what was set out in the charge as the manner in which the alleged offence was committed has not been deviated from in the evidence. Further, the appellant's own account of the transaction would show that he has not been misled.

I have carefully considered the arguments which sought to attack the finding of the learned Magistrate on the facts. I have examined the evidence and the Judgment in the light of these submissions. But, sitting in appeal, I cannot say that no reasonable man could reasonably have come to the conclusions that the Magistrate reached.

In order to consider the appellant's next submission that the prosecution has failed to prove a necessary element, viz., that the appellant had a dishonest intention at the time he received the money from Menikhamy, *i.e.*, the accused had no intention of fulfilling his part of the contract, it is necessary to set out the facts that emerge from the evidence. They are —:

(1) It was the accused who initiated the talk in respect of the appointment for Podi Menika as a nurse and induced Menikhamy to part with money ;

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(2) Menikhamy did not prevail upon the accused to procure an appointment as nurse for Podi Menika ;

(3) The accused mentioned that the usual amount for obtaining such an appointment was Rs. 500/- ; but, that he could get it done for Rs. 350/- as he was a friend of the family ;

(4) The accused induced Menikhamy to believe that the appointment was certain though Podi Menika was over-aged ;

(5) An application form would be sent to Podi Menika ;

(6) The accused received Rs. 150/- from Menikhamy ;

(7) The accused tried to get a further sum of Rs. 100/- from Menikhamy, alleging that even after she demanded the return of the Rs. 150/-, he had spent Rs. 100/- out of his own pocket ;

(8) A registered letter was sent to the accused demanding the return of the money. The accused did not reply to it. His evidence that the registered letter contained a blank sheet of paper is untrue ;

(9) There was no previous ill-feeling between complainant and accused.

It is clear that the accused was playing on the credulity of this village woman, Menikhamy. He even tried to make her believe that he had parted with the money.

There is sufficient evidence from which may be inferred that at the time he induced her to part with Rs. 150/- he had no intention of fulfilling his part of the contract, viz., to have Podi Menika appointed as a nurse.

The accused has proved by his own evidence that he is utterly untruthful and will not hesitate to lie in order to save himself.

For these reasons, the appeal is dismissed and the conviction and sentence affirmed.

Appeal dismissed.

Present : **Abeyesundere, J.**

SHELL COMPANY OF CEYLON, LTD. *vs.* PATHIRANA*

S.C. 33/1961—*Labour Tribunal*, 3997.

Argued and decided on : 29th May, 1962.

Industrial Disputes Act No. 43 *of* 1950 *as amended by Act, No.* 62 *of* 1957, *sections* 31 *B and* 31 *C—Dismissal of employee held to be both lawful and justified—Has a Labour Tribunal jurisdiction to grant relief to such employee thereafter.*

Held : That even where a Labour Tribunal has held that the termination of an employee's services was both lawful and justified, it has jurisdiction to grant relief to such employee. Section 31 B of the Industrial Disputes Act (as amended) read with section 31 C (1) empowers the Tribunal to make such an order.

H. V. Perera, Q.C., with *S. J. Kadirgamar* and *L. Kadirgamar*, for the employer-appellant.

C. Ranganathan with *M. T. M. Sivardeen* and *S. D. Jayawardena*, for the applicant-respondent.

ABEYESUNDERE, J.

This is an appeal on a point of law from an order made by a Labour Tribunal on an application made by an employee of the appellant for relief under section 31B of the Industrial Disputes Act, No. 43 of 1950, as amended by Act No. 62 of 1957, in respect of the termination of his services by the appellant. The point of law that I have to consider is whether the tribunal had jurisdiction to grant relief under the aforesaid section in view of the fact that the tribunal has held that the termination of service of the respondent is not only lawful but also justified. There is no limit imposed by the legislature in regard to the power to grant relief under section 31B that would prevent the grant of relief where the termination of service is both lawful and justified. The only

*For Sinhala Translation, see Sinhala section vol. 4, part 6, p. 19

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limit placed on the power to grant relief under the said section 31B is that contained in sub-section (1) of section 31C of the Industrial Disputes Act. That sub-section requires the order granting relief to be just and equitable. The power to grant relief under section 31B is wide in view of the fact that sub-section (4) of that section enables relief to be granted notwithstanding anything to the contrary in any contract of service between the applicant and his employer.

In the present case, the tribunal, having considered the circumstances which in its opinion necessitate the grant of relief, reached the conclusion that, taking into consideration the nature of employment, length of service and the wage period of the respondent, it would be just and equitable to grant relief in respect of the termination of his services by requiring the payment of six weeks' wages in lieu of notice instead of two weeks' wages which had been offered to him in accordance with the terms of the contract of service. It is not for me to consider whether or not the grounds on which the tribunal considered that the applicant was entitled to relief are reasonable or justifiable. So long as the tribunal had jurisdiction to grant such relief, this Court has no power to go into any question of fact.

In view of the conclusion I have reached that the Labour Tribunal had jurisdiction to grant the relief that it has granted, I dismiss the appeal with costs.

Appeal dismissed.

Present : **Abeyesundere, J.**

SAHEED *vs.* SANITARY INSPECTOR, WATTEGAMA*

Application No. 253 *of* 1962—*M.C., Panwila,* 3121.

Argued and decided on : 11th June, 1962.

Charge—Framing thereof—Necessary precondition for conviction—Continuing offence—Housing and Town Improvement Ordinance, section 15 (3).

The petitioner was convicted of occupying a building without a certificate of conformity from the Chairman of the Wattegama Urban Council and sentenced to pay a fine of Rs. 50/- on 18th November, 1960. An appeal from this conviction was dismissed. The Public Health Inspector of the Urban Council then moved on 23rd December, 1961 that the court be pleased to pass a "continuing sentence" on the petitioner, as he was continuing to occupy the building without a certificate of conformity. The Magistrate caused notice to be issued on the petitioner to show cause why a "continuing sentence" should not be passed on him, but in the ensuing proceedings no charge was framed against the petitioner. The defence did not lead any evidence, and after the evidence of the Public Health Inspector was led, the petitioner was convicted of an offence under section 15 (3) of the Housing and Town Improvement Ordinance and sentenced to pay a "continuing fine."

Held : That these latter proceedings were invalid as there was no legal trial by reason of the fact that no charge had been framed against the petitioner.

Izzadeen Mohamed with *H. D. Thambiah,* for the petitioner.

No appearance for the respondent.

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*For Sinhala Translation, see Sinhala section vol. 4, part 6, p. 20

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ABEYESUNDERE, J.

The petitioner in this case was prosecuted for occupying a building without a certificate of conformity from the Chairman of the Wattegama Urban Council and thereby committing an offence punishable under section 15 of the Housing and Town Improvement Ordinance. He was convicted of that offence on 4th November, 1960, and sentenced on 18th November, 1960, to pay a fine of fifty rupees. He appealed from that conviction and sentence and the appeal was dismissed on 22nd June, 1961.

The Public Health Inspector of the Wattegama Urban Council moved on 23rd December, 1961, that the Court be pleased to pass a "continuing sentence" on the petitioner as he was continuing to occupy the building without a certificate of conformity from the Chairman of that Council. Acting on that motion, the Magistrate caused notice to be issued to the petitioner to show cause why a "continuing sentence" should not be passed on him. Proceedings arising from the aforesaid motion commenced on 11th May, 1962, when the Magistrate recorded the evidence of the Public Health Inspector that the petitioner had not obtained a certificate of conformity even after the conviction. There was, however, no charge framed against the petitioner on that occasion. After the evidence of the Public Health Inspector, the Magistrate called for the defence of the petitioner and the Proctor appearing for him stated that he was not calling any evidence and that the Court had no jurisdiction to enlarge or vary any punishment meted out to the petitioner. The Magistrate convicted the petitioner of an offence under section 15 (3) of the Housing and Town Improvement Ordinance and sentenced him to day "a continuing fine" of twenty-five rupees a day commencing from 11th May, 1962.

The proceedings that ended with the conviction of the petitioner on 11th May, 1962, were invalid as there was no legal trial by reason of the fact that no charge had been framed against the petitioner. Exercising my powers of revision, I set aside the petitioner's conviction and the sentence passed on him and order that he be discharged.

Set aside.

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

MOHAMED *vs.* THE COMMISSIONER OF INLAND REVENUE

S.C. 5/1961—*Income Tax Appeal BRA* 294.

Argued on : 19th and 20th September, 1962.
Decided on : 12th October, 1962.

Income Tax Ordinance (*Cap.* 242) *as amended by Act, No.* 13 *of* 1959—*Method of assessing income of a business for taxation purposes—Monies spent in purchasing refreshments for customers—Such expenditure incurred by persons other than the proprietor or his executive officers—Are such expenses permissible deductions in assessing income of the business.*

Taxing statutes to be strictly construed—Construction favourable to assessee to be adopted where two constructions possible.

This was a case stated under section 74 of the Income Tax Ordinance, as amended, in which the opinion of the Supreme Court was sought on the question whether the assessee, the proprietor of a business, could claim as deductible expenses under the Ordinance, monies spent by his salesmen on entertainment in connection with his trade or business in assessing the income of his trade or business for the purpose of taxation.

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Held : That in assessing the income of his business for the purpose of taxation the assessee was entitled to deduct as permissible deductions, the expenses incurred by his employees other than executive officers, in entertaining the customers. Such expenses are not covered by section 12 (*a b*) iii of the Income Tax Ordinance, as amended.

Per TAMBIAH, J.—"Express and unambiguous language is absolutely indispensable in statutes passed for the purpose of imposing a tax (*vide* Craies on Statute Law (5th Ed.), (1952) by Sir Charles Odgers, p. 106), for such a statute is always strictly construed (*vide* Maxwell on Interpretation of Statutes, (9th Ed.), (1946) by Sir Gilbert Jackson, p. 126). In a taxing statute, if therefore, two constructions are possible, one in favour of the assessee and the other in favour of the assessor, the Court must adopt that construction which is favourable to the assessee."

Cases referred to : *Sussex Peerage Claim*, (1844) 11 Cl. & F. 85, ; 6 St. Tr. (N.S.) 79; 3 L.T.O.S. 277; 8 E.R. 1034
Cargo ex Argos, 1872 L.R. 5 P.C. 134
Curtis v. *Stovin*, (1889) 22 Q.B.D. 513 ; 60 L.T. 772; 58 L.J.Q.B. 174
Colquhoun v. *Brooks*, (1888) 21 Q.B.D. 52; 59 L.T. 661; 57 L.J.Q.B. 439

S. Nadesan, Q.C., with *Desmond Fernando*, for the appellant.

A. C. Alles, Solicitor-General, with *H. L. de Silva, C.C.*, for the respondent.

TAMBIAH, J.

This is a case stated under section 74 of the Income Tax Ordinance (Cap. 242, as amended by Act No. 13 of 1959), in which the opinion of this Court is sought on the question whether the proprietor of a business could claim as deductible expenses, monies spent by his employees on entertainment in connection with his business in assessing the income of the business for purposes of taxation.

The facts, which are set out in the case stated, are as follows : The assessee, who is carrying on a partnership business with two others as wholesale dealers in textiles, appealed against the assessment for the years 1958-1959 and 1959-1960, and claimed that the sums of Rupees 2,110/- and Rupees 2,853/-, as entertainment expenses incurred in the production of income during these respective years. Refreshments were purchased for customers both by the partners of the business as well as by the salesmen employed in the business. The money required for the purchase of these refreshments on each occasion was obtained by the partners or by the salesmen, as the occasion demanded, from the cashier and these sums were subsequently debited to the account of the business. The employees were given a free hand in the selection of customers for the purpose of serving refreshments.

There is agreement between the assessor and the assessee on the following matters :—

(i) Seventy-five per cent. of the total expenditure for entertainment was incurred by the salesmen and twenty-five per cent. by the partners.

(ii) Twenty-five per cent. of entertainment expenses incurred by the partners were not deductible expenses after the amending Act No. 13 of 1959.

(iii) The salesmen, who had provided the refreshments, were not executive officers within the meaning of section 2 of the amending Act (No. 13 of 1959).

The opinion of this Court is sought in respect of the seventy-five per cent. of the expenses incurred by the salesmen.

Under the Income Tax Ordinance (Cap. 242), before the amending Act, No. 13 of 1959, all expenses incurred in entertainment, on the facts of the instant case, would have been deductible

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expenses incurred in the production of income (*vide* section 12 of Cap. 242). The rights of an assessee to claim certain expenses spent on entertainment and travelling, as permissible deductions, were considerably curbed by the Income Tax (Amendment) Act (No. 13 of 1959).

Mr. S. Nadesan, Q.C., who appeared for the assessee, urged that the Legislature, by introducing the amending Act (No. 13 of 1959), never intended to interfere with small-scale entertainment provided by businessmen through their employees, such as offering aerated waters, etc., to their prospective customers. It is a well-known fact that owners of textile businesses often serve aerated waters to their prospective customers. Indeed, such a benevolent gesture not only quenches the thirst of the prospective customers but also induces them to buy some articles of clothing as a matter of moral obligation. Mr. Nadesan urged that such a practice would not only be conducive to an increase in income for businessmen but also enables the revenue department to reap a richer harvest by way of taxes. Be that as it may, the intention of the Legislature has to be ascertained on the wording of the statute itself where such wording is clear and unambiguous (*vide Sussex Peerage Claim*, (1844) 11 Cl. & F. 85, 143 ; 6 St. Tr. (N.S.) 79 ; accepted by the Judicial Committee in *Cargo ex Argos*, (1872) L.R. 5 P.C. 134, 153).

The relevant provisions of the amended Income Tax Ordinance (Cap. 242, as amended by Act, No. 13 of 1959), read as follows :—

" 12. For the purpose of ascertaining the profits or income of any person from any source no deduction shall be allowed in respect of—

(*ab*) the following for any year of assessment commencing on or after April 1, 1958 :—

(i) expenses incurred in connection with employment other than the expenses referred to in section 9 (1) (*h*) ;

(ii) any travelling expenditure in excess of two thousand rupees a year incurred in connection with any trade, business, profession or vocation carried on or exercised by such person *other than any such expenditure so incurred by an employee of such person who is not an executive officer* ;

(iii) entertainment expenses *incurred* by such person in connection with any trade, business, or profession or vocation carried on or exercised by him ;

(iv) entertainment expenses *incurred* by an executive officer of such person in connection with a trade, business, profession or vocation carried on or exercised by such person ;

(v) entertainment or travelling allowance paid by such person to his executive officers."

Mr. Nadesan contended that the intention of the Legislature in passing the amending Act was to minimise some of the abuses of the assessees and their executives, who entertained people lavishly and became globe-trotters, under the guise of travelling in connection with their trade or business, and then claiming large sums as deductible expenses in assessing their income for purposes of taxation.

The learned Solicitor-General, appearing for the respondent, submitted, on the other hand, that the seventy-five per cent. of the expenses incurred by the salesmen in providing refreshments would really come under section 12 (*ab*) (iii) of the amending Act and that this sub-section embraces all forms of entertainment not only by a proprietor but also by an executive officer and an employee. The learned Solicitor-General invited this Court to hold that section 12 (*ab*) (iv) and (v) were enacted out of abundance of caution, as sub-sections (iii) of the same section was wide enough to bring within its ambit the subsequent two sub-sections.

Although the word " incurred " has been used in section 12 (*ab*) (i) in somewhat of a wider sense, nevertheless the same word is used in a restrictive sense in sub-section (iii) to mean entertainment expenses incurred only by the proprietor of a business. It is not possible for us to give

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the word " incurred ", as it occurs in sub-section (iii), a wider meaning to include entertainment expenses incurred not only by the proprietor but also by his executives and his employees, for the reason that specific provisions have been made regarding entertainment expenses incurred by the proprietors in sub-section (iii) and executives in sub-sections (iv). If the contention of the learned Solicitor-General is to be accepted, then there was no necessity for the Legislature to have enacted sub-sections (iv) and (v) abovementioned. It is a cardinal rule of construction that, wherever possible, the words of an Act of Parliament must be construed so as to give a sensible meaning to them (*vide per* Bowen, L.J., in *Curtis* v. *Stovin*, (1889) 22 Q.B.D. 512, 517). There is a presumption against the Legislature using surplus words in a statute. The reasons urged by the learned Solicitor-General are not adequate for us to depart from this presumption and his argument must, therefore, fail.

Section 12 (*ab*) (ii) of the amended Income Tax Ordinance (*supra*) allows only the sum of Rupees Two thousand as travelling expenses to be deducted as expenses incurred in the production of income of a trade or business. Sub-sections (iii) and (iv) impose absolute prohibitions on any entertainment expenses which may be incurred by the proprietor or an executive in connection with the trade or business ; sub-section (v) debars a proprietor from paying his executive officer any travelling or entertainment allowance. No restrictions, however, have been placed on the travelling or entertainment expenses, which may be incurred *by an employee* in connection with the trade or business.

The learned Solicitor-General also contended that Mr. Nadesan's argument is based on the maxim " *expressio unius exclusio alterius* ". Citing the observations of Lopes, J., in *Colquhoun* v. *Brooks*, (1888) 21 Q.B.D., p. 52, at 55, the learned Solicitor-General pointed out that while this maxim is a good master, it has proved to be a bad servant and should, therefore, be cautiously applied. Mr. Nadesan's argument, in our opinion, is not based on this maxim. Mr. Nadesan contended that where a taxing statute changes the law and introduces certain restrictions, it must be strictly construed and the restricting statute must only be allowed to operate to the extent to which it applies and no further.

Express and unambiguous language is absolutely indispensable in statutes passed for the purpose of imposing a tax (*vide* Craies on Statute Law (5th Ed.) (1952) by Sir Charles Odgers, p. 106), for such a statute is always strictly construed (*vide* Maxwell on Interpretation of Statutes, (9th Ed.) (1946) by Sir Gilbert Jackson, p. 126). In a taxing statute, therefore, if two constructions are possible, one in favour of the assessee and the other in favour of the assessor, the Court must adopt that construction which is favourable to the assessee.

We hold that the word " incurred " in section 12 (*ab*) (iii) of the amended Income Tax Ordinance (*supra*) does not cover the entertainment expenses incurred by the employees of the assessee in the instant case. Such a finding, no doubt, opens the floodgate to many malpractices, but that is a matter for the Legislature to remedy. Courts of law cannot arrogate to themselves the functions of the Legislature.

For these reasons, we are of opinion that the assessee is entitled to deduct as permissible deductions, the expenses incurred by his employees in entertaining the customers under section 12 of the amended Income Tax Ordinance (*supra*), for the years of assessment 1958-1959 and 1959-1960, respectively. The respondent must pay costs fixed at Rs. 105/- to the appellant.

Herat, J.
I agree.

Appeal allowed.

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Present : **Sansoni, J.**

In the matter of an application under Section 42 *of the Courts Ordinance for an order in the nature of Writ of Prohibition and Mandamus on N. Sivagnanasundaram Esquire, the District Judge of Point Pedro.*

S. ESWARALINGAM

vs.

N. SIVAGNANASUNDARAM, THE DISTRICT JUDGE OF POINT PEDRO

Application No. 20 *of* 1962.

Argued on : 26th July, 1962.
Decided on : 30th July 1962.

Writs of Prohibition and Mandamus on District Judge—Notice issued by District Judge on party before inquiring into a complaint—Notice disobeyed—Attachment issued—Order for security on production after arrest, to ensure appearance—Judge's right to make such orders—Civil Procedure Code, sections 137 *and* 138.

Held : (1) That a judge has a right to notice a party to appear before him in order that an inquiry might be held into any matter pending before him.

(2) That where the party noticed fails to obey such notice, the Judge is entitled to enforce obedience to it by issuing an attachment against him.

(3) That when such a party is arrested and produced before the Court, the Court is entitled under section 138 of the Civil Procedure Code to order him to give bail or other security to ensure his appearance and to release him on his complying with such order.

Per SANSONI, J.—"In my view there was a clear case for inquiry. Money had been paid out, as the Judge thought *per incuriam* and which was claimed by the substituted defendants as due to them. It was the duty of the Court to inquire into their complaint and for that purpose to summon the 1st and 2nd defendants and to require them to deposit in Court the money which had been paid out to them until such time as the rights of parties could be ascertained."

Cases referred to : *Narayan Chetty* v. *Jusey Silva,* (1903) 8 N.L.R., 162.
Edirisinghe v. *District Judge of Matara,* (1949) 51 N.L.R., 549.

Nimal Senanayake, for the petitioner.

H. L. de Silva, Crown Counsel, for the respondent.

SANSONI, J.

This is an application for Writs of Prohibition and Mandamus by the petitioner (1st defendant in D.C. Point Pedro, Case No. 5279), against the respondent, who is the District Judge of Point Pedro. It arises out of the following circumstances. Case No. 5279 is a pre-emption action filed by one Annapillai against the petitioner, his wife (2nd defendant), and one Velan Kanapathy (3rd defendant) impugning a deed of transfer executed by the 2nd defendant in favour of the 3rd defendant. As part consideration for that transfer, the 3rd defendant had executed a Mortgage Bond in favour of the 2nd defendant in a sum of Rs. 3,000/-.

After trial the District Judge gave judgment for the plaintiff and decreed that the plaintiff should deposit a sum of Rs. 3,500/- in Court as the value of the land which he was seeking to pre-empt, and that sum was accordingly deposited. Subsequently, the 1st and 2nd defendants moved for an order of payment in their favour for the sum of Rs. 3,500/- to be applied in part satisfaction of the principal and interest due on the Mortgage Bond, and an order of payment was issued to them for that sum on 15th November, 1961.

On 16th December, 1961, the widow and children of the 3rd defendant who had, meanwhile, been substituted in place of the deceased 3rd defendant, applied to the Court to order the 1st and 2nd

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defendants to bring back into Court the sum of Rs. 3,500/- drawn by them. The Court ordered notice to issue on all three defendants and the plaintiff. The notice required the 1st and 2nd defendants : (1) to bring into Court the sum of Rs. 3,500/- as the payment to them had been made *per incuriam*, and (2) to appear in person on the 22nd December, 1961, in respect of the application of the substituted defendants.

Notice was admittedly served on the 1st and 2nd defendants, but they did not appear in Court on the notice returnable day or deposit the money. The judge on that day thought that they should be brought into Court on attachment to show cause why they should not bring into Court the money drawn by them. An attachment was accordingly issued. On the 23rd December the 1st defendant appeared in Court in Fiscal's custody. The Judge explained to him : (1) that the payment order had been issued to him by error ; (2) that it should not have been issued as there was no decree on the Mortgage Bond in favour of him and his wife ; (3) that he and his wife should bring back the money into Court ; and (4) that the money will not be returned to any party without the due consideration of their rights.

The 1st defendant explained that he had been advised that the money could be drawn by way of a motion and that is how he came to withdraw it. The Judge then ordered the 1st defendant to give security in Rs. 3,500/- in cash to appear on 26th December. As he did not furnish security he was remanded to Fiscal's custody.

On 30th December there is a journal entry which reads :—

> "The 1st and 2nd defendants now wish to bring into Court the sum of Rs. 3,500/-, *vide* para 3 of proceedings, dated 23.12.61.
>
> (1) Issue D.N. for Rs. 3,500/- ;
>
> (2) Enlarge him on furnishing personal bail in a sum of Rs. 500/-."

Further entries show that this sum of Rs. 3,500/- was actually deposited within the next day or two. Before any further proceedings could take place this application was filed in this Court.

Mr. Senanayake for the petitioner submitted that the Judge had no right to insist on the attendance in Court of the 1st and 2nd defendants ; and that, in any event, he had no right to issue the order of attachment or to order security to be furnished for their appearance. Crown Counsel referred to sections 137 and 138 of the Civil Procedure Code and he relied on the judgment in *Narayan Chetty* v. *Jusey Silva*, (1903) 8 N.L.R., p. 162. He also urged that since the money had been paid out to the 1st and 2nd defendants on an ex-parte application made by them, which the Judge subsequently thought had been allowed *per incuriam*, it was open to the Judge under his inherent powers to inquire into the matter, and for that purpose to summon the 1st and 2nd defendants and any other persons whose presence the Judge thought necessary in order to inquire into the matter.

In my view there was a clear case for inquiry. Money had been paid out, as the Judge thought *per incuriam*, and which was claimed by the substituted defendants as due to them. It was the duty of the Court to inquire into their complaint and for that purpose to summon the 1st and 2nd defendants, and to require them to deposit in Court the money which had been paid out to them, until such time as the rights of the parties could be ascertained. If the Judge failed to take steps to this end, a grave injustice might have been done to the substituted defendants. It was undoubtedly the duty of the Judge to take action to prevent any injustice, especially where such injustice arose from the action of the Judge himself.

In the case of *Narayan Chetty* v. *Jusey Silva*, Wendt, J., said :

> "The Court has an inherent right to summon a party before it, and, if that summons be disregarded without lawful excuse, to enforce obedience by warrant . . . I would add that the defendant's proctor ought, at the very least in courtesy to the Court, to have explained the non-appearance of either of himself or of his client, and given the Court an opportunity, if so advised, to recall the order for the warrant before he presented an appeal to this Court."

Middleton, J., who agreed, thought that sections 137 and 141 of the Code justified the issue of a warrant when a party who had been summoned to appear before the Court failed to appear. In that case the party in default was the defendant who had been noticed under section 219 of the Code. The Court then ordered a warrant to be issued for his arrest, and an appeal was filed against that order.

Mr. Senanayake submitted that this case was no authority because under section 219 (2) there is express provision for the issue of a warrant on

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a debtor who has been summoned to appear. I cannot accept this argument, because it overlooks the provisions of section 219 as it stood when this judgment was given. Sub-section (2) to section 219 is a later addition. It was not originally in the Code, and it had not been enacted in 1903 when this case was decided, nor is it to be found even in the 1907 edition of the Enactments. I cannot say when it was added, for there is no marginal note of the date in the new edition of the Legislative Enactments. I see no reason to limit the application of the dicta in that case.

Further authority in support of the right of a Judge to notice a party to appear before him, in order that an inquiry might be held into any matter pending before him, will be found in *Edirisinghe* v. *District Judge of Matara*, (1949) 51 N.L.R., p. 549. There the District Judge had issued notice on a party, against whom a complaint of obstruction was made by a Commissioner appointed to conduct a sale in a partition action, to appear in Court. A similar application to the present one was then made by the party to this Court, on the ground that the Judge had no jurisdiction to inquire into the alleged obstruction, or to make an order requiring the party to furnish bail for his future appearance in Court. Basnayake, J., held that the Judge was entitled to ascertain the true facts by inquiry in order to decide what action, if any, he should take in respect of the alleged obstruction. He also referred to section 839 of the Code which saved the inherent powers of the Court. He accordingly refused the application for the writ of prohibition.

Similarly, in this case I would hold that the Judge was entitled to hold an inquiry into the complaint of the substituted defendants, and for that purpose to notice the 1st and 2nd defendants to appear, as they were the persons who had drawn out the money which the substituted defendants said had been wrongly drawn out. When they failed to obey the notice, the Judge was entitled to enforce obedience to it by issuing an attachment against them.

The next question that arises is whether he was entitled to order the petitioner to give bail, when he was arrested and produced before the Court to ensure his attendance on 26th December. I think section 138 of the Code enables the Judge to do this, for it provides that a person arrested and brought before the Court for non-compliance with the summons may be required to give bail or other security for his appearance, and when such bail or security is given, he may be released. Basnayake, J., in the case I have just cited said that he could find no authority for the order made in that case by the District Judge that bail should be furnished. Perhaps, if his attention had been drawn to section 138, he might have taken a different view. I, therefore, see nothing wrong in the orders made by the learned District Judge in the present case with regard to the issue of notices, attachments, and the orders to furnish security.

There is one other matter which Mr. Senanayake referred to, and that is the journal entry of 30th December, 1961, referring to the deposit of Rs. 3,500/-. He submitted that this sum was deposited solely in order to obtain the release of the 1st defendant-petitioner, and not as a refund of the money withdrawn from Court. This is a matter which the 1st and 2nd defendants should raise in the lower Court with notice to the other parties. I reserve this right to them, and I direct that the inquiry into this matter be held by another District Judge.

For the reasons I have given, I refuse the application for writs of prohibition and mandamus. The parties will bear their own costs.

Applications refused.

Present : **Tambiah, J.**

PREMARATNE *vs.* SUPPIAH

S.C. 45/1959/*C.R., Gampaha, Case No.* 7563/*B.*

Argued on : 5.6.1961 and 29.1.1962.
Decided on : 7.2.1962

Landlord and tenant—Tenant compelled to leave premises owing to communal disturbances—Refusal by landlord to restore possession of premises to tenant on latter's return—Action by tenant for

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restoration of possession—Was there an abandonment of the premises by the tenant—Value of premises over Rs. 300—*Does Court of Requests have jurisdiction to try such action—Test to be applied in determining whether Court of Requests has such jurisdiction.*

The plaintiff brought this action in the Court of Requests averring that the defendant who had been his landlord had unlawfully dispossessed him from the premises which he had been occupying as tenant. The plaintiff prayed that he be restored to possession of the said premises and also asked for damages. The defendant while admitting that the plaintiff had been his tenant contended that the plaintiff had abandoned the said premises towards the end of May, 1958, and the tenancy had thereby terminated. He also took up the position that the Court of Requests had no jurisdiction to try this case.

The evidence given by the plaintiff was that he was compelled to leave the premises on 27th May, 1958, owing to communal disturbances in the area, but that he returned to Gampaha in June and asked the defendant to give the premises back to him. The defendant had refused. The learned trial Judge accepted the plaintiff's version and went on to hold that there had been a justifiable abandonment of these premises by him. The defendant appealed.

Held : (1) That the plaintiff could not in law be said to have abandoned the premises at all. The question whether there had been a justifiable abandonment did not, therefore, arise.

(2) That the Court of Requests had jurisdiction to try this case. The present action was not a possessory action but one based on the breach of the contract of tenancy. The true test to be applied in cases of this nature was not the value of the land but the monthly rental and damages claimed.

Cases referred to : *Mouson* v. *Boehm*, (1884) 26 Ch. D. 398.
Nagamani v. *Vinayagamoorthy*, (1923) 24 N.L.R. 48.
Appuhamy v. *Appuhamy*, (1945) XXXI C.L.W. 3.
Perera v. *Liyanagama*, (1956) 58 N.L.R. 454.
Mudiyanse v. *Rahman*, (1890) 2 N.L.R. 25.
Usoof v. *Zainudeen*, (1918) 21 N.L.R. 86.

H. W. Jayawardene, Q.C., with *C. G. Weeramantry, Hannan Ismail* and *N. R. M. Daluwatte* for the defendant-appellant.

A.W.W. Gunewardene with *K. Charavanamuttu*, for the plaintiff-respondent.

TAMBIAH, J.

The plaintiff brought this action for the restoration of possession of premises No. 40, Bazaar Street, Gampaha, which he had taken at a rental of Rs. 20/- per mensem and for damages. He averred that the defendant, his landlord, had unlawfully dispossessed him from the said premises. The defendant admitted that the plaintiff was his tenant but stated that the plaintiff had abandoned the said premises towards the end of May, 1958. It was also urged that the Court of Requests had no jurisdiction to try this case.

The plaintiff, in the course of his evidence, stated that prior to the communal disturbances of 1958 he was in occupation of the said premises as a tenant of the defendant and that he was compelled to leave the premises on the 27th of May, 1958, as a result of communal disturbances in the Gampaha area, which was predominantly occupied by the Sinhalese. The plaintiff further stated that he returned to Gampaha on the 6th of June, 1958, and found the said premises closed. Thereupon, on the 10th of June, 1958, he asked the defendant to give back the premises, and although the defendant had assured him that he would hand over the possession of the premises after the communal disturbances, he did not keep his promise. The plaintiff thereafter sent Rs. 40/- as rent for the months of May and June, 1958, but the defendant returned Rs. 26.50 out of it and refused to hand over the premises. The complaint of the plaintiff to the Village Headman proved to be of no avail. Thereafter, he brought this action. The defendant's contention is that the tenancy had terminated as a result of the abandonment of the premises by the plaintiff and he (the defendant) had rented the same to one Mr. Fernando.

The learned Commissioner has accepted the version given by the plaintiff and had disbelieved the defendant. He characterised the version of the defendant as "just an excuse adopted to deny restoration of possession of these premises to plaintiff". The learned Commissioner, however, has erroneously taken the view that there had been a justifiable abandonment of the said premises by the plaintiff. In order that there might be abandonment not only should the tenant leave the premises but *his intention to abandon should*

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also be clear. A person cannot abandon a right, without intending to do so (*vide Mouson* v. *Boehm*, 26 Ch. D. 398 ; *Nagamani* v. *Vinayagamoorthy* (1923) 24 N.L.R. 438). A temporary departure, therefore, with the intention of returning to the premises, does not constitute abandonment.

In the instant case, at no time had the plaintiff showed any intention of abandoning the said premises. He, no doubt, left the premises under circumstances which compelled him to leave, but he has, however, expressed his wish to re-enter possession within a reasonable time when he was prevented from doing so by the defendant. He has, therefore, not abandoned the said premises.

The argument of the counsel for the appellant is based on the misconception that there has been justifiable abandonment by the plaintiff and need not be examined any further in the light of the above conclusion. The counsel for the appellant also contended that the Court of Requests had no jurisdiction to hear this case and in support of this argument he cited the ruling in *Appuhamy* v. *Appuhamy*, (1945) 31 C.L.W., p. 33. In that case, the Divisional Bench had to consider the test of jurisdiction when a possessory action was brought by a lessee against a person who has dispossessed him. The issues framed and adopted indicated that the title to the land would be investigated. No issues were, however, proposed to suggest that the value of the subject-matter of the action, namely, the right of possession of the land, uncomplicated by the lease, was less than the value of the land. The Divisional Bench, therefore, held that the possessory action instituted in that case could not be maintained in the Court of Requests. Soertsz, A.C.J., discussed the two lines of authorities on the vexed question whether a lessee could bring a possessory action in a Court of Requests where his interest in the leasehold is less than Rs. 300/- but the value of the leased premises is over this amount.

In the instant case, it is unnecessary for me to go into this question. Suffice it for me to state that the present action is not a possessory action but an action based on a breach of contract of tenancy. In the language of the Roman-Dutch authorities, the action brought by the plaintiff is the *actio conducti* (Dig. 19.2.15 ; 19.2.19.8 ; Voet, 19.2.14., V.D.L. 1.5.12). The plaintiff had brought this action as tenant to enforce the terms of his contract and to be restored to possession, and the title to the premises in question is not in dispute. As Soertsz, A.C.J., stated in *Appuhamy's* case (*vide* (1945) 31 C.L.W. 33, at 35) : " In order to ascertain whether an action is within or beyond the pecuniary jurisdiction of a Court, the nature and extent of the subject-matter in dispute has to be ascertained, and for that purpose, it would be necessary to examine not only the plaintiff's claim, but also the defendant's answer to it ". In *Perera* v. *Liyanagama*, (1956) 58 N.L.R., p. 454, it was held that where an owner of premises sues a trespasser for ejectment and damages and the defendant, without disputing the plaintiff's title to the property, contends that he is the lawful tenant of the plaintiff, the jurisdiction of the Court to try the case does *not* depend on the value of the premises.

If the test of jurisdiction, in an action by the landlord to recover possession of his premises, is the value of the land, then no landlord could bring an action for the recovery of possession of his land from his tenant in a Court of Requests where the land exceeds Rs. 300/- in value. The true test, in such cases, is not the value of the land but the monthly rental and damages claimed (*vide Mudiyanse* v. *Rahman*, (1890) 2 N.L.R. 235). As regards continuing damages, it is to be noted that in an action for ejectment and for damages for over-holding, the amount of a month's rent need not be added to the damages claimed to ascertain the value of the relief claimed (*vide Usoof* v. *Zainudeen*, (1918) 21 N.L.R. 86). There is no reason why a different test should be applied when a tenant has been dispossessed by his landlord and he brings an action to be restored to possession.

For these reasons, I dismiss the appeal. The respondent is entitled to costs of appeal and costs in the lower Court.

Appeal dismissed.

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Present : **Tambiah, J.**

ARIYADASA & OTHERS *vs.* INSPECTOR OF POLICE, CRIMES, MATARA

S.C. 1048-1050/1961 —*M.C. Matara, No.* 60692.

Argued and decided on : 23rd January, 1962.

Criminal Procedure—Trial judge disbelieving prosecution witnesses and accepting defence version of incident—Can he thereafter proceed to convict the accused by acting only on certain parts of the evidence given by the prosecution witnesses—Defence version revealing that the accused had acted in the exercise of their right of private defence—Accused to be entitled to an acquittal in these circumstances.

Held: (1) That where a magistrate unequivocally rejects the evidence of the prosecution witnesses, he cannot in the absence of corroboration, pick and choose certain parts of their evidence and then proceed to convict the accused.

(2) That on the evidence given by the accused, which the learned Magistrate had accepted, this was a case where the accused had acted in the exercise of their right of private defence. Their conviction should, therefore, be quashed.

Case referred to : *Bhowanipur Banking Corporation, Ltd.* v. *Dassi,* 1941 A.I.R. (P.C.) 95.

Ranjit Dheeraratne, for the accused-appellants.

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

TAMBIAH, J.

In this case seven accused, namely : (1) U. Palihakkara, (2) H. P. Ariyadasa, (3) K. Palliyaguru (4) M. Jayawardene, (5) G. Palliyaguru, (6) U. Dissanayake, and (7) H. P. Somawathie, were charged with various offences set out in the charge sheet. The first accused was charged with causing hurt with a sword to Hewa Kandambige Hinnimahatmaya *alias* Nandadasa in an incident that took place on the 12th December, 1959, an offence punishable under section 315 of the Penal Code. On count 2 the 2nd, 3rd, 4th and 5th accused were charged with causing hurt to Hewa Kandambige Hinnimahatmaya *alias* Nandadasa by striking him with clubs, hands and stones in the same incident, an offence punishable under section 314 read with section 32 of the Penal Code. On count 3 the 1st accused was charged with voluntarily causing hurt to Hewa Kandambige Nandasena by cutting him with a manna knife, in the same incident, an offence punishable under section 315 of the Penal Code, On count 4 the 3rd accused was charged with causing grievous hurt by cutting him with a sword in the same incident, an offence punishable under section 317 of the Penal Code. On count 5 the 1st, 2nd, 3rd, 4th and 6th accused were charged with causing hurt to H. N. Nandasena by striking him with hands and clubs in the same incident, an offence punishable under section 314 read with section 32 of the Penal Code. On count 6 the 5th accused was charged with causing hurt to Hewa Kandambige Somipala with clubs in the same incident and thereby having committed an offence punishable under section 314 of the Penal Code and on count 7 the 7th accused was charged with using criminal force on Hewa Gunasekerage Kathirinahamy otherwise than on grave and sudden provocation given by the said Hewa Gunasekerage Kathirinahamy in the same incident and thereby committed an offence punishable under section 343 of the Penal Code.

The case for the prosecution is that on the night of 12th December, 1959, Kathirinahamy and her son, Nandasena, who were living in a place called Walpola, heard that the accused's party had a row with Hinnimahatmaya *alias* Nandasena and went to see what the row was about. Nandadasa is another son of Kathirinahamy and a brother of Nandasena. The prosecution witnesses also stated that to go to Nandadasa's house Kathirinahamy and Nandasena had to go along Thotupola Road, Weragampita, from which road there is a turn-off to the house in which the 1st, 2nd, 3rd and 7th accused live. Kathirinahamy and Nandasena gave evidence and stated that when they were on their way to the house of Hinnimahatmaya on this night and reached this point on Thotupola

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road they were set upon by these accused and attacked. There is evidence that the accused lived about 150 yards away from the turn-off to the Thotupola road. The prosecution version is that two other sons of Kathirinahamy, namely. Somapala and Hinnimahatmaya *alias* Nandadasa also came to the spot where this row was going on and they were set upon and attacked by the accused's party.

The 1st, 2nd, 3rd, and 7th accused gave evidence and according to them this incident took place in a different way. The accused who gave evidence stated that there was an earlier incident late in the evening that day between witness, Hinnimahatmaya *alias* Nandadasa and the 2nd accused. Nandadasa wanted a bicycle from the 2nd accused and when he refused to part with the bicycle there was a fight. According to the accused's version Kathirinahamy and her three sons came to accused's house and Kathirinahamy abused them and certain incidents took place. The 2nd accused stated in evidence that when the previous altercation took place between the tnd accused and Hinnimahatmaya, the 4th, 5th 2nd 6th accused were present near the ambalam and when he and Hinnimahatmaya exchanged blows with hands, witness, Somapala, also intervened. He also stated that on the night of 12th December, 1959, he was sleeping in the verandah of his house with Keerthipala and at that time Nandadasa, Nandasena, Kathirinahamy and Somipala came up to their land uttered obscene words. Then, he said, thereafter the 3rd accused, Keerthipala, told Nandadasa, "Banda, this can be settled next morning, now go home". Then 2nd accused said that thereafter Nandadasa struck Keerthipala with a club. He also stated that when he saw this he brought a manna knife and cut that party and he cannot say who got injured. Nandadasa and Nandasena in turn struck him and he got injured. He also stated that before he received a cut with the knife he had received a club blow and this blow had alighted on the back of his chest and added that the injured party came and challenged them. He was emphatic that only when he was attacked with a club that he cut with a manna knife. He also stated that the others who got injured in this incident were the 7th accused, Somawathie, himself and Ariyadasa, and the 3rd accused, Keerthipala Palliyaguru, and that all of them received injuries with blunt weapons. The 3rd and 7th accused gave evidence and supported the others on material points.

The learned Magistrate in the course of his judgment says that he fully believes the version given by the accused as to how this incident took place. He said :

"On this matter I believe fully the evidence given by the accused that Kathirinahamy and her three sons, namely, Nandasena, Hinnimahatmaya *alias* Nandadasa and Somapala, had on this night gone to the land, Borugalwalawatte, and abused the accused party and threatened them. I am firmly of the view that in view of the earlier incident the complainant party made the statements in question at the police station as a precaution and then went and abused the accused party."

"In view of my findings as to how this incident took place I must now state that I am making my findings in the case acting on the evidence given by the accused, namely, H. P. Ariyadasa, U. Palihakkara, K. Palliyaguru and H. P. Somawathie."

"I disbelieve the prosecution witnesses. I must say that I totally disbelieve the two witnesses, Nandadasa *alias* Hinnimahatmaya and Somipala."

Later on he added as follows :—

"As I have stated earlier I make my findings in the case on the basis that I believe the four accused who have given evidence."

Having categorically stated that he is acting only on the evidence of defence witnesses, the magistrate later sought to pick out certain parts of the evidence given by the prosecution witnesses and states that they are true. If the prosecution witnesses cannot be believed on material points it will be difficult for a judge to accept their evidence on other material points unless there is corroboration. (*See* 1941, A.I.R. (P.C.), page 95). It seems to me that the learned magistrate, having unequivocally stated that he is not accepting the evidence of the prosecution witnesses, cannot pick and choose certain parts of the evidence of the prosecution witnesses and act on them, in the absence of corroboration. The learned magistrate merely stated that he considered the evidence given by the accused and there are no mitigating circumstances. In this case the evidence given by the second accused is to the effect that when he was attacked by a hostile crowd who were armed he used the manna knife. His version is supported by the evidence of the other accused and the learned magistrate has accepted the evidence of the accused *in toto*. Then it seems to me that this is a case where the accused have acted in the exercise of their right of private defence. For these reasons, I quash the convictions and acquit the accused.

Appeal allowed.

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Present : **Herat, J., and Abeyesundere, J.**

G. PIYADASA *vs.* THE QUEEN*

S.C. No. 112—*D.C.* (*Crim.*) *Hambantota, No.* 43/28347.

Argued and decided on : 21st June 1962.

Criminal Procedure Code, sections 202 *and* 217—*Indictment—Withdrawal of one of several counts at District Court trial by Crown Counsel—Conviction of accused on remaining counts after trial—Failure to alter charge under section* 172 *of the Criminal Procedure—Effect of such withdrawal.*

Two persons were indicted before the District Court on eight counts and Crown Counsel withdrew one count a the trial. The trial proceeded on the remaining counts without altering the indictment under section 172 of the Crimina Procedure Code and the accused were convicted. The accused appealed.

Held : That the effect of the withdrawal of one of the counts from the indictment was that the indictment had been altered in a manner not permitted by section 202 of the Criminal Procedure Code. The proceedings on the indictment were therefore invalid and the accused must be discharged.

Colvin R. de Silva with *M. L. de Silva,* for the accused-appellant.

E. H. C. Jayatilaka, Crown Counsel, for the Attorney-General.

ABEYSUNDERE, J.

The 1st accused-appellant in this case was charged together with the 2nd accused in the District Court of Hambantota on an indictment containing eight counts. During the trial the Crown Counsel who appeared for the prosecution moved to withdraw count eight from the indictment. That motion appears to have been allowed by the Court, although there is no order to that effect, as the withdrawal of that count is referred to in the judgment of the learned District Judge.

Unlike at a trial in the Supreme Court, the Attorney-General has no power to withdraw a charge from an indictment at a trial in a District Court. Section 202 of the Criminal Procedure Code provides that the Attorney-General may at any time before the verdict is recorded withdraw any indictment and the prosecuting counsel may also with the permission of the District Judge at any time before the verdict is recorded withdraw any indictment, and thereupon all proceedings thereon shall be stayed and the accused shall be discharged. Under sub-sections (1) and (3) of section 217 of that Code before the return of the verdict at a trial in the Supreme Court the Attorney-General may inform the Court that he will not further prosecute the accused upon the indictment or any charge therein, and the prosecuting counsel may with the consent of the presiding Judge withdraw the indictment or any charge therein, and thereupon all proceedings on such indictment or charge as the case may be against the accused are stayed and he is discharged.

The indictment in this case could have been altered by the Court under section 172 of the Criminal Procedure Code, but that course of action has not been adopted by the learned District Judge. The effect of the withdrawal of one of the counts from the indictment is that the indictment has been altered in a manner not permitted by law, and the proceedings on the indictment as so altered are, therefore, invalid.

I set aside the conviction of the 1st accused-appellant and the sentences passed on him and order that he be discharged. In consequence of my finding that the proceedings are invalid, I exercise the powers of revision and set aside the verdict and order of the learned District Judge in respect of the 2nd accused in this case and order that he also be discharged.

HERAT, J. :

I agree.

Convictions set aside.

* For Sinhala translation, see Sinhala section, vol. 4, part 7, p. 24.

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Present : **L. B. de Silva, J., and G. P. A. Silva, J.**

T. CHRISTINA & OTHERS *vs.* CECILIN FERNANDO & ANOTHER

S.C. No. 38/60 *(Inty.)—D.C. Kalutara, Case No.* 3648/*T.*

Argued on : 11th October, 1962.
Decided on : 1st November, 1962.

Divorce, action for—Defendant's failure to appear and defend though served with summons—Decree nisi entered—Decree nisi made absolute without serving notice on defendant—Is decree absolute a nullity—Does such failure to serve notice deprive Court of jurisdiction—Can a third party collaterally attack such decree absolute.

Civil Procedure Code, section 85—*Evidence Ordinance, sections* 41 *and* 44.

C. (the respondent), applied for letters of administration to the estate of *L.* (deceased), as his widow. The appellants objected to the grant of letters to her, claiming that they themselves were the lawful heirs of *L.* Their objection was on the ground that *C.* was not legally married to *L.*, as she had been previously married to one *M.* from whom she had not obtained a valid divorce at the time of her second marriage to *L.* *C.* had instituted action for divorce against *M.* and obtained a *decree nisi* by default after due service of summons. This *decree nisi* was thereafter made absolute, but without serving notice of the *decree nisi* on the defendant.

It was contended on behalf of the appellants :—

(i) that the service of notice of the *decree nisi* was an imperative requirement under section 85 of the Civil Procedure Code and that in the absence of a compliance with this section, the Court had no jurisdiction to enter decree absolute ;

(ii) that the decree absolute entered in favour of *C.* was, therefore, a nullity and of no legal effect whatsoever and that her marriage to *C.* was a bigamous one as she was at this time legally married to *M.*

Counsel for the respondent submitted that the decree absolute was only voidable at the instance of *M.* in direct proceedings and that it was not open to collateral attack in other proceedings at the instance of third parties. He strongly relied on sections 41 and 44 of the Evidence Ordinance.

Held : (1) That the provisions of section 85 of the Civil Procedure Code apply to a decree nisi for default in a divorce action and the failure to serve notice of decree nisi on the defendant was a non-compliance with an imperative provision of the law.

(2) That as the defendant *M.*,in the divorce case was duly served with summons,though he did not appear and defend, the Court had jurisdiction to enter the decree absolute inasmuch as the service of the notice of *decree nisi*, though an imperative step, was not a condition precedent to an exercise of the jurisdiction of the Court.

(3) That the decree could have been reversed on this ground on appeal or set aside by direct action or application to Court, but it was not a nullity.

(4) That it was not open to any person to attack a decree absolute for divorce collaterally, in other proceedings, except on the grounds set out in sections 41 and 44 of the Evidence Ordinance.

Cases referred to : *Annammah* v. *Subramaniam*, (1950) 51 N.L.R. 547.
Marsh v. *Marsh*, (1945) A.C. 271 ; 62 T.L.R. 20 ; 114 L.J.P.C. 89.
Craig v. *Kanseen*, (1943) 1 A.E.R. 108 ; 168 L.T. 38 ; (1943) K.B. 256 ; 112 L.J.K.B. 228.
Woolfenden v. *Woolfenden*, (1947) 2 A.E.R. 653.
B. v. *B.*, (1961) 2 A.E.R. 398 ; (1961) 1 W.L.R. 856.
Caston v. *Caston*, I.L.R. 22 Allahabad 270 ; Indian Decisions (New Series), Vol. 9, Allahabad 1212.

Nathu Ram and Others v. *Kalian Das and Others*, I.L.R. 26 Allahabad 523 ; Indian Decisions (New Series), Vol. 2, Allahabad 351.

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Malkarjun v. *Narhari and Another*, I.L.R. 25 Bombay 337 ; 5 C.W.N. 10 ; Indian Decisions (New Series), Vol. 13, Bombay 221.
Sardarmal Jagonath v. *Aranvayal Sabhapathy Moodliar*, I.L.R. 21 Bombay 205; Indian Decisions (New Series), Vol. 11, Bombay 139.

H. W. Jayawardene, Q.C., with *M. L. de Silva* and *S. S. Basnayake*, for the objectors-appellants.

H. V. Perera, Q.C., with *U. A. S. Perera*, for the petitioner-respondent.

L. B. de Silva, J.

The petitioner-respondent, S. Cecilin Fernando, applied for letters of administration to the estate of the deceased, H. Liveris Fernando, as the widow of the deceased. The objectors-appellants, claiming to be the lawful heirs of the deceased, opposed the application of the petitioner-respondent on the ground that she was not legally married to the deceased. The basis of this claim was that she had previously married one P. A. Marthelis. She sued Marthelis for a divorce and obtained a decree nisi by default after due service of summons in D.C. Kalutara, Case No. 26390. This decree nisi was thereafter made absolute without service of notice of the decree nisi on the defendant.

The appellants are attacking the decree absolute for divorce as a nullity in these testamentary proceedings. The petitioner-respondent married the deceased after she obtained the decree-absolute for divorce and the marriage was duly registered. The appellants contend that the petitioner's marriage to the deceased was a bigamous marriage, as she was at the time of this marriage, the legally married wife of P. A. Marthelis.

It has been held in *Annammah* vs. *Subramaniam*, 51 N.L.R. 547, that the provisions of section 85 of the Civil Procedure Code apply to a decree nisi for Divorce and the service of notice of the decree nisi on the defendant was an imperative provision of the law. It was also held in that case in appeal, that summons had not been served on the defendant. On these two grounds, the Court held that the decree nisi and decree-absolute were both void and of no effect. The application to set aside the decree was made in the same case.

On this authority we hold that the provisions of section 85 of the Civil Procedure Code apply to a decree nisi for default in a divorce action and the failure to serve notice of decree nisi on the defendant in the case, was a non-compliance with an imperative provision of the law. The above decision would be binding if the defendant made an application in the divorce case to set aside the decree absolute or to have that decree absolute declared null and void on the ground that notice of decree nisi was not served on him.

The appellants contend in the present case that the decree-absolute for divorce in favour of the petitioner-respondent was *ab initio* null and void and of no legal effect whatsoever. The petitioner-respondent contends that the decree absolute was only voidable at the instance of the defendant in direct proceedings and it is not open to collateral attack in other proceedings at the instance of third parties.

In some cases the expression " null and void " has been used in a loose sense to include a decree or other act of Court which could be so declared in appropriate proceedings—(*i.e.* when the decree or act is only voidable).

The question for decision in this case is whether the decree absolute for divorce in favour of the petitioner-respondent is *ab initio* void and of no legal consequence. If so it could be attacked by the appellants in collateral proceedings.

In *Marsh* v. *Marsh*, (1945) A.C., at p. 284, the Privy Council stated—

" if the Order is void, the party whom it purports to affect can ignore it and he who has obtained it, will proceed thereon at his peril, while if it be voidable only the party affected must get it set aside. No Court has ever attempted to lay down a decisive test for distinguishing between the two classes of irregularities nor will their Lordships attempt to do so here, beyond saying that one test that may be applied is to inquire whether the irregularity has caused a failure of natural justice. There is, for instance, an obvious distinction between obtaining judgment on a writ which has never been served and one in which, as in *Fry* v. *Moore*, 23 Q.B.D. 395, there has been a defect in the service but the writ had come to the knowledge of the defendant. *Hamp-Adams* v. *Hall*, (1911) 2 K.B. 942, really depends on different considerations, it was a case depending on the application of positive law. The rule laid down in terms that before taking a certain step, namely, proceeding in default, endorsement of service must be made on the writ. If this condition is not fulfilled, the plaintiff cannot take advantage of this particular procedure,

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Mc Pherson v. *Mc Pherson*, (1936) A.C. 117, is an illustration of the rule that where there has been a defect in procedure which has not caused a failure of natural justice the resulting order is only voidable ".

Appellants strongly relied on *Craig* vs. *Kanseen*, (1943) 1 A.E.R. 108. In this case summons had not been served on the defendant before judgment was obtained. It was held that

> " failure to serve process where service of process is required, is a failure which goes to the root of our conceptions of the proper procedure in litigation. Apart from proper *ex parte* proceedings, the idea that an order can validly be made against a man who had no notification of any intention to apply for it, is one which has never been adopted in England. To say that an order of that kind is to be treated as a mere irregularity, and not something which is affected by a fundamental vice, is an argument which, in my opinion, cannot be sustained."

In that case Lord Greene M.R. said at p. 113,

> " These cases appear me to establish that an order which can properly be described as a nullity is something which the person affected by it, is entitled *ex debito justitiae* to have set aside."

In *Woolfenden* vs. *Woolfenden*, (1947) 2 A.E.R. 653, the decree absolute for Divorce was entered at the instance of the guilty defendant without service of notice on the plaintiff who obtained the decree nisi, as required by the rules. The judge held that as the husband has not complied with the statute, he could not treat the making of the decree absolute as a mere irregularity and must treat it as a nullity. He set aside the decree absolute.

In *B.* vs. *B.*, (1961) 2 A.E.R. 398, Scarman, J., declared the decree absolute for Divorce, void as the statute provided that the decree shall not be made absolute until the Court is satisfied as to the arrangements for the care and upbringing of the children. He considered the question if the decree absolute was a nullity or if it was valid till it was lawfully set aside. He held that the disobedience to the law was so fundamental that it does render the decree absolutely void.

It must be noted that in the cases cited so far, the finding that the decree was a nullity, was made in the same case, on the application of a party affected. Such an order may be made by the Court that entered the decree, by an Appellate Court, in revision, by a writ of *certiorari* or by separate action between the parties concerned for that purpose. But we are required to consider if such an order or decree is open to collateral attack in other proceedings at the instance of third parties.

If such an order or decree was void *ab initio* and had no legal consequence, it could undoubtedly be challenged collaterally in other proceedings even by third parties, as no one can possibly claim any rights from such an order or decree.

In dealing with the Collateral Impeachment of judgments—in volume 1 of " The Law of Judgments " by H. C. Black, (an American publication), 2nd edition (1902), the author states at p. 425 :

> " When the record itself discloses the fact that the Court had no jurisdiction of the controversy, or that jurisdiction of the person of the defendant did not attach in the particular case, the judgment is a mere nullity, and may be collaterally impeached, by any person interested, whenever and wherever it is brought in question. Thus when the defendant against whom a judgment was entered had no notice and that appears from the proceedings, the judgment is void on its face. It is equally true of want of jurisdiction of the subject-matter. Orders and judgments which the Court has not the power under any circumstances to make or render are null and void, and their nullity can be asserted in any collateral proceeding when they are relied on in support of a claim of right."

He further states at p. 426,

> " It is also to be remarked that there is a clear distinction between those facts which involve the jurisdiction of the Court over the parties and the subject-matter, and those quasi-jurisdictional facts, without allegation of which the Court cannot be set in motion and without proof of which a decree should not be pronounced. In the absence of the former, the judgment of the Court is void and may be attacked in collateral proceedings, while, in respect of the latter, it is conclusive, and cannot be questioned except on a direct proceeding."

In support of her position, the petitioner-respondent strongly relied on the provisions of sections 41 and 44 of the Evidence Ordinance—Section 41 (1) provides that a final judgment, order or decree of a competent Court, in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction, which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character . . . not as against any specified person but absolutely, is relevant, when the existence of any such character . . . is relevant.

Sub-section (2) provides that such judgment, or order or decree is conclusive proof—

(*a*) . . . . . .

(*b*) that any legal character to which it declares any such person to be entitled, accrued to that person at the time when such judgment, order or decree declares it to have accrued to that person.

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(*c*) that any legal character which it takes away from any such person ceased at the time from which such judgment, order or decree declared that it had ceased or should cease.

(*d*) . . . . .

The decree absolute for divorce in favour of the petitioner-respondent is undoubtedly a decree which falls within the provisions of this section. It is not disputed that the District Court of Kalutara is a competent Court to enter a decree absolute in a matrimonial cause both with respect to the parties and the subject-matter of the action.

Under section 44, any party to a suit or proceeding may show that any judgment, order or decree which is relevant under section 41 and which has been proved by the adverse party, was delivered by a Court not competent to deliver it or was obtained by fraud or collusion.

It is not the case for the appellants that there was any fraud or collusion in obtaining the decree absolute for divorce. It was argued that the Court was not competent to enter the decree absolute because the imperative provision of the law which required notice of decree nisi to be served personally on the defendant was not complied with. In other words, the case for the appellants was that the Court had no jurisdiction to enter the decree absolute and the decree was a nullity *ab initio.*

There are no local cases on this point where such a decree has been attacked collaterally as in this case.

In *Caston* vs. *Caston*, 22 Allahabad, (1900), p. 271, a decree absolute for nullity of marriage was made absolute by the High Court before the expiry of six months from the passing of the decree nisi. There was a provision in the statute that a decree nisi passed by the District Judge is subject to confirmation by the High Court. There was also a proviso that no decree nisi shall be confirmed till after the expiration of not less than six months . . . from the pronouncing thereof. It was held in that case that this proviso did not apply to the High Court. But the Court considered the effect of this proviso on the decree absolute for nullity of marriage, if it applied to a decree of the High Court.

The Court held at p. 1217 (bottom),

"The decree of the High Court . . . was a decree of the kind specified in section 41 of the Indian Evidence Act, 1872. It was a final decree made in the exercise of matrimonial jurisdiction, declaring the present respondent not to be the wife of the then respondent. If it was a decree of "a competent Court" *then however erroneous or irregular it may have been*, it is under the section conclusive proof that the respondent's previous marriage was a nullity. The effect of such conclusive proof can *only be avoided* by showing that the High Court was not 'a competent Court' within the meaning of section 41 or was 'a Court not competent to deliver' the decree within the meaning of section 44. Unless that can be proved, the decree is conclusive, as no fraud or collusion is suggested. The question then is, was the High Court's decree 'delivered by a Court not competent to deliver it ?'

It appears to me that this question must be answered in the negative. The High Court had undoubted jurisdiction in the suit for nullity of marriage. As regards the place, it possessed the local jurisdiction defined by the Act. It possessed personal jurisdiction over the parties to the suit who were persons governed by the Divorce Act, it had jurisdiction over the subject-matter or the class of suit as disclosed in the petition for declaration of nullity.

Since the High Court had jurisdiction in the suit, it follows that it had jurisdiction to consider and determine every question of law or fact arising in the suit. This would, of course, include any question of the construction of sections 17 and 20 of the Indian Divorce Act."

Having considered an illustration, the Court held,

"In such a case, surely the Court would not only be competent but bound to decide the question they raised and argued. If competent to consider and decide the question, it cannot be supposed that the Court was 'Competent' to decide it in one particular way only. This shows that even if the decision was erroneous or irregular, the Court was nevertheless competent to deliver it.

The competency or jurisdiction of the Court cannot possibly depend on whether a point which it decides has been raised or argued by party or counsel. An express decision upon the construction of sections 17 and 20 and an implied decision must stand on the same footing. The view that the decree was a nullity by reason of the proviso in section 17 could only be supported on the principle that whenever a decision is wrong in law or violated a rule of procedure, the Court must be held incompetent to deliver it. Such a principle is obviously unsustainable. In the first place it is opposed to the language of sections 41 and 44 of the Evidence Act, which were undoubtedly meant to make the decrees which they refer to, conclusive except in a very restricted class of cases. If the intention had been to make such decrees questionable on the ground of any legal defect or irregularity, very different expressions would have been used and it would be inaccurate to describe such decrees as constituting 'Conclusive proof'. In the second place, if the principle were sound, any judgment might be collaterally attacked by contending that it was in violation of such rules of procedure as the rule of *res judicata* contained in section 13 of the Code of Civil Procedure, or the rule of limitation contained in

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section 4 of the Limitation Act, 1877. These rules are expressed in language as per-emptory as that of the proviso in section 17 of the Divorce Act, but it has never been held, and it could not be held, that a Court which erroneously decrees a suit which it should have dismissed as time-barred, or as barred by the rule of *res judicata*, acts without jurisdiction and is not competent to deliver its decree. The insecurity of titles and of status arising from the adoption of such a principle is just what sections 41 and 44 of the Divorce Act were intended to prevent. The sections recognize that, given the competency of the Court, even error or irregularity in the decision is a less evil than the total absence of finality which would be the only alternative.

In the third place, the judgment of the Privy Council in *Amir Hassen Khan* v. *Sheo Baksh Singh*, 11 I.A. 237 ; 11 C. 6, shows that, even for the purposes of direct attack in revision under section 622 of the Civil Procedure Code, a decree cannot be held to have been made without jurisdiction or illegally, merely because it was wrong in law or alleged to be in violation of such rules of procedure as those contained in sections 13 and 43 of the Code.

If so, then *a fortiori* such a decree could not be regarded as made without jurisdiction for the purposes, not of direct but merely collateral attack in a subsequent suit."

It may to noted that the provisions of sections 41 and 44 of the Indian Evidence Act are the same as the provisions of these sections in our Evidence Ordinance. In the Allahabad case cited, the attack on the decree absolute was collateral.

In *Nathu Ram* vs. *Kalian Das*, 26 Allahabad 523, the decision in *Caston* vs. *Caston* was cited with approval. Judgment was entered in a time barred action on a confession to judgment. As the Court was competent to hear the suit, it was held that it was competent to decide every question, whether raised limitation or any other matter, arising in the suit and whether raised by party or counsel. If it did decide such a question wrongly, it did not thereby lose its jurisdiction and its decree, though possibly wrong, is not a nullity. The decree is a perfectly good decree until reversed in the manner pointed out by their Lordships of the Privy Council in *Malkarjun* vs. *Narhari*, (1900) I.L.R. 25 Bombay 337

In the last case, notice of execution proceedings was served on the wrong person and on his objection, the Court wrongly held that he was the right person. The Privy Council observed that—

"In so doing the Court was exercising its jurisdiction. It made a sad mistake, it is true, but a Court has jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course presented by law for setting matters right, and if that course is not taken the decision, however wrong, cannot be disturbed."

In *Sardarmal* vs. *Aranvayal Sabhapathy*, 21 Bombay 206, it was argued that an adjudication of insolvency was made by the Madras Insolvent Court on a petition that did not disclose an act of insolvency and was, therefore, a nullity. At page 212, the Court stated,

"What then is the test of whether the order of adjudication in this case was not merely wrong but an order which the Insolvent Court was not competent to make ? In *Ketlilamma* v. *Kelappen*, 12 Madras 228, it was held that the words 'not competent' in section 44 refers to a Court acting without jurisdiction and that the decree of a Court in a suit which should have been dismissed as barred by section 244 of the Code of Civil Procedure, though wrong, could not be treated as passed by a Court not competent to pass it . . . The 'competency' of a Court and its 'jurisdiction' are thus synonymous terms. They mean the right of a Court to adjudicate in a given matter. They do not mean, in a case where that right exists, the coming to a correct conclusion upon any question of fact or law arising in that matter."

It was held that the Madras Insolvent Court was competent to enter the order of adjudication.

Our attention has been invited in this case to the "Restatement of Law"—"Judgments" by the American Law Institute (1942). In chapter 2 dealing with the validity of judgments, section 4 (page 19), states : "In general, a judgment, even though it is subject to reversal or to attack in equity, is valid if

(*a*) the state . . . has jurisdiction . . .

(*b*) a reasonable method of notification is employed and a reasonable opportunity to be heard is afforded to persons affected.

(*c*) it is rendered by a Court with competency to render it.

(*d*) there is compliance with such requirements as are necessary for the valid exercise of power by the Court.

Inter-state questions do not arise in this case. The defendant in the Divorce action was served with summons and he undoubtedly had a reasonable opportunity to defend the action. This requirement of the law has been dealt with in *Marsh* vs. *Marsh* referred to earlier. There would undoubtedly be a failure of natural justice if the Court does not employ a reasonable meethod of notifying the defendant, of the suit and if he is not given a reasonable opportunity of being heard. It may be noted that in many of the English and Privy Council cases cited, there was a failure to

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issue summons or writ on the defendant. Even in the *Woolfenden* case, when the guilty party moved to have the decree nisi obtained by the wife, made absolute, he gave no notice of his application to the plaintiff. A plaintiff who obtains a decree nisi for Divorce, need not take steps to have it made absolute. So that if the guilty defendant takes that step, the issue of notice on the plaintiff was not only a requirement of the statute law but as a matter of natural justice, the plaintiff was entitled to have such notice. It is very similar to a plaintiff obtaining a judgment without service of summons on the defendant.

As stated earlier, the Court that entered the decree absolute for divorce was a Court of competent jurisdiction. It is the ground (*d*) that needs further consideration. In dealing with this question, it is stated under section 8, at page 46, of the "Judgments",

> "the judgment may nevertheless be void because of a failure to comply with requirements of the law of the State for the valid exercise of power by the Court. *The validity of the judgment depends upon whether or not the requirements are jurisdictional.*"

Dealing with defects of process, it stated,

> "Ordinarily, it is true, the failure to comply with procedural requirements, although it may make the judgment reversible, does not make it void. The result is different, however, if under the law of the State in which the judgment is rendered, the procedural requirement is essential to the exercise of jurisdiction by the Court. It is a question in each case, whether under the law of the State *the requirement is a condition precedent to the exercise of jurisdiction by the Court.*"

This aspect of the law has been considered in Hamp-Adams *vs.* Hall cited earlier.

As the defendant in the divorce case was duly served with summons but did not appear and defend the action, we are unable to take the view that the failure to serve notice of decree nisi on the defendant, though it was an imperative step in the case, was a condition precedent to the exercise of the jurisdiction of the Court. No doubt the decree could have been reversed on that ground in appeal or set aside by direct action or application to the Court but it was not a nullity. It was a decree absolute of a competent Court and the Court was competent to pass the decree in spite of the material irregularity that occurred in the case.

We hold that it is not open to any person to attack a decree absolute for divorce collaterally except on the grounds set out in sections 41 and 44 of the Evidence Ordinance.

We may incidentally mention that the defendant in the divorce case subsequently appeared in that case and acknowledged the validity of the decree and had the decree formally amended as his name was incorrectly given. This application was made in that case after the petitioner-respondent had married the deceased. We are, however, not basing our decision on any question of acquiescence or estoppel.

For the reasons set out in our judgment, we hold that the petitioner-respondent is the lawful widow of the deceased and is entitled to Letters of Administration to the deceased's estate. The appeal is dismissed with costs.

G. P. A. Silva, J.

I agree.

Appeal dismissed.

Present : **Weerasooriya, J.**

NAGAMUTTU *vs.* KUMARASEKERAM & ANOTHER

S.C. No. 61—*C.R. Jaffna*, 1610/*A* (*Rent and Ejectment*).

Argued on : 29th August, 1960.
Delivered on : 7th October, 1960.

Civil Procedure Code, sections 325, 326—*Delivery of possession to judgment-creditor by Fiscal's officer—Judgment-creditor complaining of being hindered or obstructed in taking complete and effectual possession—Hindrance or obstruction taking place two days after delivery of possession—Can the procedure laid down in these sections be invoked by judgment-creditor in the circumstances.*

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Held : That the procedure laid down in sections 325 and 326 of the Civil Procedure Code cannot be invoked by a judgment-creditor, where the hindrance or obstruction complained of takes place two days after the Fiscal had delivered possession of the land to him. In the present case the judgment-creditor had been in possession for two days before the act of re-entry by the judgment-debtor.

Per WEERASOORIYA, J.—"If the plaintiffs-respondents are not entitled to an order under section 326, a question that poses itself is what legal remedy for the recovery of possession of the land is available to them short of filing a regular action against the appellant who, even on the 11th August, 1959, was bound by the decree entered in the case and is still bound by it. In considering a similar question in *Menika* v. *Hamy*, 2 C. L. Reports 145, Lawrie, J.. expressed the opinion that a Court 'ought to have the power to compel complete and lasting obedience to its decree, and that on due proof of dispossession, a fresh writ of possession ought to issue.' While I am of the same opinion, and see no reason why a writ under section 323 of the Civil Procedure Code should not be re-issued for the removal of the appellant, the weight of authority seems to be against such a course being adopted—see *Queen* v. *Abraham* (1843-55) Ramanathan's Reports 79 and also *Pereira* v. *Aboothahir* (*supra*). Moreover, no application for the re-issue of writ under section 323 has been made by the plaintiffs-respondents."

Cases referred to : *Perera* v. *Aboothahir*, 37 N.L.R. 163.
Mohomado Lebbe v. *Ahamado Ali et al.*, 23 N.L.R. 406.
Menika v. *Hamy*, 2 Ceylon Law Reports 145.
Queen v. *Abraham*, (1843-45) Ramanathan Reports 79.

J. D. Aseervathan, for the defendant-respondent-appellant.

No appearance for plaintiffs-respondents.

WEERASOORIYA, J.

This is an appeal from an order made by the Commissioner of Requests, Jaffna, committing the appellant (the judgment-debtor) to jail for a term of 30 days under section 326 of the Civil Procedure Code and also directing that the two plaintiffs-respondents (the judgment-creditors) be put in possesson of a land called Kokkanpulam. The order was made on an application by the plaintiffs-respondents under section 325 of the Code, and is based on the Commissioner's finding that the appellant hindered the plaintiffs-respondents in taking complete and effectual possession of the land after the Fiscal's officer had delivered possession of the same to them in execution of a writ for the appellant's ejectment which had issued under the decree entered in the action in which the present proceedings arose. The action was one for the cancellation of a lease of the land which the plaintiffs, as lessors, had entered into with the appellant, and for ejectment.

The writ was executed on the 8th August, 1957, by the Fiscal's officer placing the 1st plaintiff in possession of the land at a time when the appellant was not present. But the appellant re-entered the land (which was an open one) on the 11th August, 1959, and has been in occupation of it since then.

In submitting that the order appealed from was wrongly made, learned counsel for the appellant relied on the case of *Pereira* vs. *Aboothahir*, 37 N.L.R. 163. In that case the purchaser of certain premises at an execution sale—under section 287 (2) of the Civil Procedure Code such a purchaser is placed in the same position as a jugment-creditor—obtained a writ for recovery of possession of the premises. The Fiscal in execution of the writ ejected from the premises a person who was in occupation and gave the purchaser complete and effectual possession of the same. The door of the premises was locked and the key handed by the Fiscal to the purchaser who elected to take the key and go away. Two hours later the person ejected succeeded in re-entering and getting into occupation of the premises. Garvin, J., in a judgment with which Maartensz, A.J., agreed, held that in these circumstances sections 325 and 326 had no application as the interruption of possession took place *after* the Fiscal had already given complete and effectual possession.

The 1st plaintiff in his evidence at the inquiry under section 326 stated that he remained in effectual possession of the land for two days after he was given possession by the Fiscal's officer (on the 8th August, 1959). In view of this admission it is clear that the subsequent re-entry by the appellant on the 11th August, 1959 did not amount to a hindrance of the kind contemplated in section 325, as the section specifically, refers to hindrance offered to the judgment-creditor in taking complete and effectual possession.

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Although the case of *Pereira* vs. *Aboothahir* (*supra*) was cited to the Commissioner, in making the order appealed from he seems to have acted on the strength of an observation of Schneider, J., in *Mohomado Lebbe* v. *Ahamado Ali et al.*, 23 N.L.R. 406, that the " hindrance or obstruction should be at the time of giving of possession or shortly thereafter. " In another part of his judgment in that case Schneider, J., stated that it is impossible to take the view that section 325 was intended for a case where the hindrance or obstruction did not follow " very shortly after ". But even if the procedure laid down in sections 325 and 326 cannot be invoked by a judgment-creditor unless the hindrance or obstruction is either at the time of giving of possession or shortly (or very shortly) thereafter, I do not think that those conditions can be said to be satisfied where the hindrance or obstruction was two days afterwards, as in the present case. In so far as the observations of Schneider, J., are in conflict with the decision in *Pereira* v. *Aboothahir* (*supra*) the latter case, being a judgment of a bench of two Judges, was binding on the Commissioner, even as it is binding on me.

If the plaintiffs-respondents are not entitled to an order under section 326, a question that poses itself is what legal remedy for the recovery of possession of the land is available to them short of filing a regular action against the appellant who, even on the 11th August, 1959, was bound by the decree entered in the case and is still bound by it. In considering a similar question in *Menika* v. *Hamy*, 2 C. L. Reports 145, Lawrie, J., expressed the opinion that a Court " ought to have the power to compel complete and lasting obedience to its decree, and that on due proof of dispossession, a fresh writ of possession ought to issue. " While I am of the same opinion, and see no reason why a writ under section 323 of the Civil Procedure Code should not be re-issued for the removal of the appellant, the weight of authority seems to be against such a course being adopted —see *Queen* vs. *Abraham* (1843-55) Ramanathan's Reports 79, and also *Pereira* v. *Aboothahir* (*supra*). Moreover, no application for the re-issue of writ under section 323 has been made by the plaintiffs-respondents.

The order appealed from is set aside and the application made by the plaintiffs-respondents under section 325 is dismissed with costs in both Courts.

Appeal allowed.

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

M. B. HENDRICK *vs.* B. M. A. PERERA

Application for the Stay of Proceedings in C.R. Colombo, Case No. 81411, *and for the Transfer of the said Case to the District Court of Colombo.*

S.C. Application, No. 294/1962

Argued on : 14th September, 1962.
Decided on : 24th September, 1962.

Courts Ordinance (*Cap.* 6), *section* 79—*Action for rent and ejectment filed in the Court of Requests—Claims in reconvention and plea of " jus retentionis " by defendant—Application to Supreme Court by defendant for an order transferring such action to the District Court on the ground that the Court of Requests had no jurisdiction—Circumstances in which such a transfer will be ordered.*

The plaintiff filed action in the Court of Requests for ejectment of the defendant, averring that the defendant had become his tenant on a monthly tenancy of certain premises at a rent of Rs. 70/- per month and that he had given the defendant notice to quit the premises but that the defendant continued to remain in wrongful and unlawful occupation. In his answer the defendant stated *inter alia* that he had given money to the plaintiff for the construction of a bakery on these premises and that he had spent a further sum of Rs. 7000/- on repairs and improvements. He claimed to be entitled to a jus retentionis for this aggregate amount. Thereafter the defendant (petitioner) made the present application to the Supreme Court for the transfer of the case to the District Court on the ground that the Commissioner of Requests would have no jurisdiction to entertain his claim in reconvention.

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Held : (1) That the circumstances of the present case did not conclusively exclude the possibility that the defendant's claim to a *jus retentionis* was justified. Thus the claim and counter-claim in the present case were intimately connected in that each party claimed a right to possession of the land.

(2) That the Supreme Court would, in these circumstances, order the transfer of an action filed in the Court of Requests, to the District Court.

Case referred to : *Noorbhoy* v. *Husair*, (1959) 60 N.L.R. 398.

N. S. A. Goonetilleke, for the defendant-petitioner.

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

H. N. G. FERNANDO, J.

This is an application for the transfer to the District Court of an action instituted against the petitioner as defendant in the Court of Requests of Colombo.

The plaint to the action averred that the defendant had become the tenant of the plaintiff on a monthly tenancy of certain premises at Maharagama at a rent of Rs. 70/- per month. Plaintiff there stated that he had given notice to the defendant to quit the premises on 30th November, 1961, but that the defendant still continues in wrongful and unlawful occupation, and therefore sues for ejectment. In the answer the defendant pleaded, *inter alia*, that the parties had in November, 1952, entered into a notarial agreement under which the defendant had paid a total sum of Rs. 4,150/- to the plaintiff, and that he spent that amount in constructing a bakery and boutique on the plaintiff's land, which premises were let to him at Rs. 70/- per month. He further states that he had spent a further sum of Rs. 7,000/- on repairs and improvements and claimed to be entitled to a *jus retentionis* for this aggregate amount of Rs. 11,150/-. The present application for a transfer of the proceedings is made on the ground that the Commissioner of Requests would have no jurisdiction to entertain the petitioner's claim in reconvention.

One of the matters urged by counsel for the respondent is that the claim in reconvention is not made in good faith. It is argued that since the defendant originally provided money and entered into occupation on a notarial lease, it is unlikely that he would subsequently have spent further moneys without again entering into a notarial transaction. But it would seem that, in fact, the defendant did make an advance additional to that covered by the agreement of 1952 ; that agreement only provided for an advance of Rs. 3,600/- whereas the plaintiff in his affidavit filed in this Court refers to a further loan of Rs. 550/- and admits that in consideration of that further loan the defendant occupied the premises for a period of six months after the expiration of the term of five years agreed to in the agreement. The circumstances do not, therefore, conclusively exclude the possibility that there were further transactions which might justify the defendant's claim to a *jus retentionis*. Counsel has also argued that neither in the answer nor in the affidavit in this Court did the defendant specifically state that the additional sum of Rs. 7,000/- was spent in pursuance of an agreement between the parties. If, it is said, there is no such agreement, there would in law be no *jus retentionis*. Indeed, the fact that there had been some agreement additional to that provided for by the transaction of 1952 is indicated by the fact that the defendant had actually been in possession of the premises for something over seven years. In these circumstances, I am unable to say upon the material before me that the defendant's claim is not made in good faith, and that he would not be able to satisfy a Court that he had, in fact, made improvements with the consent of the plaintiff.

It seems to me that the circumstances of this case fall within the third category of cases referred to in the judgment of Sinnetamby, J., in *Noorbhoy* v. *Husair*, (60 N.L.R. 398, at 401) :

> " (3) When claim and claim in reconvention are intimately connected and right to possession is involved in both claims (*Jinasena* v. *Moosajee*) ; "

The two claims in this case are intimately connected in that each party claims a right to possession of the land. If the plaintiff's claim were to be investigated without reference to the counter-claim, the defendant would have to surrender possession even though he may well be in a position to satisfy a Court of facts which would entitle him to the *jus retentionis*. I would, therefore, allow the application for the transfer with costs fixed at Rs. 157.50.

Application allowed.

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

S.C. 2—*Quazi Court* 3829.

MOOSALEBBAI *vs.* ASIAUMMA

Argued and decided on : 28th June, 1962.

Maintenance—Illegitimate child—Jurisdiction of Quazis to grant maintenance—Sections 2 *and* 47 *of Muslim Marriage and Divorce Act* (*Chapter* 115).

Held : That a Quazi has no jurisdiction to hear and determine an application for maintenance in respect of an illegitimate Muslim child whose mother has at no time been married to the alleged father. The provisions of section 47 (1) (*c*) of the Muslim Marriage and Divorce Act, Chapter 115, should be read with section 2 of the said Act.

Followed : *Jiffry* v. *Nona Binthan*, 62 N.L.R. 255; LVIII C.L.W. 49
Ismail v. *Latiff*, 64 N.L.R. 172.

Referred to : *Aliyar Lebbe* v. *Patumma*, 63 N.L.R. 571.

M. S. M. Nazeem with *M. T. M. Sivardeen*, for the petitioner-appellant.

E. R. S. R. Coomarasamy with *H. Mohideen* and *H. Ismail*, for the respondent-respondent.

SANSONI, J.

The applicant in this case claimed that she had been kept by the respondent as his mistress for two years and that she had a child by him. She applied to the Quazi to order the respondent to pay her maintenance in respect of that child.

She obtained such an order from the Quazi. The respondent appealed to the Board of Quazis, but his appeal was dismissed. He has now come to this Court, and it is contended for him that the Quazi had no jurisdiction, in the circumstances of this case, to entertain a claim for maintenance made by the applicant on behalf of this illegitimate child.

The question involves a consideration of sections 2 and 47 of the Muslim Marriage and Divorce Act, Cap. 115. Section 47 (1) (*c*) gives power to a Quazi to inquire into and adjudicate upon any claim for maintenance by or in behalf of a child whether legitimate or illegitimate, but that power is subject to the provisions of section 2. Under that section the Act applies only to the marriages and divorces, and other matters connected therewith, of those inhabitants of Ceylon who are Muslims.

It is submitted for the appellant that although this is a claim for maintenance on behalf of an illegitimate child, it has nothing to do with a marriage or divorce of the parties, who are Muslims. We accept this argument. A similar argument was urged before T. S. Fernando, J., in the case of *Jiffry* v. *Nona Binthan*, (62 N.L.R. 255). The learned Judge there held that a Quazi has no jurisdiction to hear and determine an application for maintenance in respect of a child whose mother has at no time been married to the alleged father. He laid stress on the provisions of section 2 of the Act. He also pointed out that section 47 (1) (*c*) can apply in certain cases where the child is illegitimate and a marriage is also involved. We are informed by Mr. Sivardeen and Mr. Coomarasamy that a similar view was taken by Sinnetamby, J., in S.C. 618/'61/M.C., Colombo, 31133/A.*

On behalf of the respondent our attention was drawn to the case of *Aliyar Lebbe* v. *Patumma*, (63 N.L.R. 571). That was also a case of an unmarried mother who made an application for maintenance in respect of her illegitimate child. She failed because the matter was held to be *res judicata*. There is nothing in the judgment about the question of jurisdiction, and we cannot get any assistance from that judgment on this question.

We, therefore, allow the appeal, and set aside the orders made by the Quazi and the Board of Quazis. We make no order as to costs.

G. P. A. SILVA, J.

I agree.

Appeal allowed.

* 64 N.L.R. 172

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Present : **Herat, J.**

PIYASENA *ALIAS* SIRIPALA & OTHERS *vs.* S. I. POLICE, BOMIRIYA*

S.C. 1202-1207/1961—*M.C. Colombo*, 29550/*B.*

Argued and decided on : 28th May, 1962.

Penal Code—Charge of mischief thereunder—Accused entitled to use of footpath—Complainant erecting fence encroaching on such footpath—Fence cut down by accused—Accused convicted and bound over under section 325 *of Criminal Procedure Code—Appeal—Is there a right of appeal from such order—Revisionary powers of Supreme Court—Can such conviction be sustained.*

The accused-appellants were admittedly entitled to the use of a footpath. The complainant erected a fence encroaching on it, thereby rendering it narrower. The accused-appellants cut down the newly erected fence and were charged with mischief. The learned Magistrate convicted them, although he found that the new fence encroached on the footpath and dealt with them under section 325 of the Criminal Procedure Code. The accused appealed. On a preliminary objection being taken that there was no right of appeal from an order made under section 325 —

Held : That there is no right of appeal from an order under section 325 of the Criminal Procedure Code.

Acting in revision :—

Held further: That as the footpath was encroached upon, the accused as lawful users were entitled in law to remove the encroachment. An act done in the exercise of a legal right cannot become wrongful because there may be some sense of spite against the complainant.

Cases referred to : *Cassim* v. *Abdurasak*, 38 N.L.R. 428; VIII C.L.W. 75
Culantaivalu v. *Somasundram*, 2 Balasingham's Reports 122

Nimal Senanayake, for the accused-appellants.

H. B. White, C.C., for the Attorney-General.

HERAT, J.

The facts of this case are as follows : The virtual complainant has land which is bounded by a footpath. There is a fence separating the complainant's land from this footpath. There is also another fence on the other side of the footpath which separates the land of a third party. The complainant's fence came down and he re-erected it. In doing so, as the learned Magistrate has found, he encroached upon the footpath with the result that the width of the footpath was narrow. The accused-appellants admittedly are entitled to the use of this footpath. They cut down the newly erected fence. They were charged for committing mischief by the complainant and the learned Magistrate, although he found that the re-erected fence did encroach on the footpath, convicted the accused-appellants. He said it was for the accused-appellants to prove that they acted in the *bona fide* assertion of a right. The learned Magistrate has dealt with the accused-appellants by binding them over under section 325 of the Criminal Procedure Code.

Mr. Basil White, Crown Counsel for the Attorney-General, has taken up the objection that there is no right of appeal from an order made under section 325 as there is no finality in that order. He refers to the judgment of Sir Francis Soertsz, in 38 N.L.R., page 428, and also the judgment of Chief Justice Layard reported in 2 Balasingham's Reports, at page 122. Learned counsel for the accused-appellants refers to certain other judgments to the contrary. I would, however, with respect follow the judgment of the late Sir Francis Soertsz and I hold that these accused-appellants have no right of appeal.

But this is not an end to the matter. The circumstances of this case are such that I feel it is one in which the revisionary power of this Court should be exercised. Acting in revision and considering the finding of the learned Magistrate that the newly-erected fence did constitute an encroachment on the footpath and an invasion of the rights of the accused-appellants as users of that footpath, I think that one element of the offence of mischief has not been established, namely, that the damage done to the complainant's property was wrongful. As the footpath was encroached upon, the lawful users thereof were, in law, entitled and had the right to remove the encroachment.

*For Sinhala translation, see Sinhala section, vol. 4, part 7, p. 25.

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This, the accused-appellants did and certainly it constituted the exercise of a right. If so, I cannot see how the damage done in removing the encroachment could be considered wrongful.

Learned Crown Counsel points out to a circumstance in this case showing that there was ill-feeling between the complainant on the one hand and the accused-appellants, on the other, over the failure of one party to join some society of which the others were members. There may have been this ill-feeling which functioned as a motive for what the accused-appellants did but at most it is a secondary motive. If they did act in exercise of a legal right, I fail to see how their act can become wrongful although they may have had some sense of spite or anger against the complainant for some other reason.

Acting in revision, I set aside the convictions and acquit the accused on both counts. There cannot be the other count of unlawful assembly existing if they had met not to commit an offence but to exercise a right which the law gave them.

Accused acquitted.

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

COMMISSIONER OF INLAND REVENUE *vs.* DAVITH APPUHAMY

S.C. No. 10/60—*Income Tax Case, No. BRA*-283.

Argued and decided on : July 10, 1961.

Income Tax Ordinance (*Cap.* 188), *section* 9 (1)—*Business purchased by assessee—Litigation between assessee and certain others over ownership of such business—Are legal expenses so incurred deductible in ascertaining assessee's profits from such business for taxation purposes.*

The assessee purchased a business known as the Kandy Ice Company on 16th August, 1949, on a deed of transfer executed on that date. A proposal was thereafter made as between the assessee and certain other persons to form a limited liability company to take over the Kandy Ice Company and its assets. However, even though contributions had been made towards the capital of the Company to be so formed, the plan was abandoned owing to differences of opinion between the prospective shareholders. Subsequently there was litigation between the assessee and some of these other persons, who took up the position that the assessee had, when he purchased the Kandy Ice Company, been acting on behalf of a syndicate of which they were members. They sought a declaration in these terms and also asked for their proportionate share of the profits from the business. This case was ultimately settled and a sum of money paid to the claimants by the assessee who was acknowledged to be sole owner of the business.

The assessee was assessed for taxation purposes in respect of the profits of the Kandy Ice Company from the date of his purchase of the business. He then claimed a deduction in respect of legal expenses incurred by him on account of this case. This claim was disallowed both by the assessor and the authorised adjudicator but on appeal to the Board of Review the claim was upheld.

Upon a case being stated for the opinion of the Supreme Court at the instance of the assessor :—

Held : That these legal expenses of the assessee were deductible under section 9 (1) of the Income Tax Ordinance in ascertaining the assessee's profits from his business known as the Kandy Ice Company.

V. Tennakoon, Deputy Solicitor-General, with *M. Kanagasunderam, Crown Counsel,* for the assessor-appellant.

S. Ambalavanar with *C. Pathmanathan,* for the assessee-respondent.

BASNAYAKE, C.J.

The following are the material facts in the case stated :

By deed No. 114 of 16th August, 1949, the assessee purchased the business known as the Kandy Ice Company. It would appear that after he purchased the business a proposal was made to form a limited liability Company for the purpose of acquiring the Kandy Ice Company and its assets. Contributions towards the capital of the Company were made but in consequence of certain differences between the prospective shareholders the plan was abandoned. Three of those who contributed sued the assessee and some others in D.C., Kandy, Case No. X. 1233, in which they sought a declaration that—

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"(*a*) the 1st defendant (the assessee) was acting throughout for and on behalf of a syndicate in the transaction between the 1st defendant and the owners of the Kandy Ice Co., and that the plaintiffs and 1st to 4th defendants were entitled to all the benefits and advantages resulting from the said transaction ;

"(*b*) accounts be taken of the said business as from 20.10.45 and that Court do order the 1st defendant to render accounts to pay to the said syndicate such sums as the Court finds was the profits earned by the said business in proportion to the sums contributed by the members of the syndicate."

In his answer the assessee stated :

"(*a*) the business known as the Kandy Ice Co. with all its assets movable and immovable was purchased by the 1st defendant ;

"(*b*) that a proposal was made by certain persons to form a limited liability company for the purpose of acquiring from the 1st defendant the said business and its assets. Contributions were made towards the share capital of the proposed Company but in consequence of certain differences and disagreements among the prospective shareholders this proposal abandoned."

On 17th March, 1950, the action was dismissed on certain preliminary issues. The plaintiffs successfully appealed and a re-trial was ordered. At the re-trial the following settlement was reached :—

"It is agreed that the 1st defendant is the sole owner as from 1st October, 1949, of all the assets movable and immovable including the goodwill of the business which was and is called and known as "The Kandy Ice Co." which forms the subject-matter of this action. The plaintiffs state that they have not had nor have any right title or interest or claim to or in the assets or goodwill of the business known as the Kandy Ice Co. The 1st defendant agrees to pay to the plaintiffs a sum of Rs. 76,500/-. The 1st defendant reserves his right if any, to claim a sum of Rs. 6,077.70 which he alleges is due from the 3rd plaintiff and a further alleged claim of Rs. 891.45 as against the 4th plaintiff as administrator of the estate of the deceased 2nd plaintiff. The 3rd and 4th plaintiffs do not admit these alleged claims. Both parties admit that they have no other claims against each other in respect of this transaction either collectively or individually.

"The plaintiffs are entitled to withdraw from Court the money deposited in Court to the credit of this case by the 1st defendant together with any dividends and interest declared thereon up to date in reduction '*pro tanto*' of the said sum of Rs. 76,500/-. The balance is to be paid within six months from today without any interest.

"Writ to issue in the event of non-payment of the balance with costs of execution, if any.

"Each party to bear his own costs of the case up to date."

The assessee who was from the date of his purchase of the Kandy Ice Company being assessed in respect of his profits from the business claimed a deduction of the following legal expenses incurred by him in D.C., Kandy, Case No. X. 1233:—

Year ending 31.3.1953	..	..	Rs. 3,260
Year ending 31.3.1954	..	..	„ 1,100
Year ending 31.3.1955	..	..	„ 2,695

The assessor disallowed his claim. The authorised adjudicator upheld the decision of the assessor. On an appeal to the Board of Review the claim of the assessee was upheld. The Board came to the following decision :—

"We are of opinion that the legal expenses incurred by the appellant in D.C. Kandy, X 1223, is an allowable deduction in computing his income from the said business. The appeal is allowed and the case is remitted to the Commissioner of Inland Revenue to revise the assessment for the years 1953/54, 1954/55 and 1955/56 by allowing a deduction of the legal expenses incurred by the appellant in D.C., Kandy, X 1223."

We agree with the decision of the Board that the legal expenses of the assessee are deductible under section 9 (1) of the Income Tax Ordinance in ascertaining the assessee's profits from his business the Kandy Ice Company.

We confirm the assessment determined by the Board. The assessee is entitled to the costs of his appeal and a refund of the sum paid under subsection (1) of section 74 of the Income Tax Ordinance.

H. N. G. Fernando, J.

I agree.

Appeal dismissed.

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

WIJEGUNEWARDENE *vs.* VELIN APPUHAMY

In the Matter of an Appeal under the Workmen's Compensation Ordinance 19 *of* 1934.

S.C. 3/1956—*Workmen's Compensation Case, No. C* 3/151/54.

Argued on : 10th June, 1957.
Decided on : 19th June, 1957.

Workmen's Compensation Ordinance (*Cap.* 117 *of the Legislative Enactments,* 1938 *Ed.*)—*Claims for compensation thereunder—Rules of evidence to apply at inquiry into such application—Burden of proof to be on applicant—Evidence Ordinance, section* 3.

Held: (1) That officers who deal with claims for compensation under the Workmen's Compensation Ordinance are exercising judicial functions and are bound by the rules of evidence.

(2) That in the present case, as the burden was on the applicant to establish that the deceased was employed as a "workman" and he failed to establish that fact, there was no burden on the respondent to prove that the deceased was an independent contractor.

(3) That upon the evidence available in the present case, the inference that there was a contract of service or employment is only as equally justifiable as the inference that there was a contract for work to be "independently" performed, with the result that neither position has been "proved". The applicant had, therefore, failed to discharge the burden which lay upon him.

H. W. Jayawardena, Q.C., with *P. Ranasinghe*, for the respondent-appellant.

Sir Ukwatte Jayasundera with *Sunil K. Rodrigo*, for the applicant-respondent.

H. N. G. FERNANDO, J.

I feel constrained, in view of the manner in which the Assistant Commissioner has considered this claim and one or two others which recently came to my notice, to point out that officers who deal with such claims are exercising judicial functions and are bound by the rules of Evidence. One such elementary rule set out in section 3 of the Evidence Ordinance is that "a fact is said to be proved when, *after considering the matters before it*, the Court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists."

In the present case the burden was on the applicant to establish that the deceased was employed as a "workman", and if he failed to establish that fact there was no burden on the respondent to prove that the deceased was an "independent contractor". The Assistant Commissioner reached his finding that the deceased was a workman by deciding to accept the evidence of the applicant. But there is nothing in the evidence of the applicant to support that finding : all that the applicant knows is that there was an arrangement for the deceased to attend to some repairs to the respondent's lorry. The applicant "did not discuss the mode of payment or the amount" with the respondent, nor does he know, even from hearsay, "the precise nature of the agreement" between the deceased and the respondent. The deceased apparently "worked for various people" and "also worked on a daily wage" : the deceased took his own tools when he went to attend to the respondent's lorry. Upon the available evidence, the inference that there was a contract of service or employment is only as equally justifiable as the inference that there was a contract for work to be "independently" performed, with the result that neither position has been "proved". That being so, the applicant failed to discharge the burden which lay upon him, and counsel for the respondent rightly decided to call no evidence.

The appeal is allowed and the order appealed from is set aside. The applicant must pay to the respondent the taxed costs of proceedings before the Assistant Commissioner and of this appeal.

Appeal allowed.

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Present : **H. N. G. Fernando, J., and L. B. de Silva, J.**

BANK OF CEYLON *vs.* LIVERPOOL MARINE & GENERAL INSURANCE CO., LTD.

S.C. 39/60 *(F)—D.C. Colombo, Case No.* 32412/*M.*

Argued on : 20th, 21st and 22nd November, 1962.
Decided on : 6th December, 1962.

Abatement of action—Case fixed for trial—Joint motion to take case off trial roll as negotiations for settlement in progress—Court abating action " ex mero motu " owing to lapse of over 12 *months since last order without plaintiff taking any steps to prosecute action—Is the Court empowered to make such order—Civil Procedure Code, sections* 402, 403.

On a joint motion filed by the parties to this action, Court made order taking the case off the trial roll on the ground *inter alia* that negotiations for settlement were in progress, Later the case was ordered to be laid by. After a period of over twelve months since the last order, the Court, *ex mero motu* and without notice to the plaintiff, abated the action as the plaintiff had failed to take any steps to prosecute the action. The plaintiff subsequently applied for the setting aside of the order of abatement, but the application was refused. The plaintiff appealed.

Held: (1) That the order of abatement was wrongly entered by the learned District Judge as there was no step that was necessary to prosecute the action that the plaintiff was required to take.

(2) That as the order of abatement was entered without any notice to or knowledge of the plaintiff, it was open to the plaintiff to question the validity of the order in appropriate proceedings in the same case at any time. He was not bound to appeal from the order of abatement under the provisions of the Civil Procedure Code relating to appeals notwithstanding lapse of time.

Cases referred to : *Lorensu Appuhamy* v. *Paaris,* (1908) 11 N.L.R. 202.
Suppramaniam v. *Symons,* (1915) 18 N.L.R. 229.
Marikar v. *Bawa Lebbe,* (1892) 1 S.C.R. 240,
Samsudeen v. *Eagle Star Insurance Company,* (1962) 64 N.L.R. 372.

S. Nadesan, Q.C., with *S. J. Kadirgamar* and *K. N. Choksy,* for the plaintiff-appellant.

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

L. B. DE SILVA, J.

On a joint motion filed by the parties that this be taken off the trial roll as—

(*a*) The case was very difficult and needed a great deal of preparation for trial, and

(*b*) negotiations for a settlement were then in progress, the Learned District Judge on 7th October, 1955, allowed the motion. The case was called on 28th November, 1955, and was laid by.

On 7th December, 1956, the Court acting *ex mero motu,* abated the action as a period exceeding twelve months had elapsed since the last Order without the plaintiff taking any steps to prosecute this action. The plaintiff had no notice of the Order contemplated or taken by the Court at that time.

Later the plaintiff moved to revoke the proxy granted to his proctor and on 4th January, 1958, the Court made Order to take steps to vacate the Order of abatement. On 29th September, 1959, the plaintiff filed papers to set aside the Order of abatement.

That application was refused by the learned District Judge and the plaintiff has appealed to this Court. The main question for decision on this appeal was whether the learned Judge was empowered under section 402 of the Civil Procedure Code, to enter an Order of abatement in this case.

It was argued before this Court that the Court was empowered to enter such an Order under section 402 only in cases where the plaintiff had failed to take any step to prosecute the action for the prescribed period *where any such step was necessary to be taken by him.*

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The counsel for the appellant relied on the judgment of Wood Renton, J., in *Lorensu Appuhamy* v. *Paaris*, (1908) 11 N.L.R. 202. Referring to section 402, Wood Renton, J., stated, " I think that when that section uses the word " necessary ", it means " rendered necessary by some positive requirement of the law ". We ought not to interpret it as if the section ran " without taking any steps to prosecute the action which a prudent man would take under the circumstances ".

Once a case is laid by a view to a settlement, there is no requirement under the Civil Procedure Code or in terms of any order of Court, on the plaintiff to take any steps to prosecute the action.

The counsel for the respondent relies on the later decision of Wood Renton, C.J., in *Suppramaniam* v. *Symons*, (1915) 18 N.L.R. 229. In that case on the application of the parties, the case was struck off the Roll, with a view to a settlement. As a period of one year had elapsed since that order without the plaintiff taking steps to prosecute the action, the learned District Judge entered an order of abatement.

Wood Renton, C.J., cited the case of *Marikar* v. *Bawa Lebbe*, (1892) 1 S.C.R. 240, and held that it was the duty of the plaintiff to move that the action be restored to the Roll and on such a motion, it is within the discretion of the District Judge to make an order for its abatement. His earlier decision in *Lorensu Appuhamy* v. *Paaris*, (1908) 11 N.L.R. 202, had not been brought to his notice nor had he considered the provisions of section 402 of the Civil Procedure Code.

As a result of these two decisions, conflicting views had been adopted on the question whether an order of abatement may be validly entered after a case had been laid by on the ground that the plaintiff had not taken steps to prosecute the action within the prescribed time. This question was considered very carefully in a recent judgment of this Court by Dr. Tambiah, J., in *Samsudeen* v. *Eagle Star Insurance Co., Ltd.*, S.C. Minutes in S.C. 165 F/1959 D.C. Colombo, 27306/M of 23.1.62,* with reference to all the relevant decisions.

In that case, T. S. Fernando, J., and Tambiah, J., upheld the view taken in *Lorensu Appuhamy* v. *Paaris*, (1908) 11 N.L.R. 202. We see no reason to depart from the view taken in that case. We hold that the order of abatement was wrongly entered by the District Judge in this case as there was no step that was necessary to prosecute the action, which the plaintiff was required to take.

It was further argued on behalf of the respondent that once an order of abatement was entered under section 402, the only course open to the plaintiff was to make an application under section 403 to set aside the order within reasonable time. The appellant contended that he was entitled to have the order of abatement set aside apart from the provisions of section 403, on the ground that it was not lawfully entered under section 402.

The order of abatement was entered without any notice to or knowledge of the plaintiff. Though the Court has acted *ex mero motu*, it is similar to any *ex parte* order made by Court as the plaintiff had no opportunity to show cause against it.

We, therefore, hold that it was open to the plaintiff to question the validity of the order in appropriate proceedings in the same case at any time and that he is not bound to appeal from the order of abatement under the provisions of Chapter LX of the Civil Procedure Code for Appeals notwithstanding lapse of time.

We set aside the order dismissing the plaintiff's application with costs and allow this appeal. We set aside the order of abatement. The appellant is entitled to the costs of this appeal. The costs of the plaintiff's application in the District Court will abide the result of the case.

H. N. G. Fernando, J.
I agree.

Appeal allowed.

*64 N.L.R. 372

END OF VOLUME LXII

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පිටපත් ලබාගත හැක්කේ නො: 50/3, සිරිපා පාර, හැව්ලොක් වටුම—කොළඹ 5, යන ස්ථානයෙනි.

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අලුවිහාරේ එ. සියම්පිල්ලෙ 1

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චාලි එ. ද සිල්වා 4

පකීර් එ. අබ්දු 2

පියදස එ. රජින 24

පියසේන නොහොත් සිරිපාල සහ තවත් අය එ. බෝමිරියේ උප පොලිස් ඉන්ස්පැක්ටර් 25

පීරිස් එ. ගුණවර්ධන 2

රජින එ. පුංචිබණ්ඩා සහ තවත් අය 3

ලංකා ගමනාගමන මණ්ඩලය එ. සමස්ත ලංකා මෝටර් සේවක සමිතිය ... 9

ලයිරිස් අප්පු එ. තෙන්නකෝන් කුමාරිහාමි සහ තවත් අය 11

සිල්වා එ. කෙහෙල්ගමුවේ අත්ථදස්සි ස්ථවිර 5

ෂෙල් සමාගම එ. පතිරන 19

සහීඩ් එ. වත්තෙගම සෞඛ්‍ය පරීක්ෂක තැන 20

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අපරාධ නඩු විධාන සංග්‍රහය.

අපරාධ නඩුවිධාන සංග්‍රහයේ 202 සහ 217 වන ඡෙද—චෝදනා පත්‍රය—දිස්ත්‍රික් උසාවියේ නඩු-වකදී රජයේ අධිනීතිඥ තැන විසින් චෝදනා කීපයකින් එකක් අස් කිරීම—නඩු විභාගයෙන් පසු චූදිතයා අනිත් චෝදනාවලට වරදකරුවීම—අපරාධ නඩු විධාන සංග්‍රහයේ 172 ඡෙදයට අනුව චෝදනාව වෙනස්කර නොමැති බව—මෙසේ චෝදනාවක් අස්කිරීමෙන් ඇති වන ප්‍රතිඵලය.

දිස්ත්‍රික් උසාවිය ඉදිරියේ චෝදනා අටක් ඉදිරිපත් කොට මිනිසුන් දෙදෙනෙකුට විරුඩව නඩු පවරන ලදුව රජයේ අධිනීතිඥතැන විසින් නඩුවේදී එක් චෝදනාවක් අස්කර ගන්නා ලදි. අපරාධ නඩු විධාන සංග්‍රහයේ 172 වන ඡෙදයට අනුව චෝදනා පත්‍රය වෙනස් නොකොට ඉතිරි චෝදනා උඩ නඩුව විභාගවී විත්තිකරුවෝ වරද කරුවෝ වූයෙන් ඇපැල් පෙත්සමක් ඉදිරිපත් විනි.

තීන්දුව : එක් චෝදනාවක් අස්කර ගැනීමෙන් ඇතිවන ප්‍රතිඵලය නම් චෝදනා පත්‍රය අපරාධ නඩු විධාන සංග්‍රහයේ 202 වන ඡෙදයේ පැණවි නොමැති පරිදි වෙනස්වීමයි. එම නිසා එසේ වෙනස් වූනු චෝදනා පත්‍රය අනුව කෙරුණු නඩු විභාගය අක්‍රියාකාරි වීමේ හේතුවෙන් විත්තිකරු-වන් නිදහස් විය යුතුය.

පියදස එ. රජින 24

අපරාධ නඩු විධාන සංග්‍රහයේ 325 වෙනි ඡෙදය.

"දණ්ඩනීති සංග්‍රහය" යට බලන්න.

අපරාධ නඩු සංවිධානය.

අපරාධ නඩු සංවිධානය—ශ්‍රෙෂ්ඨාධිකරණයේ අපරාධ නඩු අංශයේ ඇපැල් අධිකරණයේ ඇපැල් නඩුව නිමවන තුරු ඇප ඉල්ලා සිටීම—ඇප දීමේදී සැලකිල්ලට භාජන කළ යුතු කරුණු.

තීන්දුව : (අ) කෙටි හිර දඩුවමක් නියම කර තිබීම ; (ආ) ශ්‍රෙෂ්ඨාධිකරණයේ අපරාධ නඩු අංශයේ ඇපැල් අධිකරණයේ මීලඟ වාරයේ විභාග කිරීමට නියමිත නඩු ලැයිස්තුවට ඔවුන්ගේ ඇපැල් නඩු ඇතුලත් නොවීම ; (ඇ) ඔවුන්ගේ ඇපැල නිශ්ප්‍රභා වුවහොත් පෙත්සම කරුවන් සැඟවීමට තැත් කරනු ඇතැයි විශ්වාස කිරීමට හේතු නැතිවීම. මේ අනුව පෙත්සම් කරුවන් ඇප පිට නිදහස් කළ යුතුය.

රජින එ. පුංචි බණ්ඩා සහ තවත් අය ... 3

ඇප.

"අපරාධ නඩු සංවිධානය" යට බලන්න.

ඉඩම් හිමි සහ බදුකරු.

"වන්දි" යට බලන්න.

කාර්මික ආරවුල් පණත

කාර්මික ආරවුල් පණත—කම්කරුවකු අස්-කිරීම—සේවායෝජක තැන පක්ෂපාතීත්වයෙන් ක්‍රියා කළ බැව් කියා කම්කරු උසාවියෙන් පිළි-සරණ යදිමින් දුන් ඉල්ලුම් පත්‍රයක්—කම්කරු උසාවිය නැවතත් එම කම්කරුවා වැඩට ගැනීමට යයි කළ නියෝගය—ශ්‍රෙෂ්ඨාධිකරණයට ඉදිරිපත් කළ ඇපැල් පෙත්සම—කම්කරු උසාවියේ සභා-පතිවරයා කරුණු වරදවා තේරුම් ගැනීම—අස්-කිරීමේ නියෝගය නැවතත් ක්‍රියාත්මක කිරීම.

ලංකා ගමනා ගමන මණ්ඩලයේ යාන්ත්‍රිකයකු මෙන් රැකියාවෙහි නියුක්ත ව සිටි කම්කරුවකු රක්ෂාවෙන් අස්කරණු ලැබීය. මෙයට හේතුවූයේ යම්කිසි සේවකයකු විසින් අවසරයක් නො ලබා හෝ රිය පැදවීමේ අවසර පත්‍රයක් නොමැතිව හෝ ලංගමයට අයිති යම්කිසි වාහනයක් ඉවතට ගෙන ගියහොත් ඔහු රක්ෂාවෙන් අස්කරණු ලැබේ යයි සඳහන් වන රෙගුලාසියක් උල්ලංඝනය කිරීමයි. ඇන්න වගයෙන්ම පිළියන්දල රථ නැවතුම්පොළෙහි ගාඩ ගතකර තිබුනු බස්රථයක් ඔහු පිටතට ගෙන ගොස් අවසර පත්‍රයක් නො මැතිව එය එලවා ගෙන ගියේය. මෙම රථය පාරෙන් ඉවතට පැන ගියේය.

කම්කරු උසාවියෙන් පිළිසරණ ඉල්වූ ඔහු ඒ පිළිසරණ ලබා ගැනීම සඳහා ඉදිරිපත් කළ පළමු වෙනි කරුණ නම් ලංකා ගමනා ගමන මණ්ඩලය පක්ෂපාතිව ක්‍රියාකර තිබේය යන්නයි. මෙයට පදනම් වූයේ එම මණ්ඩලයටම අයත් බස් රථයක් එම ඩිපෝවෙන්ම ඉවතට ගෙන බලයක් හෝ අවසර පත්‍රයක් නොමැති ව මීට අවුරුද්දකට පසු එය පදවා ගෙන ගිය පෝර්මන් කෙනෙකු රක්ෂා

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වෙන් අස්නොකර ඔහුට අවසාන වරට අවවාද කර වෙන තැනකට මාරු කිරිමක් පමණක් බව කියා සිටීමකි.

කම්කරු උසාවියේ සභාපතිවරයා එක්තරා ග්‍රන්ථයක පරිච්ඡෙදයක් සලකා බැලීමෙන් පසු ලංකා ගමනා ගමන මණ්ඩලය පක්ෂපාති ව ක්‍රියා කර තිබේයයි නිගමනය කර කම්කරුවා යළිත් වැඩට ගත යුතු බව නියෝග කෙළේය. ලංගමය මෙයට විරුඩව ඇපැලක් ඉදිරිපත් කළේය.

තීන්දුව : තමා උපුටා දක්වන ලද එකී ග්‍රන්ථයෙහි කොටස හෝ මීට පසු සිදු වූ එම උප පෝර්මන් තැනගේ සිඩිය හෝ මීට අදළ නො වේ. එබැවින් කම්කරු උසාවියේ සභාපතිවරයා කරුණු වරදවා අවබෝධ කරගෙන තිබේ. කම්කරුවා රක්ෂාවෙන් අස්කරන ලද නියෝගය ස්ථිර කරන්ට අණකරන ලදී.

ලංකා ගමනා ගමන මණ්ඩලය එ. සමස්ත ලංකා මෝටර් සේවක සමිතිය 9

වෂ 1957 නො. 62 දරණ පණතින් සංශෝධනයවූ වෂ 1950 නො. 43 දරණ කාර්මික ආරවුල් පණත—එහි 31 (බී) සහ 31 (සී) දරණ ජෙද—සේවකයෙකු සේවයෙන් අස්කිරීම සාධාරණ යයිද යුක්ති යුක්ත යයිද කම්කරු උසාවිය මගින් තීරණය කිරීම—ඉන්පසු එම උසාවියට එබඳු සේවකයෙකුට පිළිසරණ දීමට හැකිද යන වග.

තීන්දුව : යම්කිසි සේවකයකුගේ සේවය නතර කිරීම සාධාරණ යයි ද යුක්ති යුක්ත යයි ද පිළිගත් අවස්ථාවක වුවද ඔහුට පිළිසරණ දීමට කම්කරු උසාවියකට අධිකරණ බලය තිබේ. (සංශෝධනය කරණ ලද) කාර්මික ආරවුල් පණතේ 31 බී දරණ ජෙදය 31 සී (1) දරණ ජෙදයන් සමග කියවන කල එම උසාවියට මෙවැනි නියෝගයක් කිරීමට බලය ඇති බව පෙණේ.

ෂෙල් සමාගම එ. පතිරන 19

කුඹුරු පනත

1958 අංක 1 දරණ කුඹුරු පනතේ ජෙද 21 (1) සහ (2)—21 (1) වැනි ජෙදය යටතේ කළ රපෝර්තුවක් උඩ සිතාසි නිකුත් නොකර පහකිරීමේ නියෝගයක් කිරීම—මේ නියෝගයේ වලංගු භාවය.

තීන්දුව : 1958 අංක 1 දරණ කුඹුරු පනතේ 21 (1) වැනි ජෙදය යටතේ කළ රපෝර්තුවක් උඩ, එම ජෙදයේ (2) වැනි උප ජෙදය අනුකූලව සිතාසියක් නිකුත් නොකර, රපෝර්තුවේ සඳහන් කුඹුරුඉඩම් හිමියන්ට විරුඩව මහේස්ත්‍රාත්වරයකු කරන පහකිරීමේ නියෝගය වලංගු නැත.

ඇස්. එච්. චාලි එ. ද සිල්වා 4

ගෙවල් හිමි සහ බදුකරු.

''ගෙවල් කුලී පාලන පනත'' යට බලන්න.

ගෙවල් කුලී පාලන පනත

ගෙවල්කුලී පාලන පනත, නො: 59, වෂ 1948 වේ, 3 වෙනි සහ 23 වෙනි ජෙද—ගෙවල් බදුකාරයා විසින් ඔහුට විරුඩව ගෙහිමියා ඉදිරිපත් කල නඩුවකදී ගෙවල් කුලී පාලන පනතින් සීමා කර තිබෙන ගණනට වඩා ගණනක් දීමට එකඟවීම—ඒ අනුව නඩු තීන්දු දීම—දෙවනු නඩුවක් බදුකාරයා අස්කිරීමට සහ හිඟ මුදල් ඉල්ලා ඉදිරිපත් කිරීම—පනතින් සීමා ගණනට වඩා අයකල නොහැකියයි බදුකාරයා කියා සිටීම—ගෙවල් හිමියා පළමු නඩු තීන්දුවෙන් නියම කුලිය විනිශ්චිත වී තිබෙන නිසා දෙවනු නඩුවේදී එම ප්‍රශ්නය නැවත නගන්ට බැරිය කීම—නඩුකාර තුමා ගෙවල් හිමියාගේ තර්කය පිලිගැනීම—එම තීන්දුවෙන් ඇපැල් ගැනීම.

තීන්දුව : (1) ගෙවල් කුලී පාලන පනතේ 23 වෙනි ජෙදයෙන් එම පනතේ සීමා කර තිබෙන ප්‍රමාණයට වඩා කුලියක් ගෙවීමත් ලබාගැනීමත් තහනම් කර තිබෙන නිසා ඊට පටහැනිව සම්මුතියක් ඇතිවීම එම නීතිය උල්ලංඝනය කිරීමකි. ඊට දඩුවම්ද පමුණුවත හැක—එම නිසා ඇපැල් කරු හා වගඋත්තරකරු එකඟ වීමෙන් ඇතිවූ නඩුතීන්දුවට පනතේ නියෝග යටපත් කිරීමට බලයක් නැත.

(2) පලමු නඩුවේ තීන්දුවෙන් මෙහි පැන නැගී ඇති ගෙවල් කුලි හබ ප්‍රශ්නය විනිශ්චිත (Res Judicata) බවට පත්වියයි කිව නොහැක.

පීරිස් එ. ගුණවර්ධන 2

ගෙවල් කුලී සීමාකිරීම (සංශොධිත) පණත—වෂ 1961 නො. 10, 13 (1), (2) සහ (3) වන ජෙද—නඩුවක් හෝ නීත්‍යානුකූල පියවරක් නිමා-

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වට නොගොස් පවතිමින් තිබේද නැද්ද යන වග— නඩුවක ඇපැල පවතිමින් තිබීම.

වර්ෂ 1961 නො. 10 දරණ ගෙවල් කුලී සීමා කිරීම් (සංශොධිත) පණතේ 13 (1) දරණ ඡෙදයේ අඩංගු කරුණු වලින් බාහිරව පිළිසරණ පතා පැමිණිලිකරු විසින් විත්තිකරුගෙන් ගෙවල් කුලී අයකර ගැනීමට හා ඔහු ගෙයින් පිටමන් කිරීමට වර්ෂ 1960 නොවැම්බර් මස 24 වැනි දින නඩු පවරණ ලදී. පළමුවන වරට නඩු පැවරූ උසාවිය පැමිණිලි කරුට පක්ෂව තීන්දුව දුන් නමුදු විත්තිකරු ඊට විරුඩව ඇපැල් පෙත්සමක් ඉදිරිපත් කෙළේය. මෙම ඇපැල වර්ෂ 1961 අප්‍රියෙල් මස 30 වෙනි දින නිමාවට නොගොස් පවතිමින් තිබින. නිශ්චය කිරීමට තිබූ ප්‍රශ්නය වූයේ ඉහත සඳහන් පණතේ 13 (3) දරණ ඡෙදය අනුව එම පණත බල පැවැත්වුනු දිනට කලින් දින දක්වා නිමාවට නොගොස් තිබුණු නිසා පැමිණිලිකරුට දී තිබුණු තීන්දුව බල ශූන්‍යවූත් බලරහිත වූවක්ද යන්න විය. මෙම පණත ක්‍රියාත්මක වූයේ වර්ෂ 1961 මැයි මස පළමුවන දින දීය.

තීන්දුව : වර්ෂ 1961 අප්‍රියෙල් මස 30 වෙනි දින මෙම නඩුව නිමාවට නොගොස් පවතිමින් තිබුනි. එමනිසා මෙම නඩුව ශූන්‍ය වූත් බල රහිත වූත් තීන්දුවක් ලෙස සැලකිය යුතුය.

පකීර් එ. අබ්ද 2

චෝදනාව.

චෝදනාව—එය සකස්කිරීම—වරදකරු කිරීමට පෙර තිබියයුතු අවශ්‍ය දෙයක්—වරද පවත්නාතෙක් දඩුවම—නිවාස සහ නගර සංවර්ධන ආඥාපණත, 15 (3) ඡෙදය.

වත්තේගම නගර සභාපතිතැනගෙන් පදිංචිවීම පිළිබඳ සහතික පත්‍රයක් නො ලබා නව ගොඩනැගිල්ලක පදිංචිවීමේ හේතුවෙන් පෙත්සම්කරු වර්ෂ 1960 නොවැම්බර් මස 18 වෙනි දින වරදකරු වී රු. 50 ක් දඩගසන ලදි. මෙයට විරුඩව ඔහු ඉදිරිපත් කළ ඇපැල් පෙත්සම නිෂ්ප්‍රභාවිය. ඉක්බිති වත්තේගම් නගර සභාවේ සෞඛ්‍ය පරීක්ෂකවරයා මෙම පෙත්සම් කරු එසේ සහතික පත්‍රයක් නොලබා දිගටම පදිංචි වි සිටින බව කියා මේ සඳහා ''වරද පවත්නාතෙක් දියයුතු'' දඩුවමක් නියම කරණ ලෙස වර්ෂ 1961 දෙසැම්බර් මස 23 වෙනි දින උසාවියට ආයාචනයක් කෙළේය. පෙත්සම්කරුට නිවේදනයක් යැවූ මහේස්ත්‍රාත්වරයා එසේ දඩුවමක් ඔහුට නොදීමට හේතු පෙන්වන ලෙස නියෝග කළ නමුත් ඔහුට විරුඩව චෝදනාවක් සකස් කලේ නැත. විත්තිපක්ෂයේ කිසිම සාක්ෂිකරුවකු නොකැඳවන ලදුව සෞඛ්‍ය පරීක්ෂකයාගේ සාක්ෂිය ඉදිරිපත් කිරීමෙන් පසු නිවාස සහ නගර සංවර්ධන ආඥා පණතේ 15 (3) ඡෙදය යටතේ වරදක් කරණ ලදැයි විත්තිකරු වරදකරු කරණු ලැබ ''වරද පවත්නාතෙක්'' ගෙවියයුතු දඩයක් වශයෙන් දවසකට රු. 25/- බැගින් ගෙවීමට නියම විය.

තීන්දුව : පසුව පැවැත්වුනු නඩු විභාගය පෙත්සම්කරුට විරුඩව චෝදනාවක් සකස් නොකර පැවැත්වීමේ හේතුවෙන් නීත්‍යානුකූල නොවන්නකි.

සහීඩ් එ. වත්තේගම සෞඛ්‍ය පරීක්ෂකතැන ... 20

තහනම් ආඥාව.

''මැන්ඩේමස් ආඥාව'' යට බලන්න.

දණ්ඩ නීති සංග්‍රහය.

දණ්ඩ නීති සංග්‍රහය—අලාභහානි කිරීමේ චෝදනාවක්—අඩි පාරක් භාවිතා කිරීමට විත්තිකරුට හිමිකම තිබීම—එවැනි අඩි පාරක් පටුවන සේ පැමිණිලිකරු වැටක් බැඳීම—විත්තිකරු එම වැට කැපීම—විත්තිකරු වරදකරු වීම—අපරාධ නඩු විධාන සංග්‍රහයේ 325 වන ඡෙදය යටතේ ඇප බැඳීම—ඇපැල—එවැනි නියෝගයකට විරුඩව ඇපැල් ගැනීමට අවකාශ තිබේද යන්න—සංශෝධන බලය—මෙසේ වරදකරු කිරීම සනාථ කළ හැකිද යන්න.

විත්තිකාර ඇපැල්කරුට අඩි පාරක් භාවිතා කිරීමට අයිතිවාසිකමක් තිබුනි. පැමිණිලිකරු විසින් මෙම අඩිපාර අඩුවනසේ බඳින ලද අලුත් වැට කරනකොටගෙන එම අඩි පාර පටුවී ගියේය. මෙහිදී විත්තිකාර ඇපැල්කරු එම වැට කපා දැමීම නිසා පැමිණිලිකරු ඔවුන්ට විරුඩව සාපරාධී ලෙස අලාභ හානි කිරීමේ චෝදනාවක් ඉදිරිපත් කෙළේය. එම අඩිපාර වැටට අසුව තිබුණු බව අනාවරණය වූ පසුත් උගත් මහේස්ත්‍රාත්වරයා ඔවුන් වැරදිකරුවන් බවට පත්කොට අපරාධ නඩුවිධාන සංග්‍රහයේ 325 වන ඡෙදය යටතේ ඔවුන් කෙරෙහි ක්‍රියා කළේය. විත්තිකරුවෝ ඇපැල් පෙත්සමක් ඉදිරිපත් කළාහ.

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ඇපැලට මූලික විරුඩතාවයක් ඉදිරිපත් කරණ ලද මෙම නඩුවේදී මෙසේ තීන්දු විය.

තීන්දුව : අපරාධ නඩු විධාන සංග්‍රහයේ 325 වන ඡෙදය යටතේ දෙනලද තීන්දුවකට එරෙහිව ඇපැල් ගැනීමට නොහැකිය.

සංශෝධන බලය ක්‍රියාවෙහි යෙදිමෙන් මෙසේ තීන්දුවිය:—

අධිපාර වැටට අයුවී තිබුනු නිසා එහි නීත්‍යානුකූලව භාවිතා කරන්නන් වන විත්තිකරුවන්ට එම බාධකය ඉවත් කිරීමට නීතියෙන් ඉඩතිබේ. පැමිණිලිකරු කෙරෙහි යම්කිසි ද්වේෂ සහගත චේතනා තිබිය හැකි වූ නිසාම නීත්‍යානුකූල අයිතිවාසිකමක් ක්‍රියාවේ යෙදවීම පිණිස කරණ ලද කටයුත්තක් නීතිවිරෝධී විය නොහැක.

පියසේන හෙවත් සිරිපාල සහ තවත් අය එ. බෝම්රියේ උප පොලිස් ඉන්ස්පැක්ටර් ... 25

නිධාන සහ නාගර සංවර්ධන ආඥා පනත

"චෝදනාව" යට බලන්න.

මැන්ඩේමස් ආඥාව.

දිස්ත්‍රික් විනිශ්චයකාරතුමෙකුට විරුඩව තහනම් සහ මැන්ඩේමස් අණපැනවක්—එම විනිශ්චයකාරතුමා විසින් තමා ඉදිරියෙහි විභාගයට තිබෙන පැමිනිල්ලක් ගැන කෙනෙකුට තම උසාවියේ පෙනීසිටීමට කළ නියෝගයක්—නියෝගය භාරගත් නමුත් ඔහු උසාවියට නොපැමිනීම—ඔහු උසාවියට ගෙන ඒමට වරෙන්තුවක් නිකුත් කිරීම—අල්ලාගෙන ආපසු නැවත උසාවියේ පෙනී සිටීම සඳහා ඇපදීමට නියම කිරීම—මේ නියෝගයන් කිරීමට දිස්ත්‍රික් නඩුකාරතුමාට බලය තිබේද?—සිවිල් නඩුසංවිධාන සංග්‍රහය. 137 වෙනි සහ 138 වෙනි ඡෙද.

තීන්දුව : (1) තමා ඉදිරිපිට විභාග කළ යුතුව තිබෙන මොනයම් කරුණක් පිළිබඳවූවත් විනිශ්චයකාරතුමෙකුට යම්කෙනෙකු උසාවියට කැඳවීමට නියෝගයක් කිරීමට බලය තිබේ.

(2) එසේ නිකුත් කරණ ලද නියෝගයක් භාර ගෙන ඊට අකීකරුව උසාවියට නොපැමුණුනහොත් ඔහු අල්ලාගෙන ඒමට වරෙන්තුවක් නිකුත් කිරීමට ද විනිශ්චයකාරතුමාට බලය තිබේ.

(3) එසේ අල්ලා ගෙනවිත් උසාවියට ඉදිරිපත් කළ අයට සිවිල් නඩුවිධාන සංග්‍රහයේ 138 වෙනි ඡෙදය යටතේ එම නියෝගයට කීකරුව උවමනා දිනයක උසාවියේ පෙනී සිටීම විශ්වාස කටයුතු පරිදි ආරක්ෂා වන අයුරින් ඇපයක් නියමකර ඔහු නිදහස් කිරීමට ද බලය තිබේ.

ඊස්වරලිංගම් එ. සිවඥානසුන්දරම්, පේදුරුතුඩුවේ දිස්ත්‍රික් විනිශ්චයකාර තැන 21

ලේඛන ලියා පදිංචි කිරීමේ ආඥා පණත.

ලිපිලේඛන ලියා පදිංචි කිරීමේ ආඥා පණත, 7 වන ඡෙදය—වංචනාශිලී භාවය හෝ වංක සහයෝගය—විකුණුම් කරයක් මේ ආකාරයෙන් ලබාගත්තේ ද යන වග—පීත කොමිසම—එය භාරගැනීම—පීත කොමිස් භාරකරු භාරගැනීම ප්‍රමාණවත් වේද යන්න.

පැමිණිලිකාරියගේ මුත්තනුවන් විසින් වර්ෂ 1919 තෑගිකරයකින් පැමිණිලිකාරියගේ පියාට ඉඩමක් පීතකොමිසමකට යටත්කර දෙන ලදුව ඒ නියාමයෙන් ඔහුට එම ඉඩමේ ප්‍රාණභුක්තියක් (තවත් කරුණු සහිතව) හිමිවිය. මෙම ප්‍රාණභුක්තිය නිමාවට පත්වූ පසු මෙම ඉඩම පැමිණිලිකාරියට සහ ඇයගේ සොහොයුරාට හිමිවේ. මෙම තෑගි කරයේ ගැබ්ව තිබූ පීතකොමිසමට පටහැනිව වර්ෂ 1945 දී පැමිණිලිකාරියගේ පියා විසින් විත්තිකරුට මෙම ඉඩම විකුණන ලදී. වර්ෂ 1945 අගෝස්තු මාසයේදී සිය සොහොයුරාට තිබූ අයිතිවාසිකම ද පැමිණිලිකාරිය විසින් දෙදෙනා අතර ලියවුනු බෙදුම් ඔප්පුවක අනුසාරයෙන් තමා පිට පවරාගන්නා ලදී. තම පියා වර්ෂ 1951 මැයි මාසයේ ජන්මාන්තරගතවූ පසු පැමිණිලිකාරි වර්ෂ 1951 සැප්තැම්බර් මාසයේදී විත්තිකරුගෙන් ඉඩමේ භුක්තිය ලබාගැනීමට මෙම නඩුව පැවරුවාය. වර්ෂ 1919 ලියන ලද මුල් තෑගි කරය ලියා පදිංචි නොකරණ ලද නමුත් වර්ෂ 1945 අප්‍රියෙල් මාසයේදී ලියැවුනු විකිණීමේ ඔප්පුව එම මාසයේදීම ලියා පදිංචි කර තිබේ. මේ නිසා ලිපිලේඛන ලියා පදිංචි කිරීමේ ආඥා පණතේ 7 (1) දරණ ඡෙදය අනුව ලියා පදිංචි නොවූ එම ඔප්පුව තමා පිළිබඳව සලකන කල අවලංගුයයි විත්තිකරු තර්ක කෙළේය. එහෙත් මීට පිළිතුරු වශයෙන් පැමිණිලිකාරිය කියා සිටියේ විකිණීම් ඔප්පුව ලියවා ඇත්තේ වංචාවෙන් හා වංචනාශිලී සහයෝගයකින් බවත් එම්නිසා එම ආඥා පණතේ 7 (2) දරණ ඡෙදයෙන් විත්තිකරුට ලැබෙන ප්‍රමුඛත්වය මෙහිදී කිඳවැටෙන බවත්ය.

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පහත සඳහන් කරුණු පිළිබඳව මෙහිදී සාක්ෂි ඉදිරිපත් විය :—

(අ) මෙම නැගී ඔප්පුව පැමිණිලිකාරියගේ පියා විසින් පිළිගෙන එය පරෙස්සම් කිරීම සඳහා ඕය බිරිඳට දෙන ලද බව.

(ආ) වර්ෂ 1935 දී ඔහු විසින් මුද්දර කොමසාරිස් තැනට ලියන ලද ලිපියක තමාට මෙම ඉඩමට ඇත්තේ ප්‍රාණ භුක්තියක් පමණක් බව සඳහන් කිරීම.

(ඇ) සාමාන්‍යයෙන් මුදල් පිළිබඳව අගහිඟකම් තිබුණු ඔහු මෙම ඉඩම බැඳ මුදල් ලබාගන්නා අටියෙන් එම නැගිකරය බිරිඳගෙන් යළිත් ලබා ගැනීම.

(ඈ) වර්ෂ 1944 දී මෙම ඉඩම (පොහොසත් මිනිසකුවූ එසේම අවිචාරවත් ක්‍රියා කලාපයකට ගොදුරුවූ) විත්තිකරුට දස වර්ෂයකට බදු දීම ද (එසේ දෙන බද්දක් හතර අවුරුද්දකට සීමා කොට දීමට පමණක් බලය ඇති වුවත්) එහිදී මෙම ඉඩම තමාට ප්‍රාණ භුක්තිය පමණක් ඇති ඉඩමක් ලෙස විස්තර කර ඇති බව.

(ඉ) මීට ටිකදිනකට පසු පැමිණිලිකාරියගේ ස්වාමිපුරුෂයා විසින් පියාට එය බදුදිය හැක්කේ හතර අවුරුද්දකට පමණකැයි කියා බද්ද තමන්ට පවරා ගැනීමට විත්තිකරු සමග දරූ පරිශ්‍රමය අසාර්ථකවීම සහ මේ පිළිබඳව පින කොමිසමක් විද්‍යාමාන වන බව ඔහුට සැලකිරීම.

(එ) ඉන් පසු වර්ෂ 1945 දී, එනම් ඉහත සඳහන් බදුකරය ලියා භාරමාසයකට පසු (මෙම නඩුවෙහි සැලකිල්ලට භාජනවූ ලිපිය විත) විකුණුම්කරය පියා විසින් විත්තිකරුගේ නමට එම බදුකරය ලියා සහතික කළ නොතාරිස් තැන ලවාම ලියවා තිබීම හා එහිදී තමාට මෙය නැසීගිය තමාගේ පියාගෙන් ලැබෙන පිය උරුමයක් ලෙස සඳහන් කිරීම.

මේ කරුණු උඩ මෙහි වංචාව සහ වංචනශීලි සහයෝගය ඔප්පුවී තිබේයයි දිස්ත්‍රික් නඩුකාර-වරයා පැමිණිලිකාරියගේ වාසියට තීන්දුව දුන්-නේය. එහෙත් ශ්‍රේෂ්ඨාධිකරණය ද ඇපෑලේදී එම තීන්දුව පිළිගත් නමුත් වංචාව සහ වංචනශීලි සහයෝගය ඔප්පුවී ඇතැයි පිළිනොගත්තේය.

තීන්දුව : රාජාධිකරණය විසින් වංචාව සහ වංචනශීලි සහයෝගය ඔප්පුවීමට ප්‍රමාණවත් සාක්ෂි තිබෙන නිසා දිස්ත්‍රික් විනිශ්චයකාර වරයාගේ තීන්දුව යළිත් ස්ථිර කළ යුතුය.

ජේ. ඇම්. ලයිරිස් අප්පු එ. තෙන්නකෝන් කුමාරිහාමි සහ තවත් අය 11

වන්දි.

වැඩි දියුණු කිරීම සඳහා වන්දි—බිම් කුලිය ගෙවා නියමිත ප්‍රමාණයට ස්ථිර ගොඩනැගිලි සැදීමට අවසර දෙන විධිමත් නොවන බදුකරයකට අනුව ඉඩමක පදිංචි වූ විත්තිකරුවෙක්—එම ගොඩනැගිලි ඉදිකළ පසු විත්තිකරු පිටමන් කිරීමට දමූ නඩුවක්—විත්තිකරු විසින් තමා කළ වැඩිදියුණු කිරීම් වලට වන්දි ඉල්ලීම—වන්දි ඉල්ලීම ක්‍රියාත්මක කළ හැක්කේ විත්තිකරු ඉඩමෙන් පිටවී ගිය පසුව යයි නඩුව ඇසූ උසාවිය තිරණය කිරීම—එම තීරණයට විරුඩව ඉදිරිපත් කළ අභියාචනය (Appeal).

ඉඩම්හිමියකු වන පැමිණිලි කරු විසින් ලියවන ලද නොතාරිස් කෙනෙකුගේ සහතික කිරීමක් නොමැති බදුකරයකැයි කියවෙන ලියවිල්ලක් අනුව ඉඩමක භුක්තිය ලැබූ විත්තිකරු ඊට අනුවම එහි නියමිත ප්‍රමාණයට ස්ථිර ගොඩනැගිල්ලක් සාදගත්තේ එම ලියවිල්ලේ සඳහන් පරිදි මාසික බිම් කුලියක් ගෙවීමෙනි. පසුකලක තමා ඉන් පිටමන් කිරීමට නඩු පවරණු ලැබූ විත්තිකරු තමා විසින් කරණ ලද වැඩිදියුණුව පිණිය වන්දියක් ඉල්ලා සිටියේය. ඔහු වන්දි ලැබීමට සුදුස්සකු බව තීරණය කළ උගත් දිස්ත්‍රික් විනිශ්චයකාරතුමා එම ඉල්ලීම ක්‍රියාත්මක කළ හැක්කේ විත්තිකරු ඉඩමෙන් පිටවී ගිය පසුවයයි නිගමනය කළේය. විත්තිකරුවා මීට විරුඩව ඇපෑලක් ඉදිරිපත් කළේය.

තීන්දුව : (1) නොතාරිස් සහතිකයක් නොමැති මෙම ලියවිල්ල බලරහිතය. එබැවින් විත්තිකරු කොයිම අවස්ථාවක වත් පැමිණිලි කරුගේ ගෙවල් බදුකරුවෙක් නොවීය.

(2) මෙවැනි අවස්ථාවක බලපැවැත්වෙන නීතිය ගාර්වින් විනිශ්වයකාරතුමා විසින් විසඳන ලද නුගපිටිය එ. ජෝසප් (28 න. නී. වා. 140) යන නඩුවේ ගැබ්වී තිබේ. මෙහිදී විත්තිකරුට නිර්-ව්‍යාජ අදහසින් ඉඩමක පදිංචි වී සිටින කෙනෙකුට ඇති අයිතිවාසිකම් දියයුතුය. එබැවින් ඔහුට

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වන්දි ලැබෙන තුරු ඉඩමේ බුත්තිය තබාගැනීමේ අයිතිය (Jus retentionis) හිමි විය යුතුය.

විලියම් සිල්වා එ. කෙහෙල්ගමුවේ අත්ථදස්සි සථවිර 5

සිවිල් නඩු විධාන සංග්‍රහය.

සිවිල් නඩු විධාන සංග්‍රහයේ 94,100, 109 (1) වැනි ඡෙද—ප්‍රශ්න මාලාව (interrogatories) —දිවුරුම් පත්‍රයක මාර්ගයෙන් හෝ නැත්නම් සම්මුඛ පරීක්ෂණයක මාර්ගයෙන් ඒවාට උත්තර දියයුතු ද යනු නඩුකාරතුමා නියම කළ යුතු බව 100 වැනි ඡෙදය යටතේ අවශ්‍යවීම—නඩුකාරතුමාගේ නියෝගයෙහි එවැනි නියමයක් රහිත වීම—ප්‍රශ්න මාලාවට උත්තර දී ඇතිමුත් දිවුරුම් පත්‍රයක මාර්ගයෙන් එසේ නොකිරීම—ප්‍රතිඵලය.

පැමිණිලිකරු විසින් උසාවිය මගින් ඉදිරිපත් කරනු ලැබූ සමහර ප්‍රශ්න මාලාවලට (interrogatories) උත්තර සපයන ලෙස උසාවියෙන් කළ නියෝගය පිළිපැදීමට විත්තිකරු අසමත් විය යන කරුණ උඩ, සිවිල් නඩු විධාන සංග්‍රහයේ 109 (1) වැනි ඡෙදය යටතේ, නඩුව විභාග කළ උගත් නඩුකාරතුමා විසින් විත්තිකරුගේ (ඇපැල් කරුගේ) උත්තරය ප්‍රතික්ෂේප කර ඇත. සිවිල් නඩු විධාන සංග්‍රහයේ 100 වැනි ඡෙදය යටතේ අවශ්‍ය පරිදි දිවුරුම් පත්‍රයක මාර්ගයෙන් හෝ නැත්නම් සම්මුඛ පරීක්ෂණයක මාර්ගයෙන් උත්තරය දියයුතු බව උගත් නඩුකාරතුමා තමාගේ මුල් නියෝගය කරණ අවස්ථාවේදී නියම කළ යුතුව තිබුන නමුත් එසේ නියමකර නැත. දිවුරුම් පත්‍රයක මාර්ගයෙන් නොවූවත් ලියවිල්ලකින් විත්තිකරු ප්‍රශ්න මාලාවට උත්තර දී ඇත.

තීන්දුව : දිවුරුම් පත්‍රයකින් නොවූවත් විත්තිකරු ඇත්ත වශයෙන් ප්‍රශ්න මාලාවට උත්තරදී ඇති හෙයින්, නඩුව විභාග කළ උගත් නඩුකාර තුමාගේ තීන්දුව පිළිපැදීමට ඔහු අසමත්වී නැත. එම නිසා ඔහුගේ නිදහසට ඉදිරිපත් කළ කරුණු නඩුව විභාග කළ උගත් නඩුකාරතුමා විසින් ප්‍රතික්ෂේප කර තිබීම වැරදිය.

අලුවිහාරෙ එ. සියම්පිල්ලෙ 1

සිවිල් නඩු විධාන සංග්‍රහයේ 137, 138 වෙනි ඡෙද.

"මැන්ඩේමස් ආඥාව" යට බලන්න.

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ගරු බස්නායක අග්‍ර විනිශ්චයකාරතුමා සහ ගරු සන්සෝනි විනිශ්චයකාරතුමා ඉදිරිපිට.

අලුවිහාරෙ එ. සියම්පිල්ලෙ*

වාදකළේ : 1962–1–22 සහ 23 දිනවල.
තීන්දුකළේ : 1962–1–23.

සිවිල් නඩු විධාන සංග්‍රහයේ 94,100, 109 (1) වැනි ඡෙද—ප්‍රශ්න මාලාව **(interrogatories)**—දිවුරුම් පත්‍රයක මාර්ගයෙන් හෝ නැත්නම් සම්මුඛ පරික්ෂණයක මාර්ගයෙන් ඒවාට උත්තර දියයුතු ද යනු නඩුකාරතුමා නියම කළ යුතු බව 100 වැනි ඡෙදය යටතේ අවශ්‍යවීම—නඩුකාරතුමාගේ නියෝගයෙහි එවැනි නියමයක් රහිත වීම—ප්‍රශ්න මාලාවට උත්තර දී ඇතිමුත් දිවුරුම් පත්‍රයක මාර්ගයෙන් එසේ නොකිරීම—ප්‍රතිඵලය.

පැමිණිලිකරු විසින් උසාවිය මගින් ඉදිරිපත් කරනු ලැබූ සමහර ප්‍රශ්න මාලාවලට **(interrogatories)** උත්තර සපයන ලෙස උසාවියෙන් කළ නියෝගය පිළිපැදීමට විත්තිකරු අසමත් විය යන කරුණු උඩ, සිවිල් නඩු විධාන සංග්‍රහයේ 109 (1) වැනි ඡෙදය යටතේ, නඩුව විභාග කළ උගත් නඩුකාරතුමා විසින් විත්තිකරුගේ (ඇපැල් කරුගේ) උත්තරය ප්‍රතික්ෂේප කර ඇත. සිවිල් නඩු විධාන සංග්‍රහයේ 100 වැනි ඡෙදය යටතේ අවශ්‍ය පරිදි දිවුරුම් පත්‍රයක මාර්ගයෙන් හෝ නැත්නම් සම්මුඛ පරීක්ෂණයක මාර්ගයෙන් උත්තරය දියයුතු බව උගත් නඩුකාරතුමා තමාගේ මුල් නියෝගය කරණ අවස්ථාවේදී නියම කළ යුතුව තිබුන නමුත් එසේ නියමකර නැත. දිවුරුම් පත්‍රයක මාර්ගයෙන් නොවූවත් ලියවිල්ලකින් විත්තිකරු ප්‍රශ්න මාලාවට උත්තර දී ඇත.

තීන්දුව : දිවුරුම් පත්‍රයකින් නොවූවත් විත්තිකරු ඇත්ත වශයෙන් ප්‍රශ්න මාලාවට උත්තර දී ඇති හෙයින්, නඩුව විභාග කළ උගත් නඩුකාර තුමාගේ තීන්දුව පිළිපැදීමට ඔහු අසමත්වී නැත. එම නිසා ඔහුගේ නිදහසට ඉදිරිපත් කළ කරුණු නඩුව විභාග කළ උගත් නඩුකාර තුමා විසින් ප්‍රතික්ෂේප කර තිබීම වැරදිය.

නීතිඥවරු: රාජනීතිඥ එච්. වී. පෙරේරා, රාජනීතිඥ ඊ. බී. වික්‍රමනායක, එච්. වනිගතුංග සහ එච්. මොහිදීන් සමග—ඇපැල්කරු වෙනුවෙන්.

කොල්වින් ආර්. ද සිල්වා සහ වී. ජේ. මාටින්—වගඋත්තර කරු වෙනුවෙන්.

ගරු බස්නායක, අග්‍ර විනිශ්චයකාරතුමා :

මෙම ඇපැල් නඩුවේ තීරණයට ලක්විය යුතු ප්‍රශ්නය නම් විත්තිකරු විසින් නිදහසට ඉදිරිපත් කළ කරුණු සිවිල් නඩු විධාන සංග්‍රහයේ 109 (1) වැනි ඡෙදය යටතේ උගත් දිස්ත්‍රික් නඩුකාර තුමා විසින් ප්‍රතික්ෂේප කර තිබීම හරිද නැද්ද යනුයි.

කරුණු කෙටියෙන් පහත සඳහන් වේ :—

විත්තිකරු ප්‍රශ්න මාලාවට පිළිතුරු දීමට අසමත්වූනිසා, එසේ කරන ලෙස සිවිල් නඩු විධාන සංග්‍රහයේ 100 වැනි ඡෙදය යටතේ නියෝගයක් කරන මෙන්, එම සංග්‍රහයේ 94 වැනි ඡෙදයේ සඳහන් පරිදි විත්තිකරුගේ පරීක්ෂණය සඳහා ලිඛිත ප්‍රශ්න මාලාවක් උසාවිය මගින් සැපයූ පැමිණිලි කරු ඉල්ලා සිටියේය. එම ඉල්ලීම පරිදි උගත් දිස්ත්‍රික් නඩුකාර තුමා පහත සඳහන් නියෝගය කළේය.

''ප්‍රශ්න මාලාවට 59. 8. 31 වැනි දින උත්තර ඉදිරිපත් කරන ලෙස මම නියෝග කරමි.''

සිවිල් නඩු විධාන සංග්‍රහයේ 100 වැනි ඡෙදය යටතේ නියෝගයක් කරන විට දිවුරුම් පත්‍රයක මාර්ගයෙන් හෝ නැත්නම් සම්මුඛ පරීක්ෂණයක මාර්ගයෙන් උත්තර දිය යුතුද යනු නඩුකාර තුමා නියම කළ යුතු බව එම ඡෙදය අනුව අවශ්‍යය. මේ නඩුවේදී එසේ නියම කර නැත. නියෝගය තමාට බාර දෙනු ලැබූ අවස්ථාවේදී අසනීපව රෝහලේ සිටි විත්තිකරු ප්‍රශ්න මාලාවට උත්තර දුන් නමුත් දිවුරුම් පත්‍රයක මාර්ගයෙන් එසේ කළේ නැත. ''මාලහ තිබෙන ලියකියවිලි අනුව ඇඳේ සිටම මේ ප්‍රශ්න මාලාවට උත්තර දෙනු ලැබේ'' යයි විත්තිකරු උත්තර සහිත සිය ප්‍රකාශයේ සඳහන් කරයි.

ප්‍රශ්න මාලාවට දිවුරුම් පත්‍රයක මාර්ගයෙන් උත්තර නොදුන් නිසා උගත් නඩුකාර තුමාගේ නියෝගය පිළිපැදීමට අසමත්වී ඇතැයි ද, ඒ අනුව 109 වැනි

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙ 62 වෙනි කා., 10 වෙනි පිට බලනු.

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ඡේදයෙන් පැවරෙන බලය පාවිච්චි කර උගත් නඩුකාර තුමා විසින් විත්තිකරු නිදහසට ඉදිරිපත් කළ කරුණු නීත්‍යානුකූල ලෙස ප්‍රතික්ෂේප කර ඇතැයි ද, වගඋත්තර කරු වෙනුවෙන් තර්ක කරන ලදී. එම තර්කයට එකඟ වීමට අපට නොහැක. ප්‍රශ්න මාලාවට දිවුරුම් පත්‍රයක මාර්ගයෙන් උත්තර දිය යුතු යයි උගත් දිස්ත්‍රික් නඩුකාර තුමාගේ නියෝගයේ නියමවී නැත. නියෝගයේ නියමවූ පරිදි විත්තිකරු දිවුරුම් පත්‍රයක මාර්ගයෙන් නොවූවත් ප්‍රශ්න මාලාවට උත්තර දී ඇත. එමනිසා උගත් නඩුකාර තුමා විසින් කරන ලද නියෝගය පිළිපැදීමට විත්තිකරු අසමත්වී නැත. එම නිසා ඔහුගේ නිදහසට ඉදිරිපත් කළ කරුණු උගත් නඩුකාර තුමා විසින් ප්‍රතික්ෂේප කරණු ලැබීම වැරදිය.

1959 සැප්තැම්බර් 17 වැනි දින දරණ නියෝගය ද ඉන් පැනනැගුන සියළුම ක්‍රියාවන් ද අපි එම නිසා නිෂ්ප්‍රභා කරමු.

පැමිණිලි කරු අනුගමනය කළ කාර්‍ය පටිපාටියට දැන් අප ඉදිරියේ කියා සිටි එකම හේතුවක් උඩ හෝ විත්තිකරුගේ පෙරකදෝරුවා විරෝධය ප්‍රකාශ නොකළ හෙයින් පැමිණිලි කරු ගාස්තු වලට යටත් නොකළ යුතුයයි වගඋත්තර කරුගේ උගත් අයිනීතිඥ තැන සැල කර සිටියේය. මෙම තර්කයේ හරයක් තිබෙන බව අප කල්පණා කරන හෙයින් ඇපැල් කරුට ඇපැලේ ගාස්තු නියම නොකරමු.

නොම්මර 533 දරණ ඉල්ලීම ප්‍රතික්ෂේප කරණු ලැබේ.

සන්සෝනි විනිශ්චයකාරතුමා.

මම එකඟවෙමි.

ඇපැලට ඉඩ දෙන ලදී.

ගරු ටී. එස්. ප්‍රනාන්දු විනිශ්චයකාරතුමා ඉදිරිපිට

පීරිස් එ. ගුණවර්ධන*

සු. උ. නො : 173/61—රිකුවැස්ට් උසාවිය, බදුල්ල, නො: 15716.

වාද කලේ : **1961–11–9.**
තීන්දු කලේ : **1961–11–23.**

ගෙවල්කුලී පාලන පනත, නො: 59, 1948 වේ, 3 වෙනි සහ 23 වෙනි ඡේද—ගෙවල් බදුකාරයා විසින් ඔහුට විරුධව ගෙහිමියා ඉදිරිපත් කල නඩුවකදී ගෙවල් කුලී පාලන පනතින් සීමා කර තිබෙන ගණනට වඩා ගණනක් දීමට එකඟවීම—ඒ අනුව නඩු තීන්දු දීම—දෙවනු නඩුවක් බදුකාරයා අස්කිරීමට සහ හිඟ මුදල් ඉල්ලා ඉදිරිපත් කිරීම—පනතින් සීමා ගණනට වඩා අයකල නොහැකියයි බදුකාරයා කියා සිටීම—ගෙවල් හිමියා පළමු නඩුතීන්දුවෙන් නියම කුලිය විනිශ්චිත වී තිබෙන නිසා දෙවනු නඩුවේදී එම ප්‍රශ්නය නැවත නගන්ට බැරිය කීම—නඩුකාර තුමා ගෙවල් හිමියාගේ තර්කය පිළිගැනීම—එම තීන්දුවෙන් ඇපැල් ගැනීම.

තීන්දුව : **(1)** ගෙවල් කුලී පාලන පනතේ 23 වෙනි ඡේදයෙන් එම පනතේ සීමා කර තිබෙන ප්‍රමාණයට වඩා කුලියක් ගෙවීමත් ලබාගැනීමත් තහනම් කර තිබෙන නිසා ඊට පටහැනිව සම්මුතියක් ඇතිවීම එම නීතිය උල්ලංඝනය කිරීමකි. ඊට දඬුවම්ද පමුණුවත හැක—එම නිසා ඇපැල් කරු හා වගඋත්තරකරු එකඟ වීමෙන් ඇතිවූ නඩුතීන්දුවට පනතේ නියෝග යටපත් කිරීමට බලයක් නැත..

(2) පළමු නඩුවේ තීන්දුවෙන් මෙහි පැන නැගී ඇති ගෙවල් කුලී හබ ප්‍රශ්නය විනිශ්චිත **(Res Judicata)** බවට පත්වියයි කිව නොහැක.

නීතිඥවරු: එන්. ආර්. එම්. දළුවත්ත, විත්තිකාර ඇපැල්කරු වෙනුවෙන්.
පැමිණිලි කාර වගඋත්තරකරු වෙනුවෙන් කිසි වෙක් පෙනීසිටියේ නැත.

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* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 62 වෙනි කා., 14 වෙනි පිට බලනු.

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ගරු ටී. ඇස්. ප්‍රනාන්දු විනිශ්චයකාරතුමා :

මෙම නඩුවෙහි පැමිණිලිකරු තම ගෙයි කුලියට පදිංචි වී සිටි වගඋත්තරකරුගෙන් හිඟ ගෙවල් කුලි ලබා ගැනීමටත් ඔහු ගෙයින් අස්කිරීමටත් නඩු පැවරූ නමුත් තමා ගෙවල් කුලි හිඟ තබා නැතැයි පැමිණිලිකරු කියා සිටියේය. කුලිය මාසයකට රු. 10 ක් යයි පැමිණිලිකරු කී අතර අයකළ හැකි මාසික කුලිය රු. 6.55 ක් පමණ යයි වගඋත්තරකරු කියා සිටියේය. වගඋත්තරකරු ඉවත් කිරීමට අදහස් කළ ස්ථානය ගෙවල් කුලි පාලන පනතින් පාලනය වන බවට මත භේදයක් නැත. මාසික කුලිය රු. 6.55 ක් නම් වගඋත්තරකරු ගෙවල් කුලී හිඟතබා නැති බව පිළිගත් කරුණකි. ගෙවල්කුලී පාලන පනත අනුව මාසික කුලිය රු. 6.55 ක් බවට මත භේදයක් නැති අතර මේ ස්ථානය පිළිබඳවම වගඋත්තරකරුත් තමාත් අතර ඊට කලින් තිබුනු නඩුවකදී (බදුල්ල දිස්ත්‍රික් උසාවියේ 13476) මේ ස්ථානය සඳහා 1959 දෙසැම්බර් 1 වෙනි ද සිට මාසික කුලිය හැටියට රු. 10 බැගින් වගඋත්තරකරු විසින් ගෙවිය යුතු හැටියට උසාවිය තීන්දු නියෝගයක් දුන් බව පැමිණිලිකරු කියා සිටියේය. එය මේ ස්ථානය තමාට අයිති බව ප්‍රකාශ කරවීමටත් වගඋත්තරකරු ඉවත් කරවීමටත් පැමිණිලිකරු විසින් පවරන ලද නඩුවකි. පැමිණිලිකරු මේ ස්ථානයේ අයිතිකරු හැටියට ප්‍රකාශකරනු ලැබූ අතර 1957 දෙසැම්බර් 1 වෙනි ද සිට රු. 10 ක මාසික කුලියක් අනුව වගඋත්තරකරු කුලියට පදිංචිකරු හැටියට පැමිණිලිකරු පිළිගැනීමෙන් නඩුව දෙපක්ෂය අතර බේරුම් කර ගන්නා ලදී. සම්මුතිය අනුව තීන්දු නියෝගයක් නිකුත් කරන ලදී. දැනට මා ඉදිරියේ ඇපැලක් හැටියට ඇති නඩුවේ මුල් විභාගයේදී මේ තීන්දු නියෝගය අනුව මාසයකට කුලිය වශයෙන් රු. 10 ක් ලැබීමේ අයිතිය විනිශ්චිත කරුණක් බව පැමිණිලිකරු කියා සිටියේය.

දැන් මාසික කුලිය වශයෙන් වගඋත්තර කරු විසින් ගෙවිය යුත්තේ රු. 6.55 ක් පමණක් හැටියට ගණන් ගත හොත් එය තීන්දු නියෝගයේ කරුණු කඩකිරීමට වගඋත්තරකරුට ඉඩදීමක් වන්නේ යයි කී උගත් කොමසාරිස්වරයා වගඋත්තරකරු විසින් ගෙවල් කුලී හිඟ තබා ඇතැයි තීරණය කොට එම ස්ථානයෙන් ඔහු ඉවත් කිරීමට නියෝග කළේය. බදුල්ලේ දිස්ත්‍රික් උසාවියේ 13476 නඩුවේ තීන්දු නියෝගය විනිශ්චිත කරුණක් හැටියට ක්‍රියාවේ නොයෙදෙන්නේය යන තර්කය සනාථ කිරීම සඳහා වගඋත්තරකරුගේ නීතිඥ තැන **මාදන් එ. නාන ඇන්ඩී** න.නි.වා. 50 වෙනි කා. 476 පිටේ සඳහන් නඩුවේදී මේ උසාවියෙන් දුන් තීන්දුව මට දැක්වීය. එහිදී (ලංකාවටද වලංගු හැටියට) ග්‍රෙෂන් විනිශ්චයකාරතුමා විනිශ්චිත කරුණු පිළිබඳ සාමාන්‍ය සිද්ධාන්තයට ඇත්තාවූ පිළිගත් අතිරේකයක් හැටියට හඳුන්වනු ලැබූවක් දැක්වීය. **ග්‍රිපිත්ස් එ. ඩේවිස්** (1943) ලෝජර්නල් කේ.බී. කා. 122, 577 පිටේ සඳහන් නඩුවෙහි ග්‍රීන් සාමිවරයා විසින් එම අතිරේකය (exception) මෙසේ දක්වා තිබේ.

"පනතකින් කළ තහනමක් හෝ නියෝගයක් ඇතිවිට දෙපක්ෂය අතර කලින් තිබුනු නඩු තීන්දුවකින්ම එය යට කිරීමට හෝ එය පරාදකිරීමට බැරිය." මා ඉදිරියේ ඇති නඩුව ඊටත් වඩා බලවත් ලෙස පෙනේ. මෙහි කියන කලින් තිබූනු නඩු තීන්දු නියෝගය ඇතිවූයේ කරුණුවල හොඳ නරක අනුව උසාවියෙන් කළ තීන්දුවක ප්‍රතිඵලයක් නොව දෙපක්ෂයේ කැමැත්තෙන් ඇතිවූවක් හෙයිනි. දැන් 1948 වේ නො : 29 දරණ ගෙවල් කුලී පාලන පනතේ 3 වෙනි ඡේදය බලමු. අවසර දෙනු ලැබූ කුලියට වැඩියෙන් ගෙවල් හිමියකු විසින් ඉල්ලීම, ලැබීම හෝ ලබාගැනීම, ඒ අනුව නීතිවිරෝධි වෙයි. පනත අනුව අවසර දෙනු ලැබූ කුලිය වැඩියෙන් පදිංචිකාරයා විසින් ගෙවීම හෝ ගෙවීමට ඉදිරිපත් කිරීම ද නීතිවිරෝධිය. ගෙවල් හිමියා හෝ පදිංචි කාරයා හෝ වේවා කවුරුන් විසින් හෝ පනතට පටහැනිව ක්‍රියා කිරීම දඬුවම් දියහැකි වරදකි. (23 වෙනි ඡේදය බලනු.) එක්සත් රාජධානියේ මෙවැනි පාර්ලිමේන්තු පනත් ගැන ඩියුපාක් අග්‍ර විනිශ්චය කාරතුමා **ග්‍රිපිත්ස් එ. ඩේවිස්** (කලින් කී) නඩුවේදී කීවාක්මෙන් මේ රටේද ගෙවල් කුලී පාලන පනතේ සම්පූර්ණ වැඩක්‍රමය නම් "තමන්ගේ පැවැත්ම හෝ එකඟත්වය නිසා කිසි ලෙසකින් කුලිය කෙරෙහි බලපෑමක් ඇතිවන පරිදි එකඟත්වයකට පැමිණීමට හෝ නියමිත කුලිය වැඩිවන අන්කිසි දෙයක් හෝ කිරීමෙන් පදිංචි කාරයා වැලක්වීමයි."

එබැවින් විනිශ්චිත කරුණක් ගැන පැමිණිලිකරු දැක්වූ තර්කය අසාර්ථක විය යුතුය. එබැවින් විභාගයේදී පිළිගෙන ඇතිපරිදි ගෙවල් කුලී හිඟ තබා නැත. මම ඇපැලට ඉඩදෙමි. පැමිණිල්ල නිෂ්ප්‍රභා කරමින් තීන්දු නියෝගයක් දෙන හැටියට මම නියෝග කරමි. උසාවි දෙකේම ගාස්තු ලැබීමේ අයිතිය වග උත්තර කරුට ලැබෙන්නේය.

ඇපැලට ඉඩදෙන ලදී.

ගරු වීරසූරිය විනිශ්චයකාරතුමා ඉදිරිපිට.

රැජින එ. පුංචි බණ්ඩා සහ තවත් අය*

ශ්‍රේෂ්ඨාධිකරණයේ අපරාධ නඩු අංශයේ ඇපැල් අධිකරණයේ 1960 නොම්මර 137–142 දරණ ඇපැල් නඩු තීරණය කරණ තුරු ඇප ලබාගන්ට කළ ඉල්ලීම.

සු. උ. නොම්මර 4—කෑගල්ලේ මහේස්ත්‍රාත් උසාවි නඩු නොම්මරය 21019.

වාදකළේ : 1960 අගෝස්තු 11 වනද
තීන්දු කළේ : 1960 අගෝස්තු 17 වනද

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 62 වෙනි කා., 15 වෙනි පිට බලනු.

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අපරාධ නඩු සංවිධානය—ශ්‍රේෂ්ඨාධිකරණයේ අපරාධ නඩු අංශයේ ඇපැල් අධිකරණයේ ඇපැල් නඩුව නිමවන තුරු ඇප ඉල්ලා සිටීම—ඇප දීමේදී සැලකිල්ලට භාජන කළ යුතු කරුණු.

තීන්දුව :—(අ) කෙටි හිර දඬුවමක් නියම කර තිබීම ; (ආ) ශ්‍රේෂ්ඨාධිකරණයේ අපරාධ නඩු අංශයේ ඇපැල් අධිකරණයේ මීලඟ වාරයේ විභාග කිරීමට නියමිත නඩු ලැයිස්තුවට ඔවුන්ගේ ඇපැල් නඩු ඇතුලත් නොවීම; (ඇ) ඔවුන්ගේ ඇපැල නිෂ්ප්‍රභා වුවහොත් පෙත්සම් කරුවන් සැඟවීමට තැත් කරනු ඇතැයි විශ්වාස කිරීමට හේතු නැතිවීම. මේ අනුව පෙත්සම් කරුවන් ඇප පිට නිදහස් කළ යුතුය.

නීතිඥවරු: රාජනීතිඥ ජී. ඊ. චිට්ටි, ඊ. බී. වන්නිතම්බි සමග, පෙත්සම් කරුවන් වෙනුවෙන්.
ආණ්ඩුවේ නීතිඥ වී. ඇස්. ඒ. පුල්ලෙනායගම් නීතිපති වෙනුවෙන්.

ගරු වීරසූරිය විනිශ්චයකාරතුමා:

තුවාල කිරීමේ පොදු පරමාර්ථයක් ඇති නීතිවිරෝධි රැස්වීමකට සහභාගිවීමේ චෝදනාවක් සහ මිනිමැරීමේ චෝදනාවක් ඇතුළු තවත් චෝදනා සහිත අධිචෝදනා පත්‍රයක් (indictment) උඩ ශ්‍රේෂ්ඨාධිකරණය ඉදිරියේ පෙත්සම්කරුවන්ට විරුඬව නඩු විභාග කරනු ලැබිය. නීතිවිරෝධි රැස්වීමේ චෝදනාවට පමණක් වරදකරුවන් වූ ඔවුහු 1960 ජුලි 6 වනද බරපතල වැඩ ඇතිව හය මසක් හිරේට නියම වූහ.

උගත් ආණ්ඩුවේ නීතිඥයා ඇප ලබා ගැනීමේ ඉල්ලීමට විරුඬවිය. නමුත් කෙටි හිර දඬුවමක් නියම කර තිබෙන නිසාත්, ශ්‍රේෂ්ඨාධිකරණයේ අපරාධ නඩු අංශයේ ඇපැල් අධිකරණයේ මීලඟවාරයේ විභාග කිරීමට නියමිත නඩු ලැයිස්තුවට ඔවුන්ගේ දඬුවම්වලට විරුඬව පැවරූ ඇපැල් නඩු ඇතුලත් නොවනු ඇතැයි ශ්‍රේෂ්ඨාධිකරණයේ අපරාධ නඩු අංශයේ ඇපැල් අධිකරණයේ නියෝජ්‍ය රෙජිස්ත්‍රාර් තැනගෙන් මට දැනගන්ට ලැබෙන නිසාත්, මගේ අදහසේ හැටියට ඔවුන්ගේ ඇපැල නිෂ්ප්‍රභා වුවහොත් පෙත්සම් කරුවන් සැඟවීමට තැත් කරනු ඇතැයි විශ්වාස කිරීමට හේතුනැතිවීම නිසාත්, ශ්‍රේෂ්ඨාධිකරණයේ අපරාධනඩු අංශයේ ඇපැල් අධිකරණයේ රෙජිස්ත්‍රාර් තැන විසින් දැනුම් දුන්විට පෙනී සිට දඬුවම් විඳීමට සූදානම් බවට එක ඇපකරුවකු ඇතිව එකෙකුට රුපියල් 2,000 බැගින් ඇප තැබූ කල්හි ඔවුන් එකිනෙකා නිදහස්කරන ලෙස මම නියෝග කරමි.

ඉල්ලීමට ඉඩ දෙන ලදී.

ගරු අබේසුන්දර විනිශ්චයකාරතුමා ඉදිරිපිට.

ඇස්. එච්. චාලි එ. ද සිල්වා*

ගාලු මහේස්ත්‍රාත් උසාවියේ නොම්මර 14748 දරණ නඩුව පරිශෝධනය පිණිස 1962 නොම්මර 79 දරණ ඉල්ලීම.

වාද කළ සහ තීන්දු කළ දිනය : 1962 මැයි 14 වැනිද.

1958 අංක 1 දරණ කුඹුරු පනතේ ඡෙද 21 (1) සහ (2)—21 (1) වැනි ඡෙදය යටතේ කළ රපෝර්තුවක් උඩ සිතාසි නිකුත් නොකර පහකිරීමේ නියෝගයක් කිරීම—මේ නියෝගයේ වලංගු භාවය.

තීන්දුව :—1958 අංක 1 දරණ කුඹුරු පනතේ 21 (1) වැනි ඡෙදය යටතේ කළ රපෝර්තුවක් උඩ, එම ඡෙදයේ (2) වැනි උප ඡෙදය අනුකූලව සිතාසියක් නිකුත් නොකර, රපෝර්තුවේ සඳහන් කුඹුරු ඉඩම් හිමියන්ට විරුඬව මහේස්ත්‍රාත්වරයකු කරන පහකිරීමේ නියෝගය වලංගු නැත.

නීතිඥවරු :—ඒ. ඩබ්ලිව්. ඩබ්ලිව්. ගුණවර්ධන, පෙත්සම්කරුවන් වෙනුවෙන්.

ගරු අබේසුන්දර විනිශ්චයකාරතුමා :

සමහර ලියකියවිලි ඉදිරිපත් කිරීමට තමාට අවශ්‍යවී ඇතැයි යන කරුණ උඩ පෙත්සම් කරුවන්ගේ නීතිඥ තැන පෙත්සම් පිළිබඳ තීරණයක් කිරීම කල් දමන ලෙස ඉල්ලා සිටී. ලියකියවිලි කිසිවක් ඉදිරිපත් කිරීමට උවමණාවක් තිබේ යැයි මට නොපෙනේ. පරිශෝධනය සඳහා ඉල්ලීම් කරන්නේ මොන කරුණක් උඩදැයි නීතිඥ තැන නොදනී.

1958 අංක 1 දරණ කුඹුරු පණතේ 21 වැනි ඡෙදයේ (1) වැනි උප ඡෙදය යටතේ ලැබුණු රපෝර්තුවක් උඩ එම රපෝර්තුවට අදළ කුඹුරු හිමි පෙත්සම්කරුවන් පහකිරීමේ නියෝගයක් මේ නඩුවේදී උගත් මහේස්ත්‍රාත්වරයා කර ඇත. කුඹුරුවලින් ඔවුන් බැහැර නොකළ යුතු මක් නිසාදැයි සිතාසියේ සඳහන් දිනයේ හේතු දක්වන ලෙස නියමකරමින් කුඹුරු හිමි පුද්ගලයින්ට සිතාසි නිකුත් කළ යුතුය යන එම ඡෙදයේ (2) වැනි උප ඡෙදයට අනුකූල නොවී මේ නියෝගය කර ඇත. පහකිරීමේ නියෝගය එම නිසා වලංගු නැත. නඩුවට අදළ කුඹුරුවල අයිතිය නැවතත් පෙත්සම් කරුවන්ට හිමිකරන ලෙස සහ ඉහත සඳහන් 21 (2) වැනි ඡෙදය අනුකූලව ක්‍රියාකිරීම සඳහා ගාලු මහේස්ත්‍රාත් උසාවියට මේ නඩුව යළිත් බාර කරණ ලෙස අණ කරමින් එම පහකිරීමේ නියෝගය අවලංගු කරයි.

ආපසු යවන ලදී.

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* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 62 වෙනි කා., 16 වෙනි පිට බලනු.

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ගරු එච්. එන්. ජී. ප්‍රනාන්දු සහ ටී. එස්. ප්‍රනාන්දු විනිශ්චයකාරතුමන් ඉදිරිපිට

විලියම් සිල්වා එ. කෙහෙල්ගමුවේ අතුළුදස්සි ස්ථවිර*

ශ්‍රෙ. අ. අ. S.C. 283 (F) 1960—මහනුවර දි. උ. 1575.

විවාද කළ දිනය : 1962 මාර්තු 19 සහ 20.
තීන්දු කළ දිනය : 1962 මාර්තු 29

වැඩි දියුණු කිරීම සඳහා වන්දි—බිම් කුලිය ගෙවා නියමිත ප්‍රමාණයට ස්ථිර ගොඩනැගිලි සෑදීමට අවසර දෙන විධිමත් නොවන බදුකරයකට අනුව ඉඩමක පදිංචි වූ විත්තිකරුවෙක්—එම ගොඩනැගිලි ඉදිකළ පසු විත්තිකරු පිටමන් කිරීමට දැමූ නඩුවක්—විත්තිකරු විසින් තමා කළ වැඩි දියුණු කිරීම් වලට වන්දි ඉල්ලීම—වන්දි ඉල්ලීම ක්‍රියාත්මක කළ හැක්කේ විත්තිකරු ඉඩමෙන් පිටවී ගිය පසුව යයි නඩුව ඇසූ උසාවිය තීරණය කිරීම—එම තීරණයට විරුඩව ඉදිරිපත් කළ අභියාචනය (Appeal).

ඉඩම්හිමියකු වන පැමිණිලි කරු විසින් ලියවන ලද නොතාරිස් කෙණෙකුගේ සහතික කිරීමක් නොමැති බදුකරයකැයි කියවෙන ලියවිල්ලක් අනුව ඉඩමක බුත්තිය ලැබූ විත්තිකරු ඊට අනුවම එහි නියමිත ප්‍රමාණයට ස්ථිර ගොඩනැගිල්ලක් සාදගත්තේ එම ලියවිල්ලේ සඳහන් පරිදි මාසික බිම් කුලියක් ගෙවීමෙනි. පසුකලක තමා ඉන් පිටමන් කිරීමට නඩු පවරණු ලැබූ විත්තිකරු තමා විසින් කරණ ලද වැඩිදියුණුව පිණිස වන්දියක් ඉල්ලා සිටියේය. ඔහු වන්දි ලැබීමට සුදුස්සකු බව තීරණය කළ උගත් දිස්ත්‍රික් විනිශ්චයකාරතුමා එම ඉල්ලීම ක්‍රියාත්මක කළ හැක්කේ විත්තිකරු ඉඩමෙන් පිටවී ගිය පසුවයයි නිගමනය කළේය. විත්තිකරුවා මීට විරුඩව ඇපැලක් ඉදිරිපත් කළේය.

තීන්දුව :

(1) නොතාරිස් සහතිකයක් නොමැති මෙම ලියවිල්ල බලරහිතය. එබැවින් විත්තිකරු කොයිම අවස්ථාවක වත් පැමිණිලි කරුගේ ගෙවල් බදුකරුවෙක් නොවීය.

(2) මෙවැනි අවස්ථාවක බලපැවැත්වෙන නීතිය ගාර්වින් විනිශ්චයකාරතුමා විසින් විසඳන ලද නුගපිටිය එ. ජෝසප් (28 න. නී. වා. 140) යන නඩුවේ ගැබ්වී තිබේ. මෙහිදී විත්තිකරුට නිර්ව්‍යාජ අදහසින් ඉඩමක පදිංචි වී සිටින කෙණෙකුට ඇති අයිතිවාසිකම් දියයුතුය. එබැවින් ඔහුට වන්දි ලැබෙන තුරු ඉඩමේ බුත්තිය තබාගැනීමේ අයිතිය (Jus retentionis) හිමි විය යුතුය.

සඳහන් කරණ ලද නඩු :

නුගපිටිය එ. ජෝසප්, 28 න. නි. වා. 140.
අලස් එ. ක්‍රිශ්නන්, 54 න. නි. වා. 155; 47 ස. ල. නි. 19.
ජැපර්ජී එ. සිරිල් ද සොයිසා, 55 න. නි. වා. 127; 50 ස. ල. නි. 1.
හසන්අලි එ. කසීම්, 61 න. නි. වා. 529.
ද සිල්වා එ. පේරුසිංහ, 14 ස. ල. නි. 137.

නීතිඥවරු : ඇස්. ශර්වානන්ද, විත්තිකරු—ඇපැල්කරු වෙනුවෙන්.
බී. ජේ. ප්‍රනාන්දු, පැමිණිලිකාර-වගඋත්තරකරු වෙනුවෙන්.

ගරු එච්. එන්. ජී. ප්‍රනාන්දු විනිශ්චයකාරතුමා:

පැමිනිලිකරුගේ ඉඩමෙන් විත්තිකරු පිටමන් කිරීමට පවරන ලද මෙම නඩුවේ විනිශ්චයකිරීමට ඇති එකම ප්‍රශ්නය නම් විත්තිකරුට තමා කලින් සිටි ඉඩම් හිමියාගේ කැමැත්ත ඇතුව එම ඉඩමට කරන ලද වැඩිදියුනු කිරීම් සඳහා වන්දියක් ලැබෙන තුරු ඉන් පිටනොවී ඉඩම තමාගේ භාරයේ තබාගැනීමේ අයිතියක් ඇද්ද යන්නයි. උගත් දිස්ත්‍රික් නඩුකාර තුමාගේ තීන්දුව වූයේ විත්තිකරු විසින් සාදන ලද ගොඩනැගිල්ලට වන්දියක් ලැබීමේ සුදුසුකම ඔහුසතු නමුත් මේ නියායෙන් ඔහු කරණ වන්දි ඉල්ලීම ක්‍රියාවේ යෙදිය හැක්කේ ඔහු ඉඩමෙන් පිටවී ගිය පසුව බවය. විත්තිකරු ඇපැල් පෙත්සම ඉදිරිපත්කරන ලද්දේ මේ තීන්දුවට විරුද්ධවය. විනිශ්චයකාර තුමාගේ මෙම නිගමන රඳා ඇත්තේ අලස් එ. ක්‍රිෂ්ණන් (54 න. නී. වා: 155) යන නඩුවේ සහ ජැපර්ජී එ. සිරිල් ද සොයිසා (55 න. නී. වා: 127) යන නඩුවේ සඳහන් ව ඇති මෙම අධිකරණයේ ප්‍රකාශයන් මත වේ. එම ප්‍රකාශයන්ගෙන් පෙනියන්නේ ගෙවල් කුලී ගෙවන්නෙකුට තමා කරණලද වැඩිදියුනුව පිළිබඳ වන්දිය ඉල්ලිය හැක්කේ එම ගෙවල් කුලී බද්ද අහෝසිවී ඔහු ඉඩමෙන් ඉවත්වූ පසුව බවකි. මෙම නඩුවෙහි පෙනීසිටි අධිනීතිඥවරු මෙම ප්‍රකාශයන් ලංකාවට

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 62 වෙනි කා., 27 වෙනි පිට බලනු.

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අදාලවන පොදුනීතියේ හැටියට නිවැරදිදැයි සලකා බැලී-මට අපට අයැදීමක් කළ නමුත් මෙම නඩුවෙහි ඉදිරි-පත්වී ඇති කරුණු අනුව එම ප්‍රකාශයන්ගේ නිරවද්‍ය-තාවය ගැන පරීක්ෂණයක් පැවැත්වීම අනවශ්‍යයයි හැඟේ. මෙම ඉඩමේ පදිංචිවීම සඳහා ඇතුල්වූ විත්ති-කරු ඉඩම්හිමියා විසින් දෙනලද බද්දක් හැටියට සැල-කෙන D1 දරණ ලේඛනය ලියා අත්සන් කරවා ගැනීමෙන් පසු තමා විසින්ම ගෙයක් සෑදුවේය. බද්දක් හැටියට සැලකෙන මෙම ලේඛනයෙහි පරමාර්ථය වූයේ විත්ති-කරු බිම් කුලිය වශයෙන් මසකට ශත 33 ක් ගෙවා එහි නියම් කරණ ලද ප්‍රමාණයට ස්ථිර ගොඩනැගිල්ලක් ඉදිකිරීමට අවකාශ දීමය. මෙම ලේඛනය නොතාරිස් කෙනෙකු විසින් සහතික කරණ ලද්දක් නොව නිසා ශූන්‍ය ලේඛනයක් බවපැහැදිලිය. පැමිණිලිකරු විසින් විත්තිකරු ඉඩමෙන් පිටමං කිරීමට පවරන ලද නඩුව රඳ තිබුණේ මෙම ලේඛනය ශූන්‍යවූවක් නිසා විත්තිකරුට එයින් එහි පදිංචිවීමට බලයක් නොලැබෙන කරුණ උඩය. මෙසේ වන්නේ විත්තිකරු මේ ලේඛනය අනුව ගෙවල්කුලී ගෙවන්නෙක් නොවන නිසාය. මෙය මෙසේවීම නිසා ගෙවල්කුලී ගෙවන්නෙකුට වන්දිය ඉල්වියහැක්කේ තමාගේ කුලී බද්ද නිමාවට ගිය පසුවයයි ප්‍රකාශ කරමින් නීතිය පහද තීන්දුව දුන් නඩු මෙම කරුණට අදාල නොවේ. මෙහිදී කෙලින්ම ගැලපෙන තීන්දුව හැටියට සැලකිය හැක්කේ ගාර්වින් විනිශ්චයකාරතුමා විසින් නුගපිටිය එ. ජෝසප් (28 න. නී. වා: 140) යන නඩුවෙහිදී දුන් තීන්දුවයි. එහිදී එම විත්ශ්චයකාරතුමා විසින් අයිතිකරුවෙකුගෙන් ලැබූ ලිපියක් නීත්‍යානුකූල යයි අදහමින් යම්කිසි ඉඩමක් වැඩිදියුණු කළ තැනැත්-තෙකුට වන්දිය ලැබීමේ ක්‍රමය පිළිබඳව ඇති අයිතිවාසි කම් ගැන අපේ නීතිය කෙසේදයන විස්තර කරමින් කරන ලද ප්‍රකාශයක් සම්පූර්ණයෙන් උපුටා දැක්වීම යෝග්‍යයයි සිතේ.

එම තීන්දුවේ සඳහන් වන්නේ මෙසේය:

"යම්කිසි බද්දක් දෙන කෙනෙකු විසින් තමාගේ බද්දේ යම් යම් අවශ්‍ය දේ නිසි පරිදි සඳහන් නොවීමේ අඩුපාඩුකම් නිසා එම බද්ද ඉවත ලූ කලෙක තමාට පූර්වයෙන් කම තිබෙන නියාම, බදු ගත් අයට එම ඉවත හෙළූ බද්දෙන් ලැබෙන අයිතිවාසිකම් නො ලැබෙන ලෙස ක්‍රියාකරන අතරම එම බදුගත් අය විසින් කරන ලද යම් යම් වැඩි දියුණුකම් ඇතොත් ඒ සඳහා ලැබිය යුතු වන්දිය සීමා කිරීම යුක්තියට අනුකූල වී සෑහේද ? බදු දෙන තැනැත්තා එම බදු කරයෙන් තමා පිට පැවරෙන බැඳීම් වලින් නිදහස් වෙනොත් එම බැඳීම් වලින් බදු ගන්න තැනැත්තා ද නිදහස් විය යුතුය. මෙවැනි තත්ත්වයක් මත ඉඩමක් බුක්ති විඳින කෙනෙකු හමුවුවහොත් ඔහුගේ තත්ත්වය කෙබඳුවේ ද? ඔහු මේ ඉඩමේ බුක්තිය පිළිබඳව දේපල තමා වෙත රඳවා ගැනීමේ ස්වාමීත්වයේ චේතනාව ("Detentio animo domini") නොමැති නිසා නිර්ව්‍යාජ බුක්තිකරුවෙකු හැටියට (Bona fide possessor) නොසැලකේ. එසේම බදුකරය ක්‍රියා කාරී නොවීම නිසා ඔහු බදුගැනුම් කරුවෙකු ලෙසද නොසැලකේ. එබැවින් ඔහු මෙම ඉඩමට ඇතුල්වී අව්‍යාජ විශ්වාසයකින් තමාට සතුටු කාල පරිච්ඡෙද-යක් තුල බුක්ති විඳිය හැකියයි සිතා එය අව්‍යාජ විශ්වාසයකින් (Bona fide) වැඩිදියුණු කල තැනැත්-තෙකි. මෙම ප්‍රශ්නයට කෙලින්ම බලපැවැත්වෙන නවත් කරුණක්ද ඇත. එනම් මෙහි වැඩිදියුණු කිරීම් කරන ලද්දේ බදුගැනුම්කරු එම වැඩිදියුණු කිරීම් කරන ලද නම් නිසි පරිදි බිම් කුලිය ගෙවූ විට එම වැඩිදියුණුකිරීම්වලින් ඔහුට සතුටුකාලයක් එය බුක්ති-විඳීමට ඉඩදීමට ඉඩම් හිමියාගේ කැමැත්ත ගෙන අවසරය ඇතුව මෙම කටයුතු සිදුවූ බවය. මෙවැනි තත්ත්වයක සිටින කෙනෙකුට සිවිල් බුක්තිය (Possessio Civilis) ඇතැයි සැලකිය නොහේ. කරුණු මෙසේ තිබියදී මෙ තැනැත්තාට වෙන අවස්ථා-වලදී මේ පිළිබඳ වන්දියක් ඉල්ලීමේ අයිතිවාසිකම නැතිවී යාහැකි වුව ද, මේ සිඩියෙහිදී ඔහුවන්දිය ඉල්ලා සිටින්නේ තමා කළ වැඩිදියුණු කිරීම ගැන දනාගෙන ඒ පිළිබඳව කැමැත්ත ප්‍රකාශ කළ කෙනෙකුගෙන් නිසා මෙහිදී ඔහුට නියම් වශයෙන් සිවිල් භුක්තිය නැතත් නිර්ව්‍යාජ විශ්වාසයකින් එය බුක්ති විඳින ලද කෙනෙකු හැටියට තමාට ඇති අයිතිය ක්‍රියාවෙහි යෙදවීමට ඉඩ දිය හැක. මොහමමදු එ. බබූන්, (2 සී. ඒ. සී. 86) යන නඩුවෙහි විත්තිකරු තමාගේ හිමිකම ප්‍රකාශ කරවාගැනීම පිණිස පවරන ලද නඩුවකදී සැලකර සිටියේ එම ඉඩමෙහි පිහිටා ඇති ගෙය තමා සෑදූ බවත් ඉඩම් හිමියාගේ අවසරය සහ අවකාශය ලබා එහි ඇති වැවිලි වගා කල බවත් මෙම වැඩි-දියුණු කිරීම් වලට ලැබිය යුතු වන්දිය නොගෙවා ඔහුව එම ඉඩමින් පිටමං නොකළ හැකි බවත්ය. මෙහිදී පෙරෙයිරා විනිශ්චයකාරතුමා විසින් නිගමනය කරන ලද්දේ එහිවූ කරුණු අනුව විත්තිකරු නිර්ව්‍යාජ විශ්වාසයකින් ඉඩමක් බුක්තිවිඳින ලද කෙනෙකුට හිමි අයිතිවාසිකම් ලැබීමට සුදුසු කෙනෙකු බවය. වන්දිය ගෙවන තුරු ඉඩමේ බුක්තියද තමා වෙත තිබිය යුතුයයි විනිශ්චයකරු තීරණය කෙළේය. (ඉහත සඳහන්) මොහමම්මදු එ. බබූන් පිළිබඳ නඩුව දවින් අප්පු එ.බහාර්—(26 න. නී. වා. 73.) දරණ නඩුවෙහි අග්‍රවිනිශ්චයකාරධුරි බර්ට්‍රම් විනිශ්චයකාරතුමා සඳහන් කරමින් කීයේ මෙය නිර්ව්‍යාජ විශ්වාසයෙන් බුක්ති විඳි කෙනෙකුට තමා කළ වැඩිදියුණුකිරීම් සඳහා ලැබිය යුතු වන්දිය සිවිල් බුක්තිය නොමැති පුද්ගලයන් කොටසකටද පිරිනැමෙන සේ ඒ පිළිබඳ නීතිය පලල් කොට ඇති බවකි. නමුත් එම උගත් විනිශ්චයකාර තුමා විසින් ම අප්පුහාමි සහ අනිත් අය එ. දෙලොස්වල තේ සහ රබර් කොම්පැනිය (23 න. නී. වා. 129) යන නඩුවෙහි අදහස් කළ පරිදි මෙහි දෙන ලද පිළි-සරණ දී ඇත්තේ එම පුද්ගලයන් Possessio utilis නමින් හැඳින්වෙන ප්‍රයෝජන ගැනීමේ බුක්තිය සතුව තිබුණ පුද්ගලයින් නිසා නොවන බව ගෞරව පෙරටුව සඳහන් කරමි. ප්‍රයෝජන ගැනීමේ බුන්තියද සිවිල් බුන්තියටම සබඳ කම් ඇති දෙයකැයි එම නඩුවේම සඳහන් වී තිබේ. නමුත් මෙම ප්‍රතිඵලය ඇතිවීමට හේතුව එය නොව වෙනත් නීති ප්‍රඥප්තියක් නවත් පලල් කොට මෙහිදී ක්‍රියාකරවා තිබීමෙනි. ඒ නීති ප්‍රඥප්තිය නම් යම්කිසි ඉඩමක් වැඩිදියුණු කිරීමට එකඟත්වය ප්‍රකාශ කළ ඉඩම් හිමියකුට ඒ පිළිබඳව එම වැඩිදියුණු කල තැනැත්තාට නිර්ව්‍යාජ

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චේතනාවෙන් බුක්ති විඳින තැනැත්තෙකු හැටියට සලකා එම වැඩිදියුණු කිරීම පිණිස ලැබිය යුතු වන්දියකට විරුඬව කලහ කිරීමට අවකාශ නැත යන්නයි.''

පැමිණිලිකාර වගඋත්තරකරු වෙනුවෙන් පෙනී සිටි නීතිඥවරයා ගාර්වින් විනිශ්චයකාරතුමා විසින් පලකල මේමතයට පටහැනි මතයක් විනිශ්චයාසනයකින් ප්‍රකාශ කර ඇති බවට කිසිම සාධකයක් පෙන්වා නැත. අනෙක් අතින්, හසන් අලි එ.කසිම් (61 න.නී.වා.529) යන නඩුවෙහි දී රාජාධිකරණය ස්ථිර කොට ඇත්තේද ඉඩම් හිමියෙකු එහි පදිංචිවීමට ලියන ලද බඳුකරයක් ඉවත දමා එම බඳුකරය නීත්‍යානුකූල නොවේයයි තර්ක කරන විට එහි පදිංචි ව සිටින්නා නමා කරන ලද වැඩිදියුණුව පිළිබඳ ඉල්ලන වන්දිය කුලියට ඉන්න කෙනෙකු ඉල්වන අයිතිවාසිකමක් හැටියට නොසැලකිය යුතු බවවේ.

ද සිල්වා එ. පේරුසිංහ (14 ස. ල. නි. 137) යන නඩු තීන්දුවේදී සලකා බලා ඇත්තේ ඉඩම් හිමියෙක් බඳුකරයක් ඉවත දැමූ නඩුවක් නොවේ. එම නිසා එහිදී කරන ලද තීරණය එනම් කුලියට සිටින කෙනෙකුට ඉඩම් හෝ ගෙය තමා වෙත තබා ගැනීමේ අයිතිය තමා වැඩිදියුණු කළ අවස්ථාවක වුවද තමාට හිමිනොවේ යන්න මෙහිදී මෙම සිඬියට කුලියට නො සිටින කෙනෙකුගේ අයිතිවාසිකම විමසා බැලීමට උප-කාරී නොවන බව මෙහිලා කියමි.

(ඉහත සඳහන්) නුගපිටිය එ. ජෝසප් නැමති නඩුවේ තීන්දුව අනුව යමක් මෙහිදී විත්තිකරුට නිර්ව්‍යාජ බුක්ති විඳින්නෙකුට ඇති අයිතිවාසිකම් දියයුතු බවත් ඒ අනුසාරයෙන් ඔහුට තමා කළ වැඩිදියුණු කිරීම්වලට වන්දිය ලැබෙන තුරු ඉඩමේ රැඳී සිටීමට අයිතිය ඇති බවත් මම නිගමනය කරමි. ඔහුට ලැබිය යුතු වන්දිය ඉඩම් හිමියාගේ ප්‍රකට කැමැත්ත ඇතුව තමා ඉදිකරන ලද ගෙයි දැනට ඇති වටිනාකම වේ. මෙම වටිනාකම නඩුවෙහිදී විවාදයට භාජන වුණු නමුත් එය කොපමණ දැයි නිගමනයට බැස තිබෙන බවක් නොපෙනේ. මෙම නඩුපොත දිස්ත්‍රික් උසාවියට ලැබුණු විගස එම ගොඩනැගිල්ලේ දැනට ඇති වටිනාකම පාර්ශව කරු-වන්ගෙන් ලැබිය හැකි සාක්ෂි අනුව තීරණය කිරීමට දිස්ත්‍රික් විනිශ්චයකාරතුමා අප්‍රමාදව කටයුතු කරනු ඇත. ඉන්පසු ඔහු විත්තිකරු පිටමං කිරීමේ නියෝගය ලියනු ඇත. එහෙත් එහි විත්තිකරුට පැමිණිලිකරු විසින් 1951 ඔක්තෝබර් මස 20 වෙනි දින සිට පිටමං කිරීමේ නියෝගය නිකුත්වන දින දක්වා තමාට ලැබිය යුතු යම් නයක් ඇත්නම් එය අඩුකර විත්තිකරුට ගෙවිය යුතු වන්දි මුදල ගෙවන තුරු විත්තිකරු පිටමං කිරීමේ එම නියෝගය නිකුත් නොකළ යුතුය.

දැනට සඳහන් වී ඇති නියෝගය ඒ තිබෙන ආකාරයෙන් ක්‍රියාත්මක වීම මෙයින් ප්‍රතික්ෂේප කෙරේ. දිස්ත්‍රික් උසාවියෙන් නඩුගාස්තුවද මෙම ඇපැල් උසාවියේ නඩු වෙහි නඩුගාස්තුවද විත්තිකරුට ලැබිය යුතුය.

ගරු ටී. ඇස්. ප්‍රනාන්දු විනිශ්චයකාරතුමා

මම එකඟවෙමි.

ඇපෑලට ඉඩ දෙන ලදී.

ගරු හේරත් විනිශ්චයකාරතුමා ඉදිරිපිට

පකීර් එ. අබ්දු*

ශ්‍රෙ. අ. 55/'61—කොළඹ රික්වැස්ට් උසාවිය 78128 (R/E)

විවාද කළ හා තීන්දුකළ දිනය: 1962 ජුනි 13.

ගෙවල් කුලි සීමාකිරීම් (සංශෝධිත) පණත—වර්ෂ 1961 නො. 10, 13 (1), (2) සහ (3) වන ඡේද—නඩුවක් හෝ නීත්‍යානුකූල පියවරක් නිමාවට නොගොස් පවතිමින් තිබේද නැද්ද යන වග—නඩුවක ඇපෑල පවතිමින් තිබීම.

වර්ෂ 1961 නො. 10 දරණ ගෙවල් කුලි සීමා කිරීම් (සංශෝධිත) පණතේ 13 (1) දරණ ඡේදයේ අඩංගු කරුණු වලින් බාහිරව පිළිසරණ පතා පැමිණිලිකරු විසින් විත්තිකරුගෙන් ගෙවල් කුලි අයකර ගැනීමට හා ඔහු ගෙයින් පිටමන් කිරීමට වර්ෂ 1960 නොවැම්බර් මස 24 වෙනි දින නඩු පවරණ ලදී. පළමුවන වරට නඩු පැවරූ උසාවිය පැමිණිලි කරුට පක්ෂව තීන්දුව දුන් නමුදු විත්තිකරු ඊට විරුඬව ඇපැල් පෙත්සමක් ඉදිරිපත් කෙළේය. මෙම ඇපෑල වර්ෂ 1961 අප්‍රියෙල් මස 30 වෙනි දින නිමාවට නොගොස් පවතිමින් තිබින. නිශ්චය කිරීමට තිබු ප්‍රශ්නය වූයේ ඉහත සඳහන් පණතේ 13 (3) දරණ ඡේදය අනුව එම පණත බල පැවැත්වුනු දිනට කලින් දින දක්වා නිමාවට නොගොස් තිබුණු නිසා පැමිණිලිකරුට දීතිබුණු තීන්දුව බල ශූන්‍යවූත් බලරහිත වූවක්ද යන්න විය. මෙම පණත ක්‍රියාත්මක වූයේ වර්ෂ 1961 මැයි මස පළමුවන දින දීය.

තීන්දුව :—වර්ෂ 1961 අප්‍රියෙල් මස 30 වෙනි දින මෙම නඩුව නිමාවට නොගොස් පවතිමින් තිබුණි. එමනිසාමෙම නඩුව ශූන්‍ය වූත් බල රහිත වූත් තීන්දුවක් ලෙස සැලකිය යුතුය.

සඳහන් කරණ ලද නඩු :— සිල්වා එ. ප්‍රනාන්දු, 22 න. නී. වා. 39

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* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 62 වෙනි කා., 26 වෙනි පිට බලනු.

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නීතිඥවරු : ඈ.ම්. මාර්කානි, සිවගුරුනාදන් සමග විත්තිකාර ඇපැල්කරු වෙනුවෙන්.
ඈ.ම්. ටී. ඈ.ම්. සිවාර්ඩින්, පැමිණිලිකාර වගඋත්තරකරු වෙනුවෙන්.

ගරු හේරත් විනිශ්චයකාරතුමා

මෙය වනාහි පැමිණිලිකාර වගඋත්තර කරු විසින් විත්තිකාර ඇපැල් කරුට විරුඩව ගෙවල් කුලි අයකර ගැනීම පිණිසද ගෙයින් පිටමන් කරවීම පිණිසද පවරණ ලද නඩුවකි. මෙහි ප්‍රශ්නයට භාජන වී ඇති භූමි භාගය ගෙවල් කුලි සීමා කිරීමේ නීතියට යටත් ප්‍රදෙශයක් බව පිළිගත යුතුය. මෙම නඩුව පවරා ඇත්තේ වර්‍ෂ 1960 නොවැම්බර් 24 වෙනි දිනය. නමුත් වර්‍ෂ 1961 නො: 10 දරණ ගෙවල් කුලි සීමා කිරීම් (සංශොධිත) පණතේ 13 වන ඡෙදයේ 1 වන උපඡෙදයෙහි මෙසේ පැණවී තිබේ.

"ප්‍රධාන පණතේ යම් කිසිවක් ඇතත් එය නො සලකා මෙම පණත බලපවත්වන භූමි ප්‍රදෙශයක ඉඩම් හිමියෙකුට තමාගේ කුලියට පදිංචිව සිටින කෙණෙකු ඉන් පිටමන් කිරීම සඳහා නඩුවක් දැමීමට හෝ නීත්‍යානුකූල පියවරක් ගැනීමට හෝ හැකිවන්නේ මෙහි පහත දක්වෙන කරුණු එකක් හෝ වැඩි ගණනක් අනුව පමණකි."

මින් පසු ("ඒ"), ("බී") සහ ("සී") යනුවෙන් දක්වෙන කරුණු තුනක් සඳහන් වී තිබේ. මෙහිදී පැමිණිලි කාර වගඋත්තර කරු අප ඉදිරියේ දැනට ඇති මෙම නඩුව පවරා ඇත්තේ වර්‍ෂ 1961 නො: 10 දරණ ගෙවල් කුලි සීමා කිරීම් (සංශොධිත) පණතේ 13 (1) දරණ ඡෙදය් "ඒ", "බී" හෝ "සී" කොටස් වලට අනුව නොවේයයි පිළිගත හැක.

ඉහත සඳහන් 13 වන ඡෙදයේ (2) වන උපඡෙදයේ මෙසේ පණවා තිබේ.

" (1) දරණ උපඡෙදයේ සඳහන් පැණවීම් වර්‍ෂ 1960 ජුලි මස 20 වන දින සිට ක්‍රියාකාරි වූ බව සැලකිය යුතු අතර ඒවා එදින සිට අවුරුදු දෙකක් ගතවන තුරු බල පවත්වනු ඇත."

මේ නියායෙන් බලන කල 13 (1) ඡෙදයේ ඇති කරුණු මෙම නඩුව දැමූ අවස්ථාවේ බලපවත්වමින් තිබුණු බව පෙනේ. එමෙන්ම වර්‍ෂ 1961 නො: 10 දරණ ගෙවල් කුලි සීමාකිරීම් (සංශොධිත) පණතේ ඉහත සඳහන් 13 වන ඡෙදයේ (3) වන උපඡෙදයේ වැඩි දුරටත් මෙසේද පැණවී තිබේ.

" ප්‍රධාන (ගෙවල් කුලි සීමා කිරීම්) පණතට යටත් ප්‍රදෙශයක ඇති ගෙයකින් එහි කුලියට සිටින කෙණෙකු පිටමන් කිරීම සඳහා යම්කිසි නඩුවක් හෝ එබඳු නීත්‍යානුකූල පියවරක් මෙම ඡෙදයෙහි (1) වන උපඡෙදයෙහි ඇතුළත් කරුණුවලට අමතරව වර්‍ෂ 1960 ජුලි මස 20 වන දිනහෝ ඊට පසු දිනක පවරන ලදුව හෝ ගන්නා ලදුව එය මෙම පණත බලපැවැත්වීම ආරම්භ වන දිනයට කලින් දිනයෙහි නිමාවට නො ගොස් පවතිමින් තිබේ නම් එම නඩුව හෝ එසේ ගත් නීත්‍යානුකූල පියවර ශුන්‍යවූත් බලරහිත වූත් දෙයක් හැටියට සෑම අවස්ථාවන්හිදීම සලකා ගත යුතුය."

වර්‍ෂ 1961 නො: 10 දරණ ගෙවල් කුලි සීමා කිරීම් (සංශොධිත) පණත වර්‍ෂ 1961 මැයි මස 1 වෙනි දින සිට ක්‍රියා කාරිවූ බව පිළිගනු ලැබේ. පහළ උසාවියෙහිදී මේ පිළිබඳ නඩු තීන්දුව දී ඇත්තේ වර්‍ෂ 1961 මාර්තු මස 20 වන දින දීය. නමුත් යථා කාලයේදී විත්තිකාර ඇපැල් කරු ඇපැල් පෙත්සමක් ඉදිරිපත් කරණ ලදින් එය වර්‍ෂ 1961 නො: 10 දරණ ගෙවල් කුලි සීමාකිරීමේ ආඥපණත ආරම්භ වූ හෝ ක්‍රියාකාරි වූ හෝ දිනය හැටියට ගිණිය හැකි දිනට කලින් දිනය වන වර්‍ෂ 1961 අප්‍රියෙල් මස 30 වන දින නිමාවට නොගොස් පවතිමින් තිබුනි. මාගේ අදහස පරිදි මෙම ඇපැල පිළිබඳව සලකා බලන විට පණතින් ආරක්ෂාවී යයි පිළිගත යුතුව ඇති ප්‍රදෙශයක ගෙයකින් කුලිගෙවන්නකු පිටමන් කිරීමට දමා ඇති මෙම නඩුව හෝ ගෙන ඇති මෙම නීත්‍යානුකූල පියවර වර්‍ෂ 1961 අප්‍රියෙල් මස 30 වන දින නිමාවට නොගොස් පවතිමින් තිබිනි.

පළමු වන වරට නඩු දැමූ උසාවියෙන් දෙන තීන්දු ප්‍රකාශයකින් සාමාන්‍ය වශයෙන් සමාප්ත නො වන නඩුවක් හෝ නීත්‍යානුකූල පියවරක්, මා සිතන හැටියට ශ්‍රෙෂ්ඨාධිකරණයට එම් තීන්දු ප්‍රකාශයට විරුඩව ඇපැල් පෙත්සමක් ඉදිරිපත් කළ විට නිමාවට නොයේ, එමෙන්ම එම ඇපැල මෙම අධිකරණයෙන් විසඳා ලන තුරු එම නඩුව නිමාවට නොගොස් පවතිමින් තිබෙන බව මගේ අදහසය. මා මෙහිලා ගත් මතය සනාථ කිරීමට මෙම අධිකරණයෙන්ම දෙන ලද 22 වන නව නීති වාර්තාවෙහි 39 වන පිටේ ඇති නඩු තීන්දුව උපකාරීවේ. යම්කිසි කරුණක් අධිකරණයෙන් විනිශ්චිත කරුණක් (res judicata) ද යන්න තීරණය කිරීම සඳහා ද මෙම අධිකරණයත් රාජාධිකරණයත් තීරණය කර ඇත්තේ, යම්කිසි නඩුවක් හෝ නීත්‍යානුකූල පියවරක් ඇපැල් පෙත්සමකට ලක්වී තිබේ නම් එහි මූලික උසාවියෙන් දෙන ලද තීරණය අධිකරණය මගින් විනිශ්චිත කරුණක් (res judicata) හැටියට ඒත්තු ගැන්විය නො හැකි බවය. මෙම තර්කය මෙයට අදල වේයයි මට සිතේ.

මාගේ අදහසේ හැටියට වර්‍ෂ 1961 අප්‍රියෙල් මස 30 වන දින මෙම නඩුව නිමාවට නොගොස් පවතිමින් තිබිනි. එම්නිසා වර්‍ෂ 1961 නො: 10 දරණ ගෙවල් කුලි සීමාකිරීම් (සංශොධිත) පණතේ 13 වන ඡෙදයේ (3) වන උපඡෙදය අනුව මෙම නඩුව හෝ මෙහි ලා ගෙන ඇති නීත්‍යානුකූල පියවර ශුන්‍යවූත් බලරහිත වූත් දෙයකැයි මම ප්‍රකාශකරමි. මෙම ඇපැලට ඉඩ දෙන අතර පහළ උසාවියේ තීන්දු ප්‍රකාශය ඉවත හෙලමි. පැමිණිලිකාර වගඋත්තර කරු විසින් පවරන ලද නඩුව මෙයින් නිෂ්ප්‍රභා වේ. විත්තිකාර ඇපැල් කරුට මෙම උසාවියේ සහ රික්වැස්ට් උසාවියේ නඩුගාස්තුවද ගෙවිය යුතුය.

ඇපැලට ඉඩ දෙනලදී.

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ගරු සන්සෝනි විනිශ්චයකාරතුමා ඉදිරිපිට

ලංකා ගමනා ගමන මණ්ඩලය එ. සමඟත ලංකා මෝටර් සේවක සමිතිය*

ශ්‍රෙ. අ. නො. 31/වර් 1961—කම්කරු උසාවිය නො: 1/4118

විවාද කළ දිනය : 23.7.62.
තීන්දු කළ දිනය: 26.7.62.

කාර්මික ආරවුල් පනත—කම්කරුවකු අස්කිරීම—සේවායෝජක තැන පක්ෂපාතිත්ත්වයෙන් ක්‍රියා කල බැව් කියා කම්කරු උසාවියෙන් පිළිසරණ යදිමින් දුන් ඉල්ලුම් පත්‍රයක්—කම්කරු උසාවිය නැවතත් එම කම්කරුවා වැඩට ගැනීමට යයි කළ නියෝගය—ශ්‍රෙෂ්ඨාධිකරණයට ඉදිරිපත් කල ඇපැල් පෙත්සම—කම්කරු උසාවියේ සභාපතිවරයා කරුණු වරදවා තේරුම් ගැනීම—අස්කිරීමේ නියෝගය නැවතත් ක්‍රියාත්මක කිරීම.

ලංකා ගමනා ගමන මණ්ඩලයේ යාන්ත්‍රිකයකු මෙන් රැනියාවෙහි නියුක්ත ව සිටි කම්කරුවකු රක්ෂාවෙන් අස්කරණු ලැබිය. මෙයට හේතුවූයේ යම්කිසි සේවකයකු විසින් අවසරයක් නො ලබා හෝ රිය පැදවීමේ අවසර පත්‍රයක් නොමැති ව හෝ ලංගමයට අයිති යම්කිසි වාහනයක් ඉවතට ගෙන ගියහොත් ඔහු රක්ෂාවෙන් අස්කරණු ලැබේයයි සඳහන් වන රෙගුලාසියක් උල්ලංඝනය කිරීමයි. ඇත්ත වශයෙන්ම පිළියන්දල රථ නැවතුම්පොළෙහි ගෘහ ගතකර තිබුනු බස්රථයක් ඔහු පිටතට ගෙන ගොස් අවසර පත්‍රයක් නොමැතිව එය එලවා ගෙන ගියේය. මෙම රථය පාරෙන් ඉවතට පැන ගියේය.

කම්කරු උසාවියෙන් පිළිසරණ ඉල්වූ ඔහු ඒ පිළිසරණ ලබා ගැනීම සඳහා ඉදිරිපත් කළ පලමුවෙනි කරුණ නම් ලංකා ගමනා ගමන මණ්ඩලය පක්ෂපාතිව ක්‍රියාකර තිබේය යන්නයි. මෙයට පදනම් වූයේ එම මණ්ඩලයටම අයත් බස් රථයක් එම ඩිපෝවෙන්ම ඉවතට ගෙන බලයක් හෝ අවසර පත්‍රයක් නොමැති ව මීට අවුරුද්දකට පසු එය පදවා ගෙන ගිය පෝර්මන් කෙනෙකු රක්ෂාවෙන් අස්නොකර ඔහුට අවසාන වරට අවවාද කර වෙන තැනකට මාරු කිරීමක් පමණක් බව කියා සිටිමකි.

කම්කරු උසාවියේ සභාපතිවරයා එක්තරා ග්‍රන්ථයක පරිච්ඡෙදයක් සලකා බැලීමෙන් පසු ලංකා ගමනා ගමන මණ්ඩලය පක්ෂපාති ව ක්‍රියා කර තිබේයයි නිගමනය කර කම්කරුවා යළිත් වැඩට ගත යුතු බව නියෝග කෙළේය. ලංගමය මෙයට විරුඬව ඇපැලක් ඉදිරිපත් කළේය.

තීන්දුව :—නමා උපුටා දක්වන ලද එකී ග්‍රන්ථයෙහි කොටස හෝ මීට පසු සිදු වූ එම උප පෝර්මන් තැනගේ සිඬිය හෝ මීට අදළ නො වේ. එබැවින් කම්කරු උසාවියේ සභාපතිවරයා කරුණු වරදවා අවබෝධ කරගෙන තිබේ. කම්කරුවා රක්ෂාවෙන් අස්කරන ලද නියෝගය ස්ථිර කරන්ට අණකරන ලදී.

නීතිඥවරු : එ. මහෙන්ද්‍රරාජා, පී. නාගෙන්ද්‍ර සමග, සේවායෝජක ඇපැල්කරු වෙනුවෙන්.
ඒ. ඇස්. විජේතුංග, ඉල්ලුම්කාර-වගඋත්තරකරු වෙනුවෙන්.

ගරු සන්සෝනි විනිශ්චයකාරතුමා :

අස්කරණ ලද කම්කරුවකු ඔහුට ලැබියයුතු හිඟහිටිය පඩියත් දී නැවත රක්ෂාවට ගතයුතු යයි කම්කරු උසාවියක සභාපතිවරයකු විසින් දෙන ලද තීරණයකට විරුඬව ලංකා ගමනා ගමන මණ්ඩලය ගත් ඇපැලකි මේ.

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 62 වෙනි කා., 46 වෙනි පිට බලනු.

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මෙහිදී ප්‍රශ්නයට භාජනවී ඇති කම්කරුවා වනාහී අවුරුදු දෙකකුත් මාස නවයක් පමණ කාලයක රක්ෂාවෙහි නියුක්තව සිටි වැඩ උගන්නා යාන්ත්‍රිකයෙකි. යම්කිසි සේවකයෙකු ගමනා ගමන මණ්ඩලය සතු වාහනයක් එය පැදවීමේ සුදුසු කම් දක්වෙන අවසර පත්‍රයක් හෝ තමාට බලයක් හෝ නොමැතිව ගෙන ගියහොත් ඔහු අස්කළ හැකැයි පැනවෙන රෙගුලාසියක් කැඩීම නිසා මොහු රැකියාවෙන් අස්කර තිබේ. මොටෝ රථ පැදවීමේ බලපත්‍රයක් හෝ කිසිම අවසරයක් හෝ නොමැතිව මෙම සේවකයා පිළියන්දල ඩිපෝවෙන් බස් රථයක් පිටට ගෙන එය හැතැප්ම 3/4 ක් පමණ පදවා ගන යන ලද්දයි සොයාගෙන තිබේ. බස් රථය පාරෙන් පිටට පැනීම නිසා මෙම සේවකයා ආපසු ඇවිත් කඩා වැටීම් සේවා වැන් රථය (Breakdown Van) ගෙන එම බස් රථය ඇදා ගෙන ඒම සඳහා ගෙනගොස් තිබේ.

මේ සඳහා දෙන ලද අස්කිරීමේ දඬුවම උග්‍ර වැඩි බවත් මෙම සේවකයා අස්කිරීමෙන් මණ්ඩලය පක්ෂග්‍රාහීව ක්‍රියා කර තිබෙන බවත් කම්කරු උසාවියේදී පෙන්වා දෙන ලදී. උසාවියෙන් දුන් නියෝගයෙහි දඬුවමේ උග්‍රතාවය ගැන සඳහන් වී නැත. සමහර විට මේ ගැන තදින් කරුණු නොකී නිසා මෙය වූවා විය හැක. මණ්ඩලයට අයත් බඩු බාහිරාදියේ ආරක්ෂාව සඳහාත් මහපාර පරිහරණය කරණ අනික් අයගේ ප්‍රයෝජනය සඳහාත් පණවා ඇති මෙම රෙගුලාසිය කැඩීම අස්කිරීමට හේතු නොවන වරදකැයි කිසිසේත් තර්ක කළ නොහේ.

මෙයට අදාළ පණතට අනුව සභාපතිවරයා විසින් සලකා බැලිය යුතුව තිබුනේ මෙම අස්කිරීමේ දඬුවම සාධාරණ ද යුක්තියුක්ත ද යන්නය. මෙහිදී ඔහු විසින් අධිකරණ අභිමතයක් (Judicial discretion) ක්‍රියාවේ යෙදවිය යුතුව තිබුනු බව සැබෑය. නමුත් විනයෙහි ආරක්ෂාව පිළිබඳවත් මහජනාරක්ෂාව පිළිබඳවත් සැපයුනු මෙවැනි වැඩදයක රෙගුලාසියක් කැඩී තිබෙන බව පෙනී යද්දී මෙහිදී දෙන ලද අස්කිරීමේ දඬුවම ප්‍රඥාගෝචර නොවන අතිශයින් උග්‍ර දඬුවමකැයි ඔහු සිතුවේ නම් එය මාගේ පුදුමයට හේතුවේ. අධිකරණ අභිමතයක් ක්‍රියාවෙහි යෙදවිය යුත්තේ යුක්ති සහගතව මිස අත්තනෝමතිකව නොවේ.

මණ්ඩලය පක්ෂග්‍රාහීව ක්‍රියා කර තිබේය යන්නෙන් කරුණු සැලකරණ ලද්දේ මීට අවුරුද්දකට පමණ පසුව සිදුවූ සිඩියක් සම්බන්ධයෙනි. මෙම ඩිපෝවෙහිම රක්ෂාවෙහි නියුක්තව සිටි උප පෝර්මන් කෙනෙකු විසින් තමා ලත් බලයක් හෝ බල පත්‍රයක් හෝ නොමැතිව බස් රථයක් එලවන ලදී. එහෙත් ඔහු අස් නොකරණ ලදී. මේ පිළිබඳව ඔහුට දුන් දඬුවම ඔහු මාරුකර අවසාන අවවාදය දීම පමණකි. අස්ථානයේ ලැබුනු අනුකම්පාවකින් ඔහු ප්‍රයෝජන ලබා තිබේය යන්න පමණක් මෙහිදී ඒ පිළිබඳව කීම ප්‍රමාණවත්ය. කම්කරු උසාවියේ සභාපතිවරයා පිළිගෙන ඇත්තේ මෙම උප පෝර්මන් වරයා පිළිබඳ සිඩියම අස්කරණ ලද යාන්ත්‍රිකයාට විරුඩව පක්ෂග්‍රාහී ලෙස කටයුතු කෙරී ඇති බව ඔප්පුවන්නක් ලෙසය. ඔහුගේ මෙම තීරණය සනාථ කිරීමට "Labour Disputes and Collective Bargaining" නමැති ලඩ්විග් ටෙලර් මහතා විසින් ලියන ලද ග්‍රන්ථයෙහි දෙවන කොටසේ 845 වන පිටුවෙන් කරුණු දක්වා තිබේ. එහි සඳහන් වන්නේ මෙසේය : "සේවායෝජකයෙකු විසින් සේවකයෙකු අස් කිරීමට සමාගම් රෙගුලාසියක පිළිසරණ සොයන අවස්ථාවක එම රෙගුලාසියම අනුව එක ලෙස අඛණ්ඩව ක්‍රියා නොකර තිබීම හෝ එම රෙගුලාසිය ව්‍යන්තිය සංගම් විරොධී රෙගුලාසියක් වීම ඔහුගේ විශ්වාස කටයුතු තත්ත්වයට පලුදු කිරීමක් වන්නේය එමනිසා මේ අයුරින් සේවායෝජකයෙකු විසින් සේවකයෙකු අස්කිරීම සඳහා සමාගම් රෙගුලාසියක සහාය සෙවුණු කලක එයට කලින් එම රෙගුලාසිය කැඩූ අවස්ථාවන් ගැන නොසලකා සිටි බව ඔප්පුවූ විට එය පක්ෂග්‍රාහී ක්‍රියා කිරීමක සාක්ෂියක් බවට පත්වන්නේය."

මේ උපුටා දක්වූ ඡේදය මෙම කරුණට අදාළ නොවන බව මගේ හැඟීමය. ඊට එක් හේතුවක් නම් මෙහි සේවා යෝජකයාගේ විශ්වාසකටයුතු භාවය ගැන ප්‍රශ්නයක් මතුවී නොතිබීමය. අනික් හේතුව උප පෝර්මන් තැනගේ සිඩිය මීට පෙර සිදුවී නොතිබීමය. මා විසින් උපුටා දක්වන ලද මෙම පරිච්ඡේද වරදවා තේරුම් ගැනීම නිසා සභාපති මහතාට මෙහිදී මෙම කම්කරුවා නැවත රක්ෂාවෙහි නියුක්ත කරවීම විනා කළ හැකි දෙයක් නැතැයි ඒත්තු ගොස් තිබෙන සේ මට පෙනියන බව ගෞරව පූර්වකව මෙහිලා කියමි.

මෙම ඇපැලෙහි මට මැදහත් විය හැක්කේ නීති ප්‍රශ්නයක් සලකා බැලීමට පමණකි. සභාපතිතුමා මට හැඟියන හැටියට කලින් උපුටා දක්වූ මෙම පරිච්ඡේදය මෙම නඩුවට අදාළ වේයයි සලකා ගැනීමෙන් නීතිය වරදවා තේරුම් ගත් බවක් පෙනේ. එනිසා පක්ෂග්‍රාහී බව යන්නෙන් අදහස් කෙරෙන්නේ කුමක් ද යන්න වරදවා තේරුම් ගැනීම මත ඔහු දුන් තීරණය රඳා තිබේ. එබැවින් මෙය නීතිය සලකා බලනවිට වරදවා නීති ප්‍රශ්නයක් තේරුම් ගැනීමකි.

මෙම ඇපැලට ඉඩදෙන මම සේවකයා අස්කිරීමේ නියෝගය යළිත් ක්‍රියාවේ යෙදීමට උපදෙස් දෙමි.

ඇපැලට ඉඩ දෙන ලදී.

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ඩෙනිං සාමි, හොඩ්සන් සාමි, ගෙස්ට් සාමි, ඩෙව්ලින් සාමි, සහ ඇල්. ඇම්. ඩී. ද සිල්වා මහතා ඉදිරිපිටදී

ජ්. ඇම්. ලසිරිස් අප්පු එ. තෙන්නකෝන් කුමාරිහාමි සහ තවත් අය*

රාජාධිකරණයට ඉදිරිපත් කළ ඇපෑල නො. 66—වර්ෂ 1960.

වර්ෂ 1962 අප්‍රියෙල් මස 4 වෙනි දින රාජාධිකරණයේ විනිශ්චය මණ්ඩලයේ ස්වාමිවරු විසින් දෙන ලද නඩු තීන්දුව.

ලිපිලේඛන ලියා පදිංචි කිරීමේ ආඥා පණත, 7 වන ඡෙදය—වංචනශීලි භාවය හෝ වංක සහයෝගය—විකුණුම් කරයක් මේ ආකාරයෙන් ලබාගත්තේද යන වග—පිත කොමිසම—එය භාරගැනීම—පිතකොමිස් භාරකරු භාරගැනීම ප්‍රමාණවත් වේද යන්න.

පැමිණිලිකාරියගේ මුත්තනුවන් විසින් වර්ෂ 1919 තෑගිකරයකින් පැමිණිලිකාරියගේ පියාට ඉඩමක් පිතකොමිසමකට යටත්කර දෙන ලදුව ඒ නියායෙන් ඔහුට එම ඉඩමේ ප්‍රාණභුක්තියක් (තවත් කරුණු සහිතව) හිමිවිය. මෙම ප්‍රාණභුක්තිය නිමාවට පත්වූ පසු මෙම ඉඩම පැමිණිලිකාරියට සහ ඇයගේ සොහොයුරාට හිමිවේ. මෙම තෑගිකරයේ ගැබ්ව තිබූ පිතකොමිසමට පටහැනිව වර්ෂ 1945 දී පැමිණිලිකාරියගේ පියා විසින් විත්තිකරුට මෙම ඉඩම විකුණන ලදි. වර්ෂ 1945 අගෝස්තු මාසයේදී සිය සොහොයුරාට තිබූ අයිතිවාසිකමද පැමිණිලිකාරිය විසින් දෙදෙනා අතර ලියවුනු බෙදුම් ඔප්පුවක අනුසාරයෙන් තමා පිට පවරාගන්නාලදී. තම පියා වර්ෂ 1951 මැයි මාසයේ ජන්මාන්තරගතවූ පසු පැමිණිලිකාරි වර්ෂ 1951 සැප්තැම්බර් මාසයේදී විත්තිකරුගෙන් ඉඩමේ භුක්තිය ලබාගැනීමට මෙම නඩුව පැවරුවාය. වර්ෂ 1919 ලියන ලද මුල් තෑගි කරය ලියා පදිංචි නොකරණ ලද නමුත් වර්ෂ 1945 අප්‍රියෙල් මාසයේදී ලියැවුනු විකිණීමේ ඔප්පුව එම මාසයේදීම ලියා පදිංචි කර තිබේ. මේ නිසා ලිපි ලේඛන ලියා පදිංචි කිරීමේ ආඥා පණතේ 7 (1) දරණ ඡෙදය අනුව ලියාපදිංචිනොවූ එම ඔප්පුව තමා පිළිබඳව සලකන කල අවලංගුයයි විත්තිකරු තර්ක කෙළේය. එහෙත් මීට පිළිතුරු වශයෙන් පැමිණිලිකාරිය කියා සිටියේ විකිණීම් ඔප්පුව ලියවා ඇත්තේ වංචාවෙන් හා වංචනශීලි සහයෝගයකින් බවත් එමනිසා එම ආඥා පණතේ 7 (2) දරණ ඡෙදයෙන් විත්තිකරුට ලැබෙන ප්‍රමුඛත්ත්වය මෙහිදී බිඳවැටෙන බවත්ය.

පහත සඳහන් කරුණු පිළිබඳව මෙහිදී සාක්ෂි ඉදිරිපත් විය :—

(ඒ) මෙම තෑගි ඔප්පුව පැමිණිලිකාරියගේ පියා විසින් පිළිගෙන එය පරෙස්සම් කිරීම සඳහා සිය බිරිඳට දෙන ලද බව.

(බී) වර්ෂ 1935 දී ඔහු විසින් මුද්දර කොමසාරිස්තැනට ලියන ලද ලිපියක තමාට මෙම ඉඩමට ඇත්තේ ප්‍රාණභුක්තියක් පමණක් බව සඳහන් කිරීම.

(සී) සාමාන්‍යයෙන් මුදල් පිළිබඳව අගහිඟකම් තිබුණු ඔහු මෙම ඉඩම බැඳ මුදල් ලබාගන්නා අටියෙන් එම තෑගිකරය බිරිඳගෙන් යළිත් ලබාගැනීම.

(ඩී) වර්ෂ 1944 දී මෙම ඉඩම (පොහොසත් මිනියකුවූ එසේම අවිචාරවත් ක්‍රියා කලාපයකට ගොදුරුවූ) විත්තිකරුට දස වර්ෂයකට බදු දීමද (එසේ දෙන බද්දක් හතර අවුරුද්දකට සීමා කොට දීමට පමණක් බලය ඇති වුවත්) එහිදී මෙම ඉඩම තමාට ප්‍රාණ භුක්තිය පමණක් ඇති ඉඩමක් ලෙස විස්තර කර ඇති බව.

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 62 වෙනි කා., 68 වෙනි පිට බලනු.

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(ආ) මිට ටිකදිනකට පසු පැමිණිලිකාරියගේ ස්වාමිපුරුෂයා විසින් පියාට එය බදුදිය හැක්කේ හතර අවුරුද්දකට පමණකැයි කියා බද්ද තමන්ට පවරා ගැනීමට විත්තිකරු සමග දූරු පරිශ්‍රමය අසාර්ථක-වීම සහ මේ පිළබඳව පිත කොමසමක් විද්‍යමාන වන බව ඔහුට සැලකිරීම.

(එ) ඉන් පසු වර් 1945 දී, එනම් ඉහත සඳහන් බදුකරය ලියා හාරමාසයකට පසු (මෙම නඩුවෙහි සැලකිල්ලට භාජනවූ ලිපිය වන) විකුණුම්කරය පියා විසින් විත්තිකරුගේ නමට එම බදුකරය ලියා සහතික කළ නොතාරිස් තැන ලවාම ලියවා තිබීම හා එහිදී තමාට මෙය නැසිගිය තමාගේ පියාගෙන් ලැබෙන පිය උරුමයක් ලෙස සඳහන් කිරීම.

මේ කරුණු උඩ මෙහි වංචාව සහ වංචනශීලි සහයෝගය ඔප්පුවී තිබේයයි දිස්ත්‍රික් නඩුකාරවරයා පැමිණිලිකාරියගේ වාසියට තීන්දුව දුන්නේය. එහෙත් ශ්‍රෙෂ්ඨාධිකරණයද ඇපැලේදී එම තීන්දුව පිළිගත් නමුත් වංචාව සහ වංචනයිලි සහගයෝය ඔප්පුවී ඇතැයි පිළිනොගත්තේය.

තීන්දුව:— වංචාව සහ වංචනශීලි සහයෝගය ඔප්පුවීමට ප්‍රමාණවත් සාක්ෂි තිබෙන නිසා දිස්ත්‍රික් විනිශ්චයකාර වරයාගේ තීන්දුව යළිත් ස්ථිර කළ යුතුය.

''කරෝලිස් එ. අල්විස්'' නමැති නඩුවෙන් උපුටා දක්වූ ප්‍රකාශය මෙම විනිශ්චය මණ්ඩලය විසින් දෙන ලද ''අබේවර්ධන එ. වෙස්ට්'' නමැති නඩුවේ තීන්දුව සමග සසඳා බලන කල, එය නියම නීතිය හැටියට ප්‍රතිෂ්ඨාවක් නො ලබන බව දුන් රාජාධිකරණ මණ්ඩලය පිළිගෙන තිබේ.

60—න. නී. වා. 413 වන පිටේ සඳහන් පරිදි ලිපි ලේඛන ලියා පදිංචි කිරීමේ ආඥ පණතේ 7 වන ඡෙදයේ අර්ථ කථනය පිළිබඳ විරෝධය දක්විනි.

සලකා බැලූ නඩු :—

කරෝලිස් එ. අල්විස්, (1944) 45 න. නී. වා. 156.

අප්පුසිඤ්ඤො එ. ලීලාවතී, (1958) 60 න. නී. වා. 409.

සඳහන් කළ නඩු :—

අබේවර්ධන එ. වෙස්ට්, (1957) ඒ. සී. 176; 58 න. නී. වා. 313; 54. ස. ල. නී. 33.

සීමාසහිත සිලෝන් එක්ස්පෝර්ට්ස් සමාගම එ. අබේසුන්දර, (1933) 35 න. නී. වා.417.

අබේසුන්දර එ. සීමාසහිත සිලෝන් එක්ස්පෝර්ට්ස් සමාගම. (1936) 38 න. නී. වා. 117.

නීතිඥවරු: වෝල්ටර් ජයවර්ධන මහතා, විත්තිකාර ඇපැල්කරු වෙනුවෙන්.

රාජනීතිඥ ඊ. ඇජ්. ඇන්. ගුණසේන මහතා, ඒ. ආර්. බී. අමරසිංහ මහතා සමග පැමිණිලිකාර වගඋත්තරකරු වෙනුවෙන්.

ගරු ඩෙව්ලින් සාමිවරයා

කුරුණෑගල දිස්ත්‍රික් උසාවිය මගින් දෙන ලද නඩු තීන්දුවක් අනුමත කරමින් ශ්‍රී ලංකාද්වීපයේ ශ්‍රෙෂ්ඨා-ධිකරණය මගින් දෙන ලද නඩු තීන්දුවකට විරුඩව මෙම ඇපැල ඉදිරිපත් කරනලදී. එම දිස්ත්‍රික් උසාවි-යෙහි පවරන ලද නඩුවේ පැමිණිලිකරු වූද මෙම විනිශ්චය මණ්ඩලය ඉදිරියෙහිදී වගඋත්තරකරුවූ තැනැත්තා තම-න්ත් එම නඩුවේ විත්තිකරුත් අතර හිමිකම ආරවුලකට භාජන වූ ඉඩම් කැබැල්ලෙකින් විත්තිකරු පිටමං කිරීමට තමාට බලය ලැබෙන තීන්දුවක් දිස්ත්‍රික් උසාවියෙන් ලබාගෙන ඇත.

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වර්ෂ 1919 සිට 1951 දක්වා කාල පරිච්ඡේදයට අයුවී ඇති මෙම නඩුව තෙන්නකෝන්ගේ පවුලේ පරම්පරා තුනක සම්බන්ධ කම් ඇත්තකි.—එනම් පැමිණිලිකාරියගේ මුත්තනුවෝ ද, ඇගේ මව්පියෝ ද, ඇගේ ස්වාමිපුරුෂයා ද ,ඇගේ සහෝදරයා ද යන අය වෙති. (මෙම නඩුවට සම්බන්ධ කථා පුවත ඇරඹෙන විට පැමිණිලිකාරිය බාලිකාවක්මෙන් සිටියද එය අවසන් වීමට පෙර ඇය වැඩිවිය පැමිණ දිගගොස් සිටි බව ද මෙහිලා සැලකිය යුතුය). වර්ෂ 1919 ජනවාරි මස 29 වෙනි දින පැමිණිලිකාරියගේ මුත්තණුවෝ මෙම ඉඩම පැමිණිලිකාරියගේ පියාණන්ට තෑගි ඔප්පුවකින් පවරා දුන්හ. මෙම තෑගි ඔප්පුවෙහි දීමනාකරුට ප්‍රාණ භුක්තියක අයිතියක් තිබෙන බව විද්‍යමානය. එසේම එම තෑගි ඔප්පුව ඔහුට අවශ්‍යයයි හැඟුණු විටෙක අවලංගු කිරීමට ද බලය ඇති බව එහි සඳහන්ව තිබේ. එහි ඇති අවසාන කොන්දේසිය වූකලී පැමිණිලිකාරියගේ පියාණන්ට එම ඉඩම කිසිම අයුරකින් අන්සතු කිරීමට හෝ හතර අවුරුදු කාලසීමාවකට වැඩිකාලයකට බදුදීමට නො හැකිවීම සහ තමාගේ ජීවිත කාලය තුල එය තමා සන්තකව තබාගැනීමත් තමාගේ ඇවෑමෙන් පසු එය පැමිණිලිකාරියට සහ ඇගේ සහෝදරයාට හිමිවීමට බලය ඇතිසේ සඳහන් කර තිබීමත්ය. මේ නයින් බලන කල පැමිණිලිකාරියටත් ඇයගේ සොහොයුරාටත් හිමිකම පැවරෙන හැටියට ඔවුන්ගේ පියා පිත කොමිස් භාරකරු වශයෙන් ඇති පිත කොමිසමක් මෙහි ඇති කොට තිබේ. වර්ෂ 1932 සැප්තැම්බර් 17 දින මුත්තණුවෝ ජන්මාන්තර ගතවූහ. ඔහුගේ අන්තිම කැමති පත්‍රයෙන් විශේෂ දීමනා කීපයක් පිරිනැමුණු පසු ඔහු තමාගේ "සෙසු නිශ්චල හා චංචල දේපළ" පැමිණිලිකාරියට සහ ඇයගේ සොහොයුරාට හිමිවන සේ ලියා තිබේ. වර්ෂ 1945 අප්‍රියෙල් මස 12 වෙනි දින පැමිණිලි කාරියගේ පියා විසින් යථෝක්ත පිත කොමිසම උල්ලංඝනය කරමින් මෙම ඉඩම විත්තිකරුට රු. 10,000 කට විකුණන ලදී. කරුණු මෙසේ තිබියදී වර්ෂ 1945 අගෝස්තු මස 18 වන දින තම තමාට අයත් විවිධ අයිතිවාසිකම් පිළිබඳව බෙදුම් ඔප්පුවක් පැමිණිලිකාරිය සහ ඇගේ සොහොයුරා විසින් ලියා ගන්නා ලදින් ඒ මගින් මෙම නඩුවට සම්බන්ධ ඉඩම පැමිණිලිකාරියට සම්පූර්ණයෙන් හිමිවීම නිසා ඇයගේ සොහොයුරා මෙම නඩුවට අයත් කථා පුවතින් ඉවත්ව් තිබේ. වර්ෂ 1951 මැයි මස 21 වනද පියා අභාවප්‍රාප්ත වූ පසු ඔහු සතුව තිබුණු ප්‍රාණභුක්තිය නිමාවට ගියේය. වර්ෂ 1951 සැප්තැම්බර් 20 වෙනිද පැමිණිලිකාරිය මෙසේ පිටමං කිරීමේ නඩුව දැමුයේ විත්තිකරුගෙන් ඉඩමේ භුක්තිය ලබා ගැනීම සඳහාය.

ඉහත සඳහන් වර්ෂ 1919 ජූනි මස 29 දතම දරණ තෑගි ඔප්පුව කවදාවත් ලියා පදිංචි වීනොමැති අතර විත්තිකරු ඉඩම මිලදී ගත් බව සඳහන් කෙරෙන වර්ෂ 1945 අප්‍රියෙල් මස 12 දතම දරණ පවරාදීමේ ඔප්පුව වර්ෂ 1945 අප්‍රියෙල් මස 19 වෙනි දින ලියාපදිංචි වී තිබේ. ලේඛන ලියා පදිංචි කිරීමේ ආඥාපණතේ 7 වන ඡේදයෙහි මෙසේ සඳහන් වේ. ලියා පදිංචි නොවී තිබේ නම්, යම්කිසි නීත්‍යානුකූල ලේඛනයක් වුවද එයට විරුඬව අයිතියක් අගනා ප්‍රතිඡ්ඨාවක් (valuable consideration) මත ඊට අනතුරුව නීත්‍යානුකූල ලෙස ලියා යථා විදියෙන් ලියා පදිංචි කරන ලද නවත් නීත්‍යානුකූල ලේඛනයක අනුසාරයෙන් ඊට විරුඩ අයිතිවාසිකමක් කියා සිටින සෑම පක්ෂයක් ඉදිරියෙහිම ක්‍රියා විරහිත වේ. එහෙත් මෙකී පසුව ලියන ලද ලේඛනය ලබා ගැනීමෙහිදී හෝ එය අනෙක් ලේඛනයට මුලින් ලියා පදිංචි කිරීමේදී හෝ යම්කිසි වංචාවක් හෝ වංක සහයෝගයක් (Collusion) නො සිදුවී තිබේ නම් ඒ මගින් පූර්වතාව (priority) ඉල්ලා සිටින්නාට එම පූර්වතාව නොලැබේ". මෙම නඩුවෙහි දැනට ඉතිරිවී ඇති ප්‍රධාන ප්‍රශ්නය නම් මෙම ඡේදයෙන් පැමිණිලිකාරියගේ ඉල්ලීමට විරුඬව විත්තිකරුට තම නිදහසට යෝග්‍ය කරුණක් ලැබේද යන්නයි.

පැමිණිලිකාරියගේ පියා සහ විත්තිකරු අතර යම්කිසි වංකකමක් සහ වංක සහයෝගයක් විද්‍යාමාන වන බව සලකමින් වර්ෂ 1954 දෙසැම්බර මස 21 වෙනි දින දිස්ත්‍රික් විනිශ්චයකාරවරයා මේ නයින් තෑගි ඔප්පුව බලපවත්වන බව නිගමනය කරමින් පැමිණිලිකාරියගේ වාසියට තීන්දුව දුන්නේය. වර්ෂ 1958 නොවැම්බර මස 28 වෙනි දින ශ්‍රේෂ්ඨාධිකරණය විසින්ද මෙම තීරණය අනුමත කල නමුත් එහි කියන ලද ආකාරයට වංක කමක් හෝ වංක සහයෝගයක් සිදුවී ඇතැයි පිළිනොගන්නා ලදී. මේ පිළිබඳව බස්නායක අග්‍රවිනිශ්චයකාරතුමා වංක කමක් හෝ වංචනසීලි සහයෝගයක් හෝ මෙහි සිදුවී තිබෙන බව ඔප්පු නොවිනැයි නිගමනය කළ අතර එම ප්‍රශ්නය ගැන සලකා බැලීම අනවශ්‍යයයි සින්නතම්බි විනිශ්චයකාරතුමා නිශ්චය කලේය.

වංක කමක් හෝ වංචනශීලි සහයෝගයක් නොමැතිය යන ප්‍රතිඡ්ඨාව මත සලකන විට මෙහිදී පැනනගින නීති ප්‍රශ්නයේ තත්ත්වය මඳක් ව්‍යාකූල බවට පෙරලේ. කරුණු එසේ නම් පැමිණිලිකාරිය තමා ලත් තෑගි

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ඔප්පුවට අනුව කරන ඉල්ලීම අසාර්ථක වන බව ශ්‍රෙෂන් මහතා පිලිගත්තේය. නමුත් මේ අවස්ථාවට වැටෙන ඇයට එවිට (මුත්තනුවන්ගේ) අන්තිම කැමති පත්‍රයෙහි සඳහන් පරිදි සෙස්සන්ට නොදී ඇති ශේෂ දීමනා සියල්ලම (residue) තමාට ලැබිය යුතුයයි අයිතිවාසිකම් කිවහැකි ද? ලේඛන ලියා පදිංචි කිරීමේ ආඥා පණතෙහි දසවන ඡේදයෙහි මෙසේ පැනවී තිබේ. "යම් කිසි අන්තිම කැමති පත්‍රයක් ලියන්නෙකුගේ උරුමක්කාරයෙකු විසින් බැහැර කරන ලද, එම අන්තිම කැමති පත්‍රයෙහි සඳහන් ඉඩමක් එසේ බැහැර කිරීමේ දිනයෙහි එම අන්තිම කැමති පත්‍රය ලියා පදිංචි නොකර තිබීමේ හේතුව නිසාම එය (එම අන්තිම කැමති පත්‍රය) අවලංගු නොවිය යුතුය. එසේම එහි ප්‍රමුඛත්වය නැතිනොවිය යුතුයි. එසේම එයින් ඇතිවන ප්‍රතිඵලය මේ නිසා නැති නොවිය යුතුයි''. ආඥා පණතෙහි මේ සඳහා ලැබෙන යම්කිසි ආරක්ෂාවකට මෙය ඉතා හොඳ පිළිතුරකි. එහෙත් කරුණු මෙසේ නම් තවත් ප්‍රශ්නයක් පැනනගී. එනම් මෙහි සඳහන් අවශේෂ දීමනාවට මේ ඉඩම අයුවේ ද? යන්නයි. යම්හෙයකින් මරුමුවට පත්වීමට කලින් මෙම ඉඩම නීත්‍යානුකූල තෑගිකරයකින් අන්සතුකර තිබුණි නම් මුත්තනුවන්ට ඉන්පසු එය යලිත් අන්තිම කැමති පත්‍රයකින් බැහැර කිරීමට නොහැක. මෙහිදී නීත්‍යානුකූල තෑගිකරයක් තිබුණේ ද? තමාගේ ඉල්ලීමට අනාථකරන මෙම තෑගි ඔප්පුවෙන් විත්තිකරු බේරීමට තැත්කරන්නේ "එය තමාට විරුද්ධව ක්‍රියාත්මක වන්නේ නැත'' යන පැනවීමක් ගෙන හැර දක්වමිනි. නමුත් උසාවිය විසින් ඔහු ඉඩම මිලදී ගත් ඔප්පුව ගැන සලකා බැලීමේදී එය සවිනැති ඔප්පුවකැයි සැලකිය යුතුයයි ද උසාවිය විසින් අන්තිම කැමති පත්‍රයෙහි ප්‍රතිඵලය ගැන සලකා බැලීමේදී එය සවියයි සැලකිය යුතු බව ඔහුට කියා සිටිය හැකි ද? මෙය අග්‍රවිනිශ්චයකාරතුමාගේ කල්පනාවට භාජනවී නැත. තවද අන්තිම කැමති පත්‍රයෙහි ඇති අවශේෂ දීමනාව පිළිබඳ ප්‍රකාශය කලින් දුන් තෑගි ඔප්පුව අවලංගු කිරීමකැයි අග්‍රවිනිශ්චයකාරතුමා කල්පනා කොට තිබේ. මේ පිළිබඳව මෙම විනිශ්චය මණ්ඩලය ඉදිරිපිටදී ජයවර්ධන මහතාගේ තර්කය වූයේ යම්කිසි නියමිත දීමනාවක් කලින් දුන් දීමනාවක් අවලංගු කරන යුළු වූවද සාමාන්‍ය වශයෙන් සඳහන් වන අවශේෂ දීමනාවක් පිළිබඳව අර්ථකථනය කල යුත්තේ එය අන්තිම කැමති පත්‍රය ලියන්නා විසින් කලින් දෙන ලද දීමනාවන්ට බාහිර දීමනාවක් හැටියට බවය.

ශ්‍රෙෂ්ඨාධිකරණය ඉදිරිපිට බොහෝසේ සාකච්ඡාවට භාජනවූ අනෙක් කාරණය නම් හත්වන ඡේදයෙහි නියම තේරුම කුමක් ද යන්නය. එම ඡේදය එකම දීමනා කරුවෙකු විසින් සාදන ලද ඔප්පු දෙකකට අදාළ වන බව පැහැදිලිව පෙනේ. යම් විදියකින් ඉඩමක් මිළදී ගන්නෙක් එම ඉඩමට කිසිම අයිතිවාසිකමක් නොමැති කෙනෙකු තමාට දුන් ඔප්පුවක් කෙරෙහි එල්බ සිටින්නේ නම් ඔහු එම ඔප්පුව ලියා පදිංචි කිරීමෙන් පමණක් ඔහුගේ විකුණුම්කරු වෙත නොතිබුණ හිමිකමක් තමා වෙත නොපැවරෙන බව ඉඳුරා පැහැදිලිය. එසේ නම් ප්‍රාණභුක්තියක් පමණක් තිබුණු පියාට විත්තිකරුට දීම පිණිස ඊට වඩා පුළුල් අයිතියක් නොමැතියයි කිව හැකි ද? ජේම්ස් එ. කරෝලිස් (1919) 17 නව. නී. වා. 76 යන නඩුවෙහිදී ශ්‍රී ලංකාද්වීපයෙහි ශ්‍රෙෂ්ඨාධිකරණය තීන්දු කෙළේ එකම මූලස්ථානයකින් ඔප්පු දෙකක් නික්මී තිබේ නම් එය ආඥා පණතේ හත්වන ඡේදයට යටත් වන බවය. දැනට අප අතර ඇති නඩුවෙහි මූලස්ථානය හැටියට සැලකෙන්නේ මුත්තණුවන්ට ඇති ඉඩමේ අයිතියයි.

පහළ උසාවියේදී තමා ලද නඩු තීන්දුව පැමිණිලිකාරියට තහවුරු කරගත හැකිවනසේ මෙම ප්‍රශ්නවලට ශ්‍රෙෂ්ඨාධිකරණයෙහි විනිශ්චයකාරවරු සෑහෙන පමණට පිළිතුරු සැපයූහ. එහෙත් එම අධිකරණයේ සමහර නඩුතීන්දුවල ප්‍රකටව පෙනෙන ඇතැම් දුෂ්කරතා නිසා පැමිණිලිකරු වෙනුවෙන් පෙනී සිටි ශ්‍රෙෂන් මහතාට තමාගේ තර්කවල පෙරමුණෙහි කරුණු සැලකර සිටීමට සිදුවූයේ වංචනශීලී බව පිළිබඳව හා වංක සහයෝගය පිළිබඳව ද දිස්ත්‍රික් උසාවියෙහිදී දෙන ලද තීන්දුව නැවතත් දියයුතුයයි කරුණු සැලකර සිටීමටය. මෙම ඉල්ලීම විනිශ්චය මණ්ඩලයේ සාමිවරු පිළිගනිති. එම-නිසා ශ්‍රෙෂ්ඨාධිකරණය ඉදිරිපිට සාකච්ඡාවට භාජනවූ අන්කරුණු පිළිබඳ කිසිම අදහසක් ප්‍රකාශ නොකරන ඔවුහු ඔවුන්ගේ අදහසේ හැටියට ආඥාපණතේ අංක 7 දරණ ඡේදයේ කියැවෙන අන්‍දමට වංචාව හා වංචනශීලී සහයෝගය ඔප්පුවන කරුණු ඇත්නම් ඒවා ගැන තමන්ගේ සැලකිල්ල යොමුකරනු ඇත යන බවය.

පිත කොමිස් භාරකරු හැටියට පියා මෙම තෑගි ඔප්පුව පිලිගෙන භාරගත් පසු එය පරෙස්සම් කොට තබාගැනීම පිණිස පැමිණිලිකාරියගේ මැණියන්ට දුන්නේය. මුත්තණුවන්ගේ අභාවයෙන් පසු තමාට ලැබෙන ප්‍රාණභුක්තියක් පමණක් එහි තමා වෙනුවෙන් ඇති බව ඔහු පැහැදිලිව දැන සිටියේය. වර්ෂ 1935 අප්‍රේල්

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1 වෙනි දින ඔහු විසින් මුද්දර පිළිබඳ කොමසාරිස්තුමාට ලියනු ලැබ මෙහිදී ඉදිරිපත්වූ ලියමනක ඇත්තේ ඔහුට ප්‍රාණ භුක්තියක් පමණක් බව ඔහු විසින් සඳහන් කර තිබේ.

දිස්ත්‍රික් නඩුකාරවරයා විසින් පියා විස්තර කරන ලද්දේ "කීමෙහි ගිජු නාස්තිකාර" පුද්ගලයෙකු හැටියටය. මෙහි කරුණු වලින් විද්‍යමාන වන අන්දමට ඇතැම් විට ඔහු ගැන කරන ලද විස්තරයෙහි එන මෙම භාෂාව මඳක් සැඩපරුෂයයි කිවහැකි වුවද පියා වැඩිවශයෙන් බොන අයෙකු බවත් සාමාන්‍යයෙන් මේ නිසා මුදලින් අගහිඟකම් ඇතියකුව සිටි බවත් මවගේ සාක්ෂියෙන් පැහැදිලි ලෙස පිළිගැනීමට ඉඩ තිබේ. මෙම ඉඩමෙන් වර්ෂ 1944 දී යම්කිසි මුදලක් ලබාගැනීමට ඔහුට වුවමනා වී තිබේ. තැගි ඔප්පුව මවගෙන් ඔහු ලබාගත්තේ මේ හේතුවෙන් බවට කිසිදු සැකයක් නැත. නඩුවේ විත්තිකරු, දිස්ත්‍රික් විනිශ්චයකාරවරයා කියන අන්දමට සැක කටයුතු කාර්‍යයන්හි යෙදෙන පොහොසත් පුද්ගලයෙකි. පළමු වන වතාවෙහි පියා මොහුගෙන් මුදල් ලබාගෙන ඇත්තේ වර්ෂ 1944 දෙසැම්බර් මස 19 වන දින ලියන ලද මෙම ඉඩම අවුරුදු 10 ක බදුදුන් ඔප්පුවක මාර්ගයෙනි. ඔහුට මෙම ඉඩම බදුදිය හැකි කාලය අවුරුදු 4 කට සීමාකොට තිබුණු මෙම ඉඩම පිළිබඳවූ පින කොමිසම මෙහිදී ඔහු අතින් උල්ලංඝනය වී ඇත. මෙම බදුකරයට ලැබිය යුතු මුලු ප්‍රතිප්ඨා මුදල රුපියල් 2,000/- වූ අතර ඉන් රුපියල් 1,000/- ඒ සැණින්ම ගෙවිය යුතුව තිබුණි. විත්තිකරු මේ ඔප්පුව පිළියෙල කිරීම සඳහා සිරිත් පරිදි තමාගේ කටයුතු කරන නොතාරිස් තැන යෙදවීය. බදුකරයට අයත් උපලේඛනයෙහි මෙම ඉඩමේ විස්තරයට පසුව "මෙම ඉඩමට එය බදුදෙන තැනැත්තාට ඇත්තේ ප්‍රාණභුක්තියක් පමණි" යන්න සඳහන්වී තිබේ.

මෙම බද්ද ගැන තොරතුරු දැනගත් පැමිණිලිකාරියගේ ස්වාමි පුරුෂයා මේ සම්බන්ධයෙන් පියා හා විත්තිකරු සමග කථාබස් කෙළේය. ඔහුගේ පරමාර්ථය වී ඇත්තේ අවසානයෙහි මෙම ඉඩම් පැමිණිලිකාරිය අයත් වන නිසා විත්තිකරු ලද මෙම බද්ද පැමිණිලිකාරිය වෙත හරවා ගැනීමය. මේ සඳහා ඉදිරිපත්වූ ගනුදෙනු පිළිබඳ කොන්දේසි වලට දෙපක්ෂයටම එකඟ වීමට නො හැකිවූයෙන් ඔහුට මෙම ක්‍රියාව සාර්ථක කරගත නුහුණු බව පෙනේ. කෙසේවුවද මේ ඉඩම පිළිබඳව පින කොමිසමක් ඇති බවත් ඒ අනුව පියාට අවුරුදු 4 කට වැඩි කාලයකට මෙය බද්දකට දිය නො හැකි බවත් ඔහු විත්තිකරුට පැවසුවේය.

ඉහත සඳහන් බද්දට මාස 4 ක කාලයක් පමණක් ගතවූ විට මෙම නඩුවෙහි ප්‍රධාන ලියවිල්ල හැටියට සැලකෙන විකුණුම්කරය වර්ෂ 1945 අප්‍රේල් මස 12 වන දින ලියන ලදී. සමහරවිට පියාට තවත් වැඩිපුර මුදල් උවමනාවූ නිසා ඉඩම් විකිණීමේ මුදල හැටියට නැවත ඔහු අතිරේක වශයෙන් රුපියල් 10,000/- ලබාගත්තායයි සැලකිය හැක.

විත්තිකරුට බදුකරය ලියන ලද නොතාරිස් තැන විසින්ම මෙම විකුණුම්කරය ලියා සහතික කොට තිබේ. විකුණුම්කරයෙහි පියා මෙම ඉඩමෙහි හිමිකම ලබාගත් අයුරු විස්තර කර ඇත්තේ "මාගේ අභාවප්‍රාප්ත පියතුමාගෙන් එන පිය උරුමයේ අයිතිවාසිකමෙහි" යනුවෙනි.

මෙම මණ්ඩලයෙහි ස්වාමිවරුන්ට මෙම කරුණු අනුව පෙනියන්නේ මෙහි සම්පූර්ණ ලෙස පැහැදිලිව පෙනෙන වංචාවක් සිදුවී ඇති බවකි. කෙසේ හෝ වේවා සම්පූර්ණ කථා පුවත මෙය නොවන බවත් විනිශ්චයකාර ස්වාමි මණ්ඩලය පහත සඳහන් කරුණු පූරවා මෙම කථා පුවත සම්පූර්ණ කර ගතයුතු බවත් ඔවුන් වෙත තරයේ සැලකරන ලදී. මේ සඳහා කියන ලද්දේ ජන්මාන්තර ගතවූ පුද්ගලයෙකුට එක්වරටම වංචාව නො පැවරිය යුතු බවත් කලින් සඳහන් පරිදි යම්කිසි අසථාන අනුමානයක් වෙතොත් මෙම ඉඩම බදුදීමේ සහ විකිණීමේ කාලය අතරතුර පියා විසින් නීතිඥයන්ගේ අවවාද ලබාගෙන ඇති බැව් ස්වාමි මණ්ඩලය ඒත්තු ගන්නේ නම් මෙම ප්‍රශ්නය නියම අන්දමින් නිරාකරණය කිරීමට අවකාශ ඇති බවත්ය. මේ අවවාදවල ප්‍රතිඵලය වූයේ පියා ඒවනතුරු විශ්වාස කළ අන්දමට ඔහුට ඇත්තේ ප්‍රාණ භුක්තිය පමණක් නොව ඉඩමෙහි සම්පූර්ණ හිමිකාරයා ඔහු බව පියාට ඒත්තුයාමයයි වැඩිදුරටත් ස්වාමි මණ්ඩලයට කරුණු දක්වා සිටියේය. ඔහුට මෙම අවවාදය දී ඇති නීතිවේදියා එම අවවාදය කරෝලිස් ඒ. අල්විස්, (1944) 45 නව නීතිවාර්තා 156, යන නඩුව පදනම් කොට එම අවවාදය දෙන්නට ඇත. යම්කිසි පින කොමිසමක් ක්‍රියාකාරිවීමට නම් එය කෙනෙකු විසින් පිලිගත යුතු බව නියම නීතිය බවට කිසිදු සැකයක් නැත. ඉහත සඳහන් මෙම නඩුවේදී ලංකාවේ ශ්‍රේෂ්ඨාධිකරණය නිගමනය කෙළේ මුලින්ම ලැබු තෑගි ලාභිනියවූ දියණිය අතින් පින කොමිස් ලාභීන් දෙදෙනා වන තමාගේ සහෝදරයා සහ සහෝදරිය වෙනුවෙන් එය භාරගැනීම නීතියේ හැටියට සෑහෙන භාරගැනීමක් නොවන බවය. එම නඩුව සාධක පාඨයක් වශයෙන්

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ගෙන තර්ක කරන ලද්දේ දූන් අප ඉදිරියෙහි ඇති නඩුවෙහි ද පිත කොමිසම භාරගත් පියා (එය දූන් පිළිගෙන තිබේ) මෙම පිත කොමිස් ඉඩම භාරගැනීම ලමයින් වෙනුවෙන් නීතියේ හැටියට සරිලන භාරගැනීමක් නොවේය කියාය. මේ අනුසාරයෙන් අප ඉදිරියෙහි ඇති නඩුවේ කියැවෙන පිත කොමිසම පැමිණිලිකාරියගේ වාසියට නීත්‍යානුකූලව ගොඩනැගුණ නියම පිත කොමිසමක් නොවන බවත් එබැවින් පියාට ලැබුණු මෙම දීමනාව කිසිම බැඳීමක් නොමැතිව නිරායාසයෙන් ඔහු වෙත ලැබෙන දීමනාවක් බවත් වැඩිදුරටත් තර්ක කරන ලදී.

ඇත්තවශයෙන්ම කරොලිස් එ. අල්විස් අතර කියවුණ නඩුවෙහි හා එයින් ලබාගත් නිගමනයන් නියම නීතිය වශයෙන් සලකනොත් එයම පැමිණිලිකාරියගේ ඉල්ලීමට නියම පිළිතුරක් වනු ඇත. එහෙත් මෙය මෙසේ බව කීමට සාමිවරුන්ට කරන ලද ආරාධනාවක් තර්ක කිරීමෙහිදී නොපෙණිනි. පියා ඹන් විසින් දීමනාව පිළිනොගැනීම නිසා උද්ගතවුණු මෙයටම සමාන තර්කයක් මුලින් පෙරට ගෙන ආ නමුත් එය ශ්‍රේෂ්ඨාධිකරණයෙහිදී අත්හැර දමන ලදී. මෙම සාමි මණ්ඩලයේම අභයවර්ධන එ. වෙස්ට් (1957) ඒ.සී. 176 යන නඩුවේදී දෙන ලද තීරණය සමග සසඳන කල කරෝලිස් එ. අල්විස් යන නඩුවෙන් උපුටාගත් ප්‍රකාශය නියම ලෙස නීතිය පැහැදිලි වී නැති බව දූන් පිළිගැනීමට එකහවී තිබේ. එහෙත් වර්‍ෂ 1957 ට පෙර මෙය නියම නීතිය ලෙස පිළිගත හැකිව තිබුණ බැවින් පියාණන්ට දෙන ලද අවවාදය මෙය මත රඳා පවතින්නට ඇතැයි අප ඉදිරියේ තර්ක කරණු ලැබේ.

මෙය හුදෙක් අනුමානය උඩ රඳා පවතින නිසා ඊට විරෝධය දැක්විය හැකිවාක් මෙන්ම මෙහිදී ද විරෝධය දක්වා තිබේ. මේ සම්බන්ධයෙන් තවත් පියවර කීපයක් ඔබ්බට ගොස් සාමිවරු කියා සිටින්නේ එය කල්පිත සිඹියක් (hypothesis) පමණක් වුවත් එය ආචාට ගියාට කරන පරීක්ෂණයකට භාජනකල නොහැකි බවය. මෙහිදී පියා අභාවප්‍රාප්තවී ඇති බවත් දූනට ඔහුට කථාකල නොහැකි බවත් සලකන අතර විත්තිකරු දූනටජීවමානව සිටින බවත් ඔහුට කථාකල හැකි බවත් සලකා ගත යුතුය. මාස කීපයකට ඉහතදී මේ ඉඩම සම්බන්ධයෙන් ප්‍රාණභුක්තියක් පමණක් ඇතැයි බඳුකරයේ විස්තර කරන ලද පිත කොමිස් භාරකරුගෙන් පිතකොමිසමකට යටත්ව ඇතැයි තමාට කියන ලද මෙම ඉඩම මිලදී ගැනීමට තමා මෙහෙයවූයේ කුමන හේතුවක් යයි විත්තිකරු කියන්නේ ද? යටත් පිරිසෙයින් ඔහු තම මුදල් වියදම් කිරීමට පෙර පියා විසින් උපදෙස් සොයන ලද යම්කිසි නීතිඥයකු මෙම ඉඩම සඳහා ලියවුණු පිත කොමිසම ක්‍රියාකාරි නොවේ යයි පියාට අවවාද කල බව ඔහුට කීයේ යයි පියා විසින් කියන්නට ඇත. එසේ නම් විත්තිකරු මේ සම්බන්ධයෙන් තමාගේ නීතිඥයන්ගෙන් ද උපදෙස් සොයනු ඇතැයි කෙනෙකුට සිතා ගත හැක. තවද ඔහුගේ නොතාරිස් තැන විසින් මේ මනඃකල්පිත නීතිඥයාගේ නාමමාත්‍රය පමණක්වත් ලබාගැනීමට ප්‍රයත්නයක් දරනු ඇත. මෙම නීතිඥයා සාක්ෂි කීයේ නම් මෙම කල්පිත සිඹිය නියම ලෙය අතීතයේ සිදුවීමක් බවට පෙරළෙනු ඒකාන්තය. නමුත් සාක්ෂි කුඩුවට නැගගත් විත්තිකරු දූන් ඉදිරිපත් කොට ඇති කල්පිත සිඹියට ආධාර කරනු වෙනුවට කරන ලද්දේ පියාට මෙම ඉඩම පවරාදීමේ සම්පූර්ණ බලය නොතිබුණු බව තමා දූන නොසිටි බව කියා සිටීමය. මේ සඳහා පැමිණිලිකාරියගේ ස්වාමිපුරුෂයා සමග කිසිම කතා බහක් නොකල බව ඔහු කී නමුත් එය උසාවිය විසින් නොපිළිගන්නා ලදී. මෙම බඳුකරය කියවූ ඔහුගේ නොතාරිස් තැන පියාගේ ප්‍රාණභුක්තිය පිළිබඳව එහි ඇතුලත්ව තිබූ සටහන අත්හැර සෙසු කොටස් කියවන්නට ඇතැයි ඔහු කීවේය. සම්පූර්ණ නඩුව නිමවන තුරුම එහි සිටි නොතාරිස් තැන සාක්ෂිදීම පිණිස නොකැඳවන ලදී.

ඉහත සඳහන් කල්පිත සිඹිය (hypothesis) ඉවත හෙළීමට මෙය එක් හේතුවකි. දෙවැන්න මෙකී අවවාදය දී තිබේ නම් එසේම එය පිළිගෙන තිබේ නම් විත්තිකරු මෙම ඉඩම විකිණීමට තමාට ඇති අයිතිය ගොඩනගන්නේ පිත කොමිසමෙන් තොරව ත්‍යාගී ඔප්පුව පිට බව පැහැදිලිය. ඇත්තවශයෙන්ම ඔහු එයගොඩනගා ඇත්තේ "අභාවප්‍රාප්ත පියතුමාගෙන් ලැබුණු අයිතිය උඩය කියාය." පහල උසාවිවලදී තර්කකිරීමට උත්සාහකලේ මේ කරුණ පිළිබඳවය. එහිදී කියන ලද්දේ පිත කොමිසමෙන් තොරව තෑගි ඔප්පුව ක්‍රියාකාරීවන බවක් නොව නීත්‍යානුකූල පිළිගැනීමක් සිදුනොවී ඇති නිසා එය සම්පූර්ණයෙන්ම ශූන්‍ය බවය. තවදුරටත් කියන ලද්දේ, මෙම ස්වාමි-

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මණ්ඩලයට තේරුම්ගත නොහැකි කරුණක්ය. එනම් යම් කිසි හේතුවක් නිසා මෙම ඉඩම අන්තිම කැමති පත්‍රයෙහි ඇති සාමාන්‍ය ශේෂ දීමනාවන්ට අසුනොවන අතරම එය අන්තිම කැමති පත්‍රයකින් නොපැවරුණු ඉඩමක් හැටියට පියාවෙත පැවරී එන බවය.

අවසාන වශයෙන් සඳහන් කල යුත්තේ මෙම ඉඩම විකිණීමෙන් පසු පියා අවුරුදු 6 ක් ජීවතුන් අතර සිටි නමුත් එහි සඳහන් පිත කොමිසම අක්‍රියාකාරී බව කිසිම කෙනෙකුට නොකියා තිබීමය. මෙම විකිණීම වෂ් 1945 සැප්තැම්බර් මස 17 වන දින දූනගත් පැමිණිලිකාරිය තමාගේ නීතිඥවරුන් ලවා විත්තිකරුට ඉඩම විකුණූ අයට ඇත්තේ පිත කොමිසම බාරකරුගේ අයිතියක් පමණක් බවත් මෙය ඔහුගේ අභාවයෙහිදී අහෝසි වන බවත් එම නිසා විත්තිකරුගේ මෙම ඉඩම ලබා ගැනීම පිළිබඳව තිබුණු අවංකකම හා නිර්ව්‍යාජකම ගැන සැක උපදවන සුළු බවත් විත්තිකරුටම ලියවා යවා තිබේ. එහෙත් මෙම ලියමනට පිළිතුරක් නොලැබුණි. පියතුමා සහ විත්තිකරු යන දෙදෙනාම මුලසිටම මෙම ඉඩමට පැමිණිලිකාරියට ඇති අයිතිය දූනගත් බවත් එය එසේම පිළිගත් බවත් එමනිසා මෙයින් ජයගැනීමට ඔප්පුව මුලින් ලියාපදිංචි කරවීමෙන් පිළිසරණ යෙවූ බවත් නිසැකවම ස්වාමී මණ්ඩලය එත්තු ගනී.

විත්තිකරු වෙනුවෙන් ඉදිරිපත්කල තර්කවල විශේෂයෙන්ම බරපැටවී තිබුනේ ස්වාමී මණ්ඩලය විසින් ඉවත හෙලූ ඉහත සඳහන් කල්පිත මතය පිටය. එමෙන්ම අග්‍රවිනිශ්චයකාරතුමානන් විසින් වංචාවක් හෝ වංක සහයෝගයක් සිදුවී ඇතැයි යන නිගමනය ප්‍රතික්ෂේප කිරීමට දුන් හේතූන් මත ද විත්තිකරු වෙනුවෙන් විස්වාසය රඳවා තර්ක කරන ලදී. අග්‍රවිනිශ්චයකාරතුමා කීයේ මෙසේය :—

"යම්කිසි ඔප්පුවක් 7 (2) දරණ උප ඡේදයේ සීමාව තුලට ගෙන ඒමට එම ඔප්පුව ලබාගත් තැනැත්තා කරුනු ගැන නොසලකන අපරීක්ෂාකාරී පුද්ගලයෙකු බවත් එමනිසා ඔහු තමාගේ වාසිය සඳහා කිනම් අවස්ථාවකින් වුවද අයථා ප්‍රයෝජන ගන්නා කෙනෙකු බවත් ඔප්පුකිරීම පමණක් මදිය. එමෙන්ම ආදයම් බදුනීති උල්ලංඝනය කිරීම නිසා ඔහු දඩුවම් ලබන ලද්දෙකු බව ඔප්පුකිරීම හෝ ඔහු කලින් වතාවල වංචාසහගත ක්‍රියා කරතිබෙන බව ඔප්පුකිරීම හෝ ප්‍රමානවත් නොවේ. කල්පනාවට භාජනවී ඇති එම ඔප්පුව ලබාගැනීමෙහිදී ඔහු වංචාවක් කර තිබෙන බව හෝ වංචනසීලි සහයෝගයක් දී තිබෙන බව හෝ ඔප්පු කළ යුතුය. ඔහු වෙනුවෙන් තර්ක කරන ලද්දේ වංචාවක් හෝ වංචනසීලි සහයෝගයක් ඔහුගෙන් සිදුවී හෝ කෙරී නැති බවකි. ඇස්. සී. 688 දරණ නංගල්ලෙ දිස්ත්‍රික් උසාවියේදී ඇල්. 393 දරණ වෂ් 1958 නොවැම්බර් 13 දින මා විසින් දෙන ලද නඩු තීන්දුවෙහි මෙම කරුණ සඳහා යෙදෙන වංචාව සහ වංචනශීලී සහයෝගය පිළිබඳව විස්තරවී ඇත. එබැවින් 7 (2) දරණ ඡේදයෙහි සඳහන් වාක්‍යය කොටස්වලට අනුව වංචාවක් කෙරී හෝ වංචනශීලී සහයෝගයක් කෙරී නැතැයි කියමින් උගත් නීතිවේදියා ඉදිරිපත් කල තර්කය මගේ අදහසේ හැටියට නිවැරදිය. එමනිසා මම එය පිළිගනිමි."

ඉහත සඳහන් ප්‍රකාශයෙහි මුල්කොටසට මෙම සාමි මණ්ඩලය ගෞරව පෙරටුව එකහවන අතර අග්‍ර විනිශ්චයකාරතුමා කල්පනා කලාක් මෙන් මෙහිදී විත්තිකරු අවංක සාක්ෂිකරුවෙකු වශයෙන් පිළිගත නොහැකි බව තහවුරු කිරීමට පමනක් අදලවන සමහර කරුණුවල වැදගත්කම දිස්ත්‍රික් නඩුකාරවරයා අතිශයොක්තියෙන් සඳහන්කර තිබෙන බව කල්පනා කරයි. එහෙත් දිස්ත්‍රික් විනිශ්චයකාර වරයා යම් යම් කරුනු පිළිබඳ කරන ලද විශේෂ තීරනයට මෙයින් හානියක් නොවේ. එනම් මෙම සාමිමණ්ඩලය ඉහතින් වාර්තා ගතකොට ඇති කතාබස් කිරිමේදී එම ඉඩම පිළිබඳව බලපවත්වන පිත කොමිසම ගැන විත්තිකරුට සඳහන් කර තිබෙය යන්නයි. මෙම තීරණයට විරුද්ධව ඇපෑලේදී කරුණු ඉදිරිපත් කොට නැත්තේය.

දිස්ත්‍රික් නඩුකාරවරයා විසින් මෙම මාතෘකාව සම්බන්ධව කරණ ලද නවත් තීරනයකට විරුඩව ස්වාමීමණ්ඩලය ඉදිරියේදී කරණ ලද විවාදයෙහි කරුණු ඉදිරිපත් කරණ ලදී. එය මෙම අවස්ථාවෙහි සලකා බැලීම සුදුසුයයි සිතේ. එම තීරණයවූකලී රු. 10,000 ගේ ප්‍රතිෂ්ඨා මුදල කිසිසේත් ප්‍රමාන නොවේයයි දිස්ත්‍රික් නඩුකාරවරයා කල තීරණයයි. මෙම තීරණය ඔහු විසින් කර තිබෙන්නේ ප්‍රශ්නයට භාජනවී ඇති එම ඉඩම එම මුදලමෙන් තුන් හතර ගුණයක් වටීයයි දිස්ත්‍රික් විනිශ්චයකාරවරයා තමා විසින්ම කරණ ලද මිල කිරීමක් අනුවය. විත්තිකරු මෙම ඉඩම රු. 15,000 කට උගස් තබා තිබෙන බව ඔප්පුවී ඇති නියා බැලූ බැල්මට මෙම ඉඩම සඳහා රු. 10,000 ඉතාම සුළු මුදලකයි හැගේ. නමුත් හරස් ප්‍රශ්න ඇසීමේදී විත්තිකරුගෙන් මෙම කරුණු විමසා නැති නිසා මේ පිළිබඳව වටිනා සාක්ෂි

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ඇතැයි පිළිගත නොහේ. මේ අනුව බලන කල ඉඩම සඳහා කැපවුන ප්‍රතිෂ්ඨා මුදල ප්‍රමාණවත් නොවේයයි කරණ ලද තීරණය පිළිගැනීමට මෙම විනිශ්චය මණ්ඩලයට නොහැක. එහෙත් ප්‍රතිෂ්ඨා මුදල ප්‍රමාණවත් නොවීම වංචාශීලී සහයෝගයක හොඳ සාක්ෂියක් වන නමුදු එය අවශ්‍ය කරුණක් ලෙස සැලකිය නොහැක. සීමාසහිත ලාංකික බඩු පිටරට යවන්නෝ ඒ. අබේසුන්දර (1933) 35 නව. නී. වා. 417 (428 පිටුව).

ඉහතින් ලඟම සඳහන් වී ඇති මෙම නඩුවේදී 7 වන ඡේදයට අනුව ඇතිවිය යුතු වංචාව සහ වංචනශීලී සහයෝගය පිළිබඳ දී ඇති සියළුම නඩුතීන්දු ගැන ඩෝල්ටන් උප අග්‍රවිනිශ්චයකාර තුමා සලකා බලා තිබේ. එම නඩු තීන්දුව 38 න. නී. වා. 117 දරණ නඩු තීන්දුවෙහිදි මෙම ස්වාමි මණ්ඩලය විසින් ද අනුමත කරනු ලැබීය. කලින් ලියවුන ලියාපදිංචි නොකල ඔප්පුවක් තිබීම ගැන දැනගැනීම පමණක් නොසෑහේ. නියම වසයෙන් වංචාවි පරිසමාප්ත අර්ථයෙන්ම ව්‍යාජකම තිබිය යුතුය. මෙම වචනවල අර්ථයට අනුකූලව සලකා බලන කල මෙහිදී පියා විසින් තම දියනියට වංචා කරණ ලද බව හා විත්තිකරු විසින් එද දැනසිටි බව ගැන කිසිම ප්‍රශ්නයක් නැත්තේය. වැඩිදුරටත් මෙහිදි පියා පීත කොමිස් භාරකරුවෙකු බවත් එසේ පීත කොමිස් භාරකරුවෙකු වසයෙන් හා පියා වසයෙන් ඔහුගේ යුතුකම වූයේ දියනියට අයිතිය ලැබෙන එම ඔප්පුව ලියාපදිංචි කරවා ඇයගේ අයිතිවාසිකම් ආරක්ෂා කිරීම බවත් විත්තිකරු දැන සිටියේය. එබැවින් කලයුතු සැටියෙන් වර්ෂ 1945 අප්‍රේල් මස 19 වන දිනට පෙර යම්කිසි අවස්ථාවක එම ඔප්පුව පියා ලියා පදිංචිකලේ නම් පියා සහ විත්තිකරු අතර තිබූ (විත්තිකරුට උවමනා කල) එම ඉඩම (පියාට උවමනා කල) මුදල් වලට හුවමාරු කිරිමේ පොදු අදහස ව්‍යර්ථවියාමට ඉඩතිබුනි. එම නිසා දෙදෙනා මෙම ගනු දෙනු වෙහිදි පියා විසින් තම යුතුකම කඩකොට පැමිණිලිකාරිය රැවටීමේ අදහසින් ඇ විසින් මතුකලකදී හිමිකම කිවහැකි ඔප්පුව ලියා පදිංචි නොකර මේ සඳහා ගතයුතු පියවර නොගෙන තිබේය යන හැඟීම මෙයින් මතුවේයයි විශ්වාස නො කිරීමට කොහෙත්ම නුපුළුවන. මේ අනුසාරයෙන් සලකා බලන කල මෙහිදී වංචාවක් සමග වංචනශීලි සහයෝගයක් ද තිබේ.

තමාගේ නඩුතීන්දුවෙහි සඳහන් කල අප්පුසිඤ්ඤො එ. ලීලාවතී (1958) 60 න. නී. වා. 409 යන නඩුවෙහි උද්ගතවූ කරුණුවලට මෙහිදි මෙම සාමි මණ්ඩලය සඳහන් කල සකසා තහවුරු වී ඇති ප්‍රඥප්ති අදලකොට අග්‍ර විනිශ්චයකාර තුමා ඒ ගැන සලකා බලා තිබේ. එම නඩුවේ කරුණුවලට එතුමා ඒ ප්‍රඥප්ති නිවැරදි ලෙස අදලකොට සලකා තිබෙන බව මෙම ස්වාමිවරු මණ්ඩලය නිසැක ව පිළිගනී. එහෙත් එම ප්‍රඥප්ති මෙම නඩුවෙහි කරුණු වලට අදලකිරීම ගැන එයට වෙනස් තීරණයකට මෙම සාමිවරු මණ්ඩලයට එලඹීමට සිදුවී තිබෙන බව හුදු ගෞරවයෙන් සඳහන් කළ යුතුයි.

කලින් විසඳුන එම නඩුවේ 413 පිටේ අග්‍රවිනිශ්චයකාරවරයා මෙසේ කියා තිබේ :—

> ''එබඳු නීත්‍යානුකූල ඔප්පුවක් පසුව ලබාගැනීමෙන්' යන වචන වලින් ඉඩම පවරන්නෙකු හා පවරනුලබන්නෙකු අතර ඇති වංචනශීලී සහයෝගය ගනන් නොගැනේ. පසුව ලියවෙන ඔප්පුව ලබා ගැනීමට ඉඩම පවරන්නාට කොටස් කරු වෙකු විය නොහැකි බැවිනි. ඔහු කොටස් කරුවෙකු වන්නේ ඉඩම පැවරීමට හෝ දීමට පමණකි. එමනිසා මෙහි කියවෙන 'වංචනශීලී සහයෝගය' සිදුවිය යුත්තේ පසුව ලියවෙන ඔප්පුව ලබාගැනීමට උත්සාහ කිරීමට සම්බන්ධ වන (ඉඩම පවරන්නා හැර) උත්සාහ කිරීමට අනිත් පුද්ගලයන් අතරය.''

හත්වන ඡේදයට දී ඇති අර්ථකථනය නිවැරදි නම් දැනට අප ඉදිරියෙහි ඇති නඩුවේ ඇති වංචනශීලී සහයෝගය පිළිබඳ චෝදනාවට එයින්ම පිළිතුරක් ලැබේ. සමහර විට මෙම නඩුවෙහිදි දිස්ත්‍රික් විනිශ්චයකාරවරයාගේ තීරණය ඉවත දැමිය යුතුයයි කල්පනා කලවිට අග්‍ර විනිශ්චයකාරතුමා නීතියෙහි මේ මතය උඩ කල්පනා කලා වියහැක. නමුත් මෙම අර්ථකථනය පිළිගත යුතුයයි සාමි මණ්ඩලය ඉදිරියෙහිදී කරුණු දැක්වූ විත්තිකරුගේ නීතිඥයා තර්ක නොකෙලේය. මෙම සාමි මණ්ඩලය එම අර්ථකථනය සාවද්‍ය බව හුදු ගෞරවයෙන් කල්ල්පනා කරයි.

මෙම සාමි මණ්ඩලය මේ ඇපැල නිශ්ප්‍රභාකල යුතුයයි ගරු මහ රැජිනියට අවනත භාවයෙන් සැලකල යුතුයයි තීරණය කෙරේ. මෙහි නඩු ගාස්තුව ඇපැල්කරු විසින් ගෙවිය යුතුය.

ඇපැල නිෂ්ප්‍රභා විය.

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ගරු අභයසුන්දර විනිශ්චයකාරතුමා ඉදිරිපිටදී.

ෂෙල් සමාගම එ. පතිරන*

ශ්‍රෙ: අ: නො: 33/1961—කම්කරු උසාවිය : 3997.

විවාද කොට තීන්දු කළ දිනය : 1962 මැයි 29.

වර්‍ෂ 1957 නො. 62 දරණ පණතින් සංශොධනයවූ වර්‍ෂ 1950 නො. 43 දරණ කාර්මික ආරවුල් පණත—එහි 31 (බී) සහ 31 (සී) දරණ ඡෙද—සේවකයෙකු සේවයෙන් අස්කිරීම සාධාරණ යයිද යුක්ති යුක්ත යයිද කම්කරු උසාවිය මගින් තීරණය කිරීම—ඉන්පසු එම උසාවියට එබඳු සේවකයෙකුට පිළිසරණ දීමට හැකිද යන වග.

තීන්දුව :—යම්කිසි සේවකයකුගේ සේවය නතර කිරීම සාධාරණ යයි ද යුක්ති යුක්ත යයි ද පිළිගත් අවස්ථාවක වුවද ඔහුට පිළිසරණ දීමට කම්කරු උසාවියකට අධිකරණ බලය තිබේ. (සංශොධනය කරණ ලද) කාර්මික ආරවුල් පණතේ 31 බී දරණ ඡෙදය 31 සී (1) දරණ ඡෙදයන් සමග කියවන කල එම උසාවියට මෙවැනි නියෝගයක් කිරීමට බලය ඇති බව පෙණේ.

නීතිඥවරු: රාජනීතිඥ එච්. වී. පෙරේරා, ඇස්. ජේ. කදිරගාමර් සහ ඇල්. කදිරගාමර් සමග, සේවායෝජක ඇපැල්කරු වෙනුවෙන්.

සී. රන්ගනාදන්, ඇම්. ටී. සිවාර්දීන් සහ ඇස්. ඩී. ජයවර්ධන සමග, ඉල්ලුම්කරු වගඋත්තරකරු වෙනුවෙන්.

ගරු අභයසුන්දර විනිශ්චයකාරතුමා:

වර්‍ෂ 1957 නොම්මර 62 දරණ ආඥපනතින් සංශොධනය කරන ලද වර්‍ෂ 1950 නොම්මර 43 දරණ කාර්මික ආරවුල් ආඥපනතේ 31 බී ඡෙදය යටතේ පිළිසරණ පතා මෙහි ඇපැල්කරුගේ සේවකයෙකු විසින් කරනලද ඉල්ලීමකින් මතුවූ නීති ප්‍රශ්නයක් උඩ මෙම ඇපැල ඉදිරිපත් කරන ලදී. මෙම ඉල්ලීම කරන ලද්දේ ඇපැල්කරු විසින් ඔහුගේ සේවය නතර කිරීම පිළිබඳවය. මෙහිලා සලකා බැලීමට මට ඇති නීති ප්‍රශ්නය නම් වගඋත්තරකරුගේ සේවය නතර කිරීම නීත්‍යානුකූලවූවා පමණක් නොව යුක්ති යුක්තයයිද තීරණය කළ කම්කරු උසාවියට ඒ සමගම ඔහුට පිළිසරණ දීමට අධිකරණ බලය ඇද්ද යන්නය. සේවය නතර කිරීම නීත්‍යානුකූලව ද එමෙන්ම යුක්ති සහගතවද කෙරුනු අවස්ථාවක පිළිසරණ දීම වැළැක්වෙන කිසිම සීමාවක් 31 බී ඡෙදයෙහි ව්‍යවස්ථා සම්පාදක මණ්ඩලය විසින් පනවා නොමැත. මේ සඳහා පැනවිය හැකි එකම සීමාව පැනවී ඇත්තේ කාර්මික ආරාවුල් පනත යටතේ 31 සී දරණ ඡෙදයේ පළමුවන උපඡෙදයෙහිය. එම උපඡෙදයෙහි සඳහන් වන්නේ පිළිසරණ දෙන නියෝගය සාධාරන යුක්ති යුක්ත නියෝගයක් විය යුතු බවකි. සේවායෝජකයා සහ සේවකයා අතර ඇතිවන කිසියම් සේවා කොන්ත්‍රාත්තුවක ගැබවී ඇති කිසිවක් නොසලකා පිළිසරන දියහැකි බව 4 වන උපඡෙදයෙහි පැනවී තිබීමෙන් 31 බී දරණ ඡෙදයෙහි පිළිසරන දීමට ඇති බලය ඉතා පුලුල් බලයක් බව සලකා ගත හැක.

මෙම නඩුවෙහිදී පිළිසරන දීමට අවශ්‍යවන සියලුම කරුණු ගැන සලකා බැලූ කම්කරු උසාවිය රක්ෂාවේ ස්වභාවයත් සේවා කාලයත් වගඋත්තර කරු පඩි ලැබූ කාලසීමාවත් සලකා නිවේදනයක් නොදී අස්කිරීම නිසා සේවා කරුගේ කොන්ත්‍රාත්තුවේ කොන්දේසි අනුව දී ඇති සති දෙකක පඩි වෙනුවට සති හයක පඩි දිය යුතුයයි නිගමනය කොට තිබේ. සේවකයාට මෙම පිළිසරන දීමට හේතුවූ කරුනු හැටියට කම්කරු උසාවිය සලකා බැලූ කරුණු සාධාරනද යුක්ති යුක්තද යන්න සලකා බැලීම මා සතු කාර්‍ය්‍යයක් නොවේ. කම්කරු උසාවියට එවැනි පිළිසරනක් දීමට බලයක් තිබෙන තුරු ඒ බලය ක්‍රියාවේ යෙදු කරුණු පිළිබඳව කිසිදී බැලීමට මෙම උසාවියට බලයක් නොමැත.

කම්කරු උසාවියට මෙවැනි පිළිසරනක් දීමට බලයක් ඇතැයි මා කළ නිගමනය නිසා නඩුගාස්තුවටත් යටත් කර මෙම ඇපැල නිෂ්ප්‍රභා කරමි.

ඇපැල නිෂ්ප්‍රභා විය.

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 62 වෙනි කා., 83 වෙනි පිට බලනු.

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ගරු අභයසුන්දර විනිශ්චයකාරතුමා ඉදිරිපිටදී.

සහීඩ් එ. වත්තේගම සෞඛ්‍ය පරීක්ෂකතැන*

ඉල්ලීම් අංකය : 253 වෂ් 1962—පන්විල මහේස්ත්‍රාත් උසාවිය.

විවාද කොට තීන්දු කළ දිනය : වෂ් 1962 ජුනි 11 වෙනි දින,

චෝදනාව—එය සකස්කිරිම—වරදකරු කිරිමට පෙර තිබියයුතු අවශ්‍ය දෙයක්—වරද පවත්නාතෙක් දඩුවම—නිවාස සහ නගර සංවර්ධන ආඥපණත, 15 (3) ඡෙදය.

වත්තේගම නගර සභාපතිතැනගෙන් පදිංචිවිම පිළිබඳ සහතික පත්‍රයක් නො ලබා නව ගොඩනැගිල්ලක පදිංචිවීමෙ හේතුවෙන් පෙත්සම්කරු වෂ් 1960 නොවැම්බර් මස 18 වෙනි දින වරද කරු වී රු. 50 ක් දඩගසන ලදි. මෙයට විරුඩව ඔහු ඉදිරිපත් කළ ඇපැල් පෙත්සම නිෂ්ප්‍රභාවිය. ඉක්බිති වත්තේගම නගර සභාවේ සෞඛ්‍ය පරික්ෂකවරයා මෙම පෙත්සම් කරු එසේ සහතික පත්‍රයක් නොලබා දිගටම පදිංචි වී සිටින බව කියා මේ සඳහා "වරද පවත්නාතෙක් දියයුතු" දඩුවමක් නියම කරණ ලෙස වෂ් 1961 දෙසැම්බර් මස 23 වෙනි දින උසාවියට ආයාචනයක් කෙළේය. පෙත්සම්කරුට නිවේදනයක්යැවූ මහේස්ත්‍රාත්වරයා එසේ දඩුවමක් ඔහුට නොදීමට හේතු පෙන්වන ලෙස නියෝග කළ නමුත් ඔහුට විරුඩව චෝදනාවක් සකස් කළේ නැත. විත්තිපක්ෂයේ කිසිම සාක්ෂිකරුවකු නොකැඳවන ලදුව සෞඛ්‍ය පරික්ෂකයාගේ සාක්ෂිය ඉදිරිපත් කිරීමෙන් පසු නිවාස සහ නගර සංවර්ධන ආඥ පණතේ 15 (3) ඡෙදය යටතේ වරදක් කරණ ලදැයි විත්තිකරු වරදකරු කරණු ලැබ "වරද පවත්නාතෙක්" ගෙවියයුතු දඩයක් වශයෙන් දවසකට රු: 25/- බැගින් ගෙවීමට නියමවිය.

තීන්දුව :—පසුව පැවැත්වුනු නඩු විභාගය පෙත්සම්කරුට විරුඩව චෝදනාවක් සකස් නොකර පැවැත්වීමේ හේතුවෙන් නීත්‍යානුකූල නොවන්නකි.

නීතිඥවරු : ඉසදින් මොහමඩ්, එච්. ඩී. තම්බයියා සමග, පෙත්සම්කරු වෙනුවෙන්.

වගඋත්තරකරු වෙනුවෙන් කිසිවෙක් පෙනී නොසිටියේය.

අභයසුන්දර විනිශ්චයකාරතුමා:

වත්තේගම නගර සභාවේ සභාපතිවරයාගෙන් පදිංචිවීම පිළිබඳ අවසර පත්‍රයක් නොලබා ගොඩනැගිල්ලක පදිංචියට යාමේ හේතුවෙන් නිවාස හා නගර සංවර්ධන ආඥ පනතේ 15 වැනි ඡෙදය යටතේ දඬුවම් ලැබිය යුතු වරදක් කරන ලදැයි පෙත්සම්කරුට විරුඩව නඩු පවරා තිබිණ. මෙම වරදට වෂ් 1960 නොවැම්බර් 4 වන දින ඔහු වරදකරු වූයෙන් වෂ් 1960 නොවැම්බර් 18 වන දින ඔහුට රු. 50/- ක දඩයක් ගෙවීමටයයි නියම විය. මේ වරදට වරදකරු කිරීම සහ දඬුවමට විරුඩව ඔහු ඇපැල් ගත් නමුත් එය 1961 ජුනි මස 22 වන දින නිෂ්ප්‍රභා විය.

වත්තේගම නගර සභාවෙහි සෞඛ්‍ය පරීක්ෂකවරයා වෂ් 1961 දෙසැම්බර් 23 වන දින මේ පිළිබඳව "වරද පවතිනතෙක් දඬුවමක්" නියම කළ යුතු බව උසාවියට සැලකර සිටියේය. ඊට හේතුව වශයෙන් ඔහු දුන්වූයේ නගර සභාපති තුමාගෙන් කලින් කීපරිදි පදිංචිවීනම් අනුකූලතාවය පිළිබඳ සහතික පත්‍රයක් නොලබා ඔහු එම ගොඩ-නැගිල්ලෙහි නොකඩවා පදිංචිවී සිටින බවය. මෙම ඉල්ලීම අනුව කටයුතු කළ මහේස්ත්‍රාත්වරයා වරද පවතින තාක් දඬුවමක් ඔහුට නොදීමට හේතුවක් ඇත්නම් එය පෙන්වන ලෙස නියෝග කරමින් පෙත්සම් කරුට නිවේදනයක් නිකුත් කළේය. යථෝක්ත ඉල්ලීමෙන් උද්ගතවුනු නීත්‍යානුකූල ක්‍රියාමාර්ගය පටන් ගත්තේ වෂ් 1962 මැයි මස 11 වන දින දිය. මෙදින මහේස්ත්‍රාත් වරයා මෙකී පෙත්සම්කරු තමාට දඬුවම් කළ පසුවද සභාපති වරයාගෙන් පදිංචිවීමේ සහතික පත්‍රයක් ලබා නොමැති බවට සෞඛ්‍ය පරීක්ෂකවරයාගෙන් සාක්ෂි සටහන් කරගන්නා ලදී. කොයිලෙසකින් නමුත් මෙම අවස්ථාවේ පෙත්සම් කරුට විරුඩව චෝදනාවක් සකස් කොට නැත. සෞඛ්‍ය පරීක්ෂකවරයාගේ සාක්ෂියෙන් පසු මහේස්ත්‍රාත්වරයා විසින් පෙත්සම්කරුට නිදහසට කරුණු කීමට යයි අමතන ලදින් ඔහු වෙනුවෙන් පෙනී සිටි නීතිඥයා තමා සාක්ෂි නොකැඳවන බවත් පෙත්සම්කරුට දී තිබෙන දඬුවම වැඩිකිරීමට හෝ වෙනස් කිරීමට හෝ උසාවියට බලයක් නැති බවත් සැලකර සිටියේය. මහේස්ත්‍රාත් වරයා නිවාස සහ නගර සංවර්ධන ආඥ-පනතේ 15 (3) දරන ඡෙදය යටතේ දඬුවම් ලැබිය යුතු වරදක් කරන ලදැයි පෙත්සම් කරු පිට වරද පවරා ඔහුට වෂ් 1962 මැයි මස 11 වන දින සිට ක්‍රියාත්මක වන අයුරින් දිනකට රු. 25/- ක දඩයක් ගෙවීමට යයි "වරද පවතිනතෙක් යන දඬුවමක්" නියම කළේය.

වෂ් 1962 මැයි මස 11 වන දින පෙත්සම් කරු වරදට පත් කිරීමෙන් නිමවූ නඩු විභාගයෙන් පෙත්සම් කරුට විරුඩව චෝදනාවක් සකස්වී නැති බැවින් එය නීත්‍යානු-කූල නඩුවක් විලස ගිනිය නොහැක. මා සතුව ඇති සංශොධන බලය ක්‍රියාවේ යොදවමින් එසේ පෙත්සම් කරු වරදට පත් කිරීම හා ඔහුට දුන් දඬුවම ඉවත් කරමින් මම ඔහු නිදහස් කිරීමට යැයි නියෝග කරමි.

දඬුවම ඉවත්කර නිදහස් කරණ ලදී.

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 62 වෙනි කා., 84 වෙනි පිට බලනු.

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ගරු සන්සෝනි විනිශ්වයකාරතුමා ඉදිරිපිට.

ඊස්වරලිංගම් එ. සිවඥානසුන්දරම්, පේදුරුතුඩුවේ දිස්ත්‍රික් විනිශ්වයකාර තැන*

වර්ෂ 1962 නො: 20 දරණ ඉල්ලුම් පත්‍රය.

පේදුරුතුඩුවේ දිස්ත්‍රික් විනිශ්වයකාරධුරි ඇන්. සිවඥාණසුන්දරම් මහතාට විරුඩව මැන්ඩේමස් ආඥවක් හා වැලක්වීමේ ආඥවක් ඉල්ලමින් අධිකරණ ආඥ පණතේ 42 වන ඡේදය යටතේ කරන ලද ඉල්ලීමක් පිළිබඳවයි.

විවාද කළ දිනය: 26.7.62.
තීන්දු කළ දිනය: 30.7.62.

දිස්ත්‍රික් විනිශ්වයකාරතුමෙකුට විරුඩව තහනම් සහ මැන්ඩේමස් ආඥවක්—එම විනිශ්වයකාරතුමා විසින් තමා ඉදිරියෙහි විභාගයට තිබෙන පැමිනිල්ලක් ගැන කෙනෙකුට තම උසාවියේ පෙනිසිටීමට කළ නියෝගයක්—නියෝගය බාරගත් නමුත් ඔහු උසාවියට නොපැමිනීම—ඔහු උසාවියට ගෙන ඒමට වරෙන්තුවක් නිකුත් කිරීම—අල්ලාගෙන ආපසු නැවත උසාවියේ පෙනි සිටීම සඳහා ඇපදීමට නියම කිරීම—මේ නියෝගයන් කිරීමට දිස්ත්‍රික් නඩුකාරතුමාට බලය තිබේද?—සිවිල් නඩුසංවිධාන සංග්‍රහය, 137 වෙනි සහ 138 වෙනි ඡේද.

තීන්දුව :—(1) තමා ඉදිරිපිට විභාග කලයුතුව තිබෙන මොනයම් කරුණක් පිළිබඳවුවත් විනිශ්වයකාරතුමෙකුට යම්කෙනෙකු උසාවියට කැඳවීමට නියෝගයක් කිරීමට බලය තිබේ.

(2) එසේ නිකුත් කරණ ලද නියෝගයක් බාරගෙන ඊට අකීකරුව උසාවියට නොපැමුණුනහොත් ඔහු අල්ලාගෙන ඒමට වරෙන්තුවක් නිකුත්කිරීමට ද විනිශ්වයකාරතුමාට බලය තිබේ.

(3) එසේ අල්ලාගෙනවිත් උසාවියට ඉදිරිපත් කල අයට සිවිල් නඩුවිධාන සංග්‍රහයේ 138 වෙනි ඡේදය යටතේ එම නියෝගයට කීකරුව උවමනා දිනයක උසාවියේ පෙනී සිටීම විශ්වාස කටයුතු පරිදි ආරක්ෂා වන අයුරින් ඇපයක් නියමකර ඔහු නිදහස් කිරීමට ද බලය තිබේ.

සඳහන්කළ නඩු:

නරායන් චෙට්ටි එ. ජුසේ සිල්වා, 8 න.නි.වා. 162

එදිරිසිංහ එ. මාතර දිස්ත්‍රික් නඩුකාරතුමා, 51 න.නි.වා. 549.

නීතිඥවරු: නිමල් සේනානායක, පෙත්සම්කරු වෙනුවෙන්.

එච්. ඇල්. ද සිල්වා, රජයේ අධිනීතිඥ වගඋත්තරකරු වෙනුවෙන්.

ගරු සන්සෝනි විනිශ්වයකාරතුමා :

මෙය වූකලී පේදුරුතුඩුවේ දිස්ත්‍රික් විනිශ්වයකාරතුමා වූ වගඋත්තරකරුට විරුඩව වැලැක්වීමේ ආඥවක් (Writ of Prohibition) සහ මැන්ඩේමස් ආඥවක් (Writ of Mandamus) නිකුත් කරන ලෙස ඉල්ලමින් පෙත්සම්කරු (පේදුරුතුඩුවේ දිස්ත්‍රික් උසාවියේ නො: 5279 දරණ නඩුවේ පළමුවන විත්තිකරු) විසින් කරන ලද ආයාචනයකි. මෙය උද්ගතවී ඇත්තේ පහත සඳහන් කරුණු අනුවය. නො: 5279 දරණ එම නඩුව අන්නපිල්ලෙයි නැමිත්තෙකු විසින් මෙහි පෙත්සම්කරුට, ඔහුගේ භාර්‍යාවට (දෙවන විත්තිකරුට) සහ වේලකනපති (තෙවන විත්තිකරු) නැමත්තෙකුට විරුඩව, දෙවන විත්තිකරු විසින් තුන්වැනි විත්තිකරුගේ ප්‍රයෝජනය පිණිස ලියන ලද විකුණුම්කරයක් නිෂ්ප්‍රභා කරමින් තමාගේ කලින් මිලට ගැනීමේ අයිතිය (Right of pre-emption) ක්‍රියා කරවීමට දමන ලද්දකි. මෙම ගනුදෙනුවේ ප්‍රතිෂ්ඨාව වශයෙන් සැලකෙන මුදලේ කොටසක ගෙවීමක් වශයෙන් තුන්වෙනි විත්තිකරු විසින් රු: 3,000/- විටිනා උකස්කරයක් දෙවැනි විත්තිකරුගේ වාසියට ලියා තිබේ.

නඩු විභාගයෙන් පසු දිස්ත්‍රික් විනිශ්වයකාරතුමා පැමිණිලිකරුගේ වාසියට තීන්දුව දුන්නේය. මෙහිදී ඔහු පැමිණිලිකරු විසින් කලින් මිලට ගැනීමට උත්සාහ කරන

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 62 වෙනි කා., 89 වෙනි පිට බලනු.

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ඉඩමේ වටිනාකම වශයෙන් රු: 3,500/- උසාවියෙහි තැන්පත් කළ යුතුයයි නියෝග කෙළෙන් එය එපරිද්දෙන්ම තැන්පත් කරන ලදි. මින්පසු පළමුවන සහ දෙවන විත්තිකරුවන් විසින් උකස්කරයෙන් හිමි මුදලේ සහ පොලියේ කොටසක් හැටියට තමන්ට එම රු: රු: 3,500/- ගෙවීමටයයි උසාවියට ඉල්ලීමක් ඉදිරිපත් කරන ලද නිසා වර්ෂ 1961 නොවැම්බර් 15 වෙනි දින ඒ අයුරින් ගෙවන ලෙස නියෝගයක් උසාවිය මගින් නිකුත් කරන ලදි.

මේ අතර වර්ෂ 1961 දෙසැම්බර මස 16 වන දින එවකට මියගොස් සිටි තුන්වන විත්තිකරු වෙනුවෙන් මෙම නඩුවට ඇතුල්කළ ඔහුගේ වැන්දඹුව සහ දරුවන් විසින් උසාවියට ඉල්ලීමක් ඉදිරිපත් කරමින් සැලකර සිටියේ පළමුවන සහ දෙවන විත්තිකරුවන් විසින් ලබා ඇති එම රුපියල් 3,500/- නැවත වරක් උසාවියට ඉදිරිපත් කල යුතුයයි නියෝගයක් නිකුත් කරන ලෙසය. අනතුරුව උසාවිය විසින් පැමිණිලිකරුට සහ සියළුම විත්තිකරුවන්ට නිවේදන යවන ලදි. මෙම නිවේදනයෙහි සඳහන් වූයේ පළමුවන සහ දෙවන විත්තිකරුවන් විසින් (1) තමන්ට ගෙවන ලද එම රුපියල් 3,500/- වැරදීමකින් ගෙවන ලද නිසා එය නැවත උසාවියට ගෙන ආ යුතු බව සහ (2) තමන් පුද්ගලිකව 1961 දෙසැම්බර 22 වෙනි දින පසුව ඇතුල්කළ විත්තිකරුවන්ගේ ඉල්ලීම පිළිබඳව සලකා බැලීමට උසාවියට පැමිණිය යුතු බවය.

පළමු සහ දෙවන විත්තිකරුවන්ට මෙම නිවේදනය බාරදුන් බව පිළිගත හැකි නමුත් ඔවුන් නිවේදන යෙහි සඳහන් දිනයෙහි උසාවියට පැමිණියේ වත් එම මුදල් උසාවියෙහි තැන්පත් කලේවත් නැත. මෙදින මොවුන් සිවිල් වරෙන්තුවකින් උසාවියට කැඳවා ඔවුන් විසින් ලබාගත් එම මුදල ආපසු උසාවියට ඉදිරිපත් නොකිරීමට යම්කිසි හේතුවක් ඇද්දැයි විමසීම සුදුසුයයි විනිශ්චයකාරතුමා හිතුවේය. මේ සඳහා සිවිල් වරෙන්තුවක් නිකුත් වී ඇත. දෙසැම්බර 23 වෙනි දින පළමුවන විත්තිකරු පියකල් නැනගේ බාරයේ උසාවියට ඉදිරිපත් විය. විනිශ්චයකාරතුමා ඔහුට පහත සඳහන් කරුණු පැහැදිලි කර දුන්නේය: (1) මුදල් ගෙවීමටයයි කරන ලද නියෝගය වැරදීමකින් දෙනලද බව; (2) උකස්කරය පිළිබඳව නඩු තීන්දුවක් නොමැති නිසා ඔහුට සහ ඔහුගේ භාර්යාවට වාසිවන හැටියට එම නියෝගය කළ යුතුව තිබුණේ නැති බව; (3) එබැවින් එම මුදල ඔහු සහ ඔහුගේ භාර්යාව විසින් උසාවියට ගෙන ආ යුතු බව; (4) මෙම මුදල ඒ ඒ අයගේ අයිතිවාසිකම් ගැන නොසලකා කිසිම පක්ෂයකට නොගෙවන බව.

මෙම මුදල උසාවියට ඉදිරිපත් කරන මෝසමකින් (Motion) ලබාගත හැකි බවට තමා අවවාද ලත් නිසා එය තමා ඒ ආකාරයෙන් ලබාගත් බව පළමුවන විත්තිකරු පැහැදිලි කලේය. මින්පසු විනිශ්චයකාරතුමා ඔහුට යලිත් වරක් දෙසැම්බර මස 26 වෙනි දින පැමිණෙන ලෙස රුපියල් 3,500/- ඇප තැබීමට නියම කෙළේය. ඇප මුදල දිය නොහැකි වූ ඔහු නැවතත් පියකල්ගේ අත්අඩංගුවට පත් විය.

දෙසැම්බර 30 වෙනි දින නඩුපොතේ පහත සඳහන් පරිදි සටහනක් ලියවී තිබේ:

"පළමු සහ දෙවන විත්තිකරු රුපියල් 3,500/- උසාවියට ගෙන ඒමට දැන් කැමැත්තෙන් සිටිති. 23.12.61 දතමින් ඇති නඩුවිභාගයේ විස්තර සටහනේ තුන්වෙනි කොටස බලන්න.

(1) රු: 3,500/- ක් තැන්පත් කිරීමේ අවසර පත්‍රයක් දිය යුතුයි.

(2) රු: 500/- ක ශරීර ඇපයක් ගෙන ඔහු නිදහස් කල යුතුය."

මින්පසු ලියැවී ඇති සෙසු සටහන් අනුව දවසකින් හෝ දෙකකින් රු: 3,500/- ක මුදලක් නියම වශයෙන් තැන්පත් කරන ලද බව පෙනී යේ. මින්පසු වෙන යම්කිසි පියවරක් ගැනීමට පෙර මෙම උසාවියට මෙම ඉල්ලුම් පත්‍රය ඉදිරිපත් කොට තිබේ. පෙත්සම්කරු වෙනුවෙන් පෙනී සිටි සේනානායක මහතා විසින් සැලකර සිටියේ පළමු සහ දෙවන විත්තිකරුවන්ට උසාවියට පැමිනීමට බලකිරීමට විනිශ්චයකාරතුමාට බලයක් නැති බවත් කෙසේ හෝ වේවා ඔහුට සිවිල් වරෙන්තුවක් නිකුත් කිරීමට හෝ විත්තිකරුවන් නැවත පැමිණෙන බවට ඇප නියම කිරීමට හෝ කිසිසේත් බලයක් නැති බවකි. රජයේ අධිනීතිඥ නැන සිවිල් නඩුවිධාන සංග්‍රහයේ 137 සහ 138 වන ඡේදයන්ට අපගේ අවධානය යොමුකරන අතර (වර්ෂ 1903) 8 න. නි. වා. 162 පිට සඳහන්ව ඇති, නාරායන් චෙට්ටි එ. ජුසේ සිල්වා යන නඩු තීන්දුවේ පිළිසරණ ද ගෙවිය. වැඩිදුරටත් කරුණු දක්වූ ඔහු මෙම මුදල පළමු සහ දෙවන විත්තිකරු වන්ට ගෙවන ලද්දේ ඒක පාක්ෂික ඉල්ලීමක් (ex-parte application) අනුව නිසාත් මෙම ගෙවීම සාවද්‍යයයි විනිශ්චයකාරවරයා සිතූ නිසාත් ඔහුට නිරායාසයෙන් ලැබී ඇති බලතල අනුව මේ සම්බන්ධව පරීක්ෂණයක් කිරීමට ඉඩ ඇති බවත් එම පරීක්ෂණය සඳහා පළමු සහ දෙවන විත්තිකරුවන් ඇතුළු ඕනෑ කෙනෙකු අවශ්‍යයයි සිතුව හොත් එම පරීක්ෂණය ක්‍රියාත්මක කිරීම සඳහා ඔවුන් කැඳවිය යුතු බවත් සැලකර සිටියේය.

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මගේ අදහසේ හැටියට පරීක්ෂණයට භාජන කලයුතු කරුණක් ඒකාන්තයෙන්ම මෙහි තිබුණි. මුදල් ගෙවා නිමවූ පසු එය සාවද්‍යයයි විනිශ්චයකාරතුමාට හැඟීගිය බැවිනුත් එම මුදල ආදේශකල විත්තිකරුවන් තමන්ට හිමියයි අයිතිවාසිකම් කී බැවිනුත් මෙම පැමිණිල්ල විභාගකර බැලීම උසාවියේ යුතුකමව තිබුණේය. එසේම මේ සඳහා පළමුවන සහ දෙවන විත්තිකරුවන්ට සිතාසි යවා ඔවුන් කැඳවීමටත් ඔවුන්ට ගෙවන ලද එම මුදල නඩුවෙහි ඒ ඒ පාක්ෂිකයන්ගේ අයිතිවාසිකම් පසිඳන තුරු උසාවියෙහි තැන්පත් කිරීමටත් නියෝග කිරීම අධිකරණයේ යුතුකම විය. මෙම පියවර ගැනීම විනිශ්චයකාරතුමා විසින් පැහැර හරින ලද නම් ආදේශ කරන ලද විත්තිකරුවන්ට බරපතල අයුක්තියක් සිදුවීමට ඉඩ තිබේ. යම්කිසි අයුක්තියක් සිදුවීම වැලක්වීම විනිශ්චයකාරතුමාගේ යුතුකමකි. මෙම අයුක්තිය තමන්ගේ ක්‍රියාවකින් සිදුවූ විටක එය වැලක්වීම විශේෂයෙන්ම තමාගේ යුතුකම වන්නේය.

නාරායන් චෙට්ටි එ. ජුසේ සිල්වා අතර කියැවුණ නඩුවෙහි වෙන්ඩට් විනිශ්චයකාරතුමා පහත සඳහන් පරිදි ප්‍රකාශකර තිබේ.

"යම්කිසි නඩුවක පාර්ශවකරුවෙකු නම් අභිමුවට කැඳවීමට අධිකරණයට නිරායාසයෙන්ම බලයක් තිබේ. මේ සඳහා යවන ලද සිතාසිය නීත්‍යානුකූල හේතුවක් නොමැතිව පැහැර හැරියොත් වරෙන්තුවක් නිකුත් කිරීමෙන් එම පාක්ෂිකයා අවනත කරගැනීමට එසේම බලය තිබේ . . . මෙහිදී විත්තිකරුගේ නීතිඥයා අධ්‍යවශයෙන් උසාවියට හරසර දක්වීමක් වශයෙන් වත් ඔහුගේ සහ ඔහුගේ සේවාදායකයාගේ නොපැමිණීම උසාවියට පැහැදිලි කොටදී උසාවිය විසින් මැනවියයි සිතතොත් වරෙන්තුවක් නිකුත් කිරීම සඳහා දුන් නියෝගය මෙම උසාවියට ඇපැල් පෙත්සමක් ඉදිරිපත් කිරීමට කලින් ඉවත් කර දැමීමට අවස්ථාවක් දිය යුතුය." මේ ප්‍රකාශයට එකඟවූ මිඩ්ල්ටන් විනිශ්චයකාරතුමා සිතුයේ යම්කිසි පක්ෂයක් සිතාසි ලැබුණ පසුත් උසාවියට පැමිණීම මගහැරියොත් සිවිල් නඩු විධාන සංග්‍රහයේ 137 සහ 141 යන ඡෙදයන් යටතේ වරෙන්තුවක් නිකුත් කිරීම යුක්තිසහගතබවය. එම නඩුවෙහි සිවිල් නඩුවිධාන සංග්‍රහයේ 219 වන ඡෙදය යටතේ නිවේදනයක් ලැබූ විත්තිකරුවෙකු උසාවියට නොපැමිණීම නිසා ඔහු ඇල්වීමට උසාවිය මගින් වරෙන්තුවක් නිකුත් කරන ලදුව ඔහු එයටවිරුඬව ඇපැල් පෙත්සමක් ඉදිරිපත් කෙළේය.

සේනානායක මහතා සැලකර සිටියේ 219 (2) දරණ ඡෙදයෙන් නයගැත්තෙකුට සිතාසියක් යවා නොපැමිණ කල්හි වරෙන්තුවක් නිකුත් කිරීමට බලය දී තිබෙන නිසා මෙම කරුණ මෙම නඩුවට සාධක පාඨයක් ලෙස ගිණිය නොහැකි බවය. මේ තර්කය මට පිළිගත නොහේ. මන්ද, මෙම නඩු තීන්දුව දෙන අවස්ථාවෙහි 219 වන ඡෙදය තිබූ ආකාරය ගැන සැලකීමක් මෙම තර්කයෙන් නොකෙරෙන නිසාය. 219 වන ඡෙදයට ඇති (2) උපඡෙදය පසුව එකතුකරන ලද්දකි. එය සිවිල් නඩු විධාන සංග්‍රහයේ කලින් නොතිබිණ. මෙම නඩුව තීන්දුවූ 1903 වන වර්ෂයේදී පවා එය පැනවී තිබුණේ නැත. තවද වර්ෂ 1907 කරන ලද නීති ග්‍රන්ථ මුද්‍රණයෙහි ද මෙ ඇතුලත් වූ බවක් නොපෙනේ. නීතිග්‍රන්ථවල උපඡෙද සඳහන් කොටසෙහි දිනය නොමැති නිසා මෙය කවද එකතු කරන ලදැයි කීම අසීරුය. එබැවින් එම නඩු තීන්දුවෙහි ඇති ප්‍රකාශය සීමා කිරීමට ඇති කිසිම හේතුවක් නොපැනේ.

(1949) 51 න. නි. වා. 549 වන පිට සඳහන් එදිරිසිංහ එ. මාතර දිස්ත්‍රික් විනිශ්චයකාරතුමා අතර කියවුණු නඩුවෙහි ද විනිශ්චයකරුවෙකුට අධිකරණ ගාමියෙකු තමා ඉදිරියට ගෙන්වා තමා ඉදිරියෙහි පැන නැගී ඇති කිසියම් කරුණක් ගැන පරීක්ෂණයක් පැවත්වීමට බලයක් ඇති බවට වැඩි දුරටත් සාධක පෙනේ. මෙම නඩුවෙහි යම්කිසි බෙදුම් නඩුවක විකිනීමක් පිණිස පත්කරන ලද කොමසාරිස්වරයෙකුට අවහිර කරන ලදැයි ඔහු විසින් කරන ලද පැමිණිල්ලක් අනුව පාර්ශවකරුවෙකුට අධිකරණයෙහි පෙනී සිටීමටයයි දිස්ත්‍රික් විනිශ්චයකාර තුමා නිවේදනයක් නිකුත් කලේය. අප ඉදිරියෙහි දැනට ඇති ඉල්ලීමට සමාන ඉල්ලීමක් එවිට එම පාර්ශවකරු විසින් ඉදිරිපත් කරන ලදී. එය ඉදිරිපත් කෙලේ සිදුවියයි කියන ලද එම අවහිරය ගැන පරීක්ෂණයක් පැවත්වීමට විනිශ්චයකාරතුමාට බලයක් නැතැයි කියමින් සහ නැවත වරක් උසාවියට පැමිණීමට ඇප නියම කිරීමට ඔහුට බලයක් නැතැයි ද කියමිනි. බස්නායක විනිශ්චයකාරතුමා විසින් මෙහිදී තීන්දු කෙලේ දිස්ත්‍රික් විනිශ්චයකාරතුමාට පරීක්ෂණයක් පවත්වා එහි නියම තත්ත්වය දැනගෙන යම්කිසි පියවරක් ඇත්නම් එය කෙසේගත යුතුදැයි තීරණය කිරීමට බලයක් තිබේයයි කියාය. සිවිල් නඩුවිධාන සංග්‍රහයේ 839 වන ඡෙදය ගැනද සඳහන් කල එතුමා එහි උසාවියට නිරායාසයෙන් ලැබෙන බලතල ඇති බව පැවසීය. මේ අනුව එතුමා වැලක්වීමේ ආඥවක් දීමට කරන ලද ඉල්ලීම ප්‍රතික්ෂේප කළේය.

එසේම මෙම නඩුවෙහිදී ද මේ අයුරු පරීක්ෂනයක් පැවැත්වීමට සහ ආදේශ කල විත්තිකරුවන්ගේ පැමිණිල්ල ගැන ක්‍රියා කිරීම සඳහා උසාවියට පැමිණෙන ලෙස ආදේශ කරන ලද විත්තිකරුවන්ගේ කීමේ හැටියට වරදවා ගෙවන ලද මුදලක් ලබාගත් පළමු සහ දෙවන

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විත්තිකරුවන්ට උසාවියට පැමිණීමටයයි නිවේදනයක් නිකුත්කිරීමට විනිශ්චයකාරයාට බලය තිබේයයි මම නිගමනය කරමි. ඔවුන් ඒ නිවේදනය අවනතව නො පැමිණි කල සිවිල් වරෙන්තුවක් යවා ඔවුන් නඩු කර ගැනීමට ද විනිශ්චයකාරතුමාට බලය තිබේ.

මීළඟට පැන නගින ප්‍රශ්නය පෙත්සම්කරු අල්වා උසාවියට ඉදිරිපත් කල විට නැවත වරක් ඔහු දෙසැම්බර මස 26 වෙනි දින පැමිණිය යුතුයයි කියා ඇප නියම කිරීමට විනිශ්චයකරුට බලයක් ඇද්ද යන්නයි. සිවිල් නඩුවිධාන සංග්‍රහයේ 138 වන ඡේදය මෙයට අවසර දේයයි මම සිතමි. සිතාසියකට අවනත නොවූ යම් කිසිවෙකු උසාවියට ඉදිරිපත්කල අවස්ථාවක ඔහුට ඇප තබා යාමට යයි කීමට එයින් බලය දී තිබේ. මෙසේ නියම් කළ ඇපය කැඩු විට ඔහු නිදහස් කර යැවීමට අවකාශ ඇත. මා විසින් දන් සඳහන් කරන ලද නඩු-වෙහි දිස්ත්‍රික් විනිශ්චයකාරවරයා විසින් ඇප නියම් කිරීම ගැන තමාට සාධක පාඨයක් සොයාගනු නො හැකියයි බිස්නායක විනිශ්චයකාරතුමා ප්‍රකාශ කොට ඇත. සමහරවිට 138 වන ඡේදයට එතුමාගේ අවධානය යොමු කළේ නම් එතුමා මීට වෙනස් මතයක් පහල කරනු ඇත. මේ නයින් බලන කල මට පෙනී යනුයේ මෙම නඩුවෙහි දිස්ත්‍රික් නඩුකාරවරයා විසින් අනිකුත් කරන ලද නිවේදනවල හෝ සිවිල් වරෙන්තුවල හෝ ඇප තැබීමට යයි කරන ලද නියෝගවල හෝ කිසිද වරදක් නැති බවයි.

සේනානායක මහතා සඳහන් කල තවත් එක කරුණක් තිබේ. එනම් වර්ෂ 1961 දෙසැම්බර මස 30 වන දින කෙරී ඇති රු: 3,500/- තැන්පත් කල යුතුය යනුවෙන් නඩුකොපියේ ඇති සටහනය. ඔහු සැලකර සිටියේ මේ මුදල තැන්පත් කලේ පළමු වන විත්තිකාර පෙත්සම්-කරු විසින් තමාගේ නිදහස ලබා ගැනීමේ අදහසින් මිස උසාවියෙන් ලබාගත් මුදල ආපසු ගෙවන අදහසින් නොවය. මෙය පළමු සහ දෙවන විත්තිකරුවන් අනිත් පාර්ශවකරුවන්ට දැනුම් දී පහල උසාවියේ ඉදිරිපත් කල යුතු ප්‍රශ්නයකි. එසේ ඉදිරිපත් කිරිමේ අයිතිය ඔවුන් වෙත පවරන මම මේ කරුණ පිළිබඳව පරීක්ෂණය වෙන දිස්ත්‍රික් විනිශ්චයකාර තුමෙකු ලවා කරවන ලෙස උපදෙස් දෙමි.

මා විසින් දෙන ලද මේ හේතුන් නිසා වැලැක්වීමේ ආඥාවක් හා මැන්ඩේමස් ආඥාවක් සඳහා මෙම උසාවියට කරන ලද ආයාචනය මම ප්‍රතික්ෂේප කරමි. තම තමාට වියදම් වූ ගාස්තු ආදිය තම තමා විසින් දරාගත යුතුය.

ඉල්ලීම් නිශ්ප්‍රභා විය.

ගරු හේරත් විනිශ්චයකාරතුමා සහ අභයසුන්දර විනිශ්චයකාරතුමා ඉදිරිපිට.

පියදාස එ. රැජින*

සු. උ. නොම්මරය: 112—දි. උ. (ක්‍රිමිනල්) හම්බන්තොට නො: 43/28347.

වාද කළේ සහ තීන්දු කළේ: 21.6.1962.

අපරාධනඩු විධාන සංග්‍රහයේ 202 සහ 217 වන ඡේද—චෝදනා පත්‍රය—දිස්ත්‍රික් උසාවියේ නඩුවකදී රජයේ අධිනීතිඥ තැන විසින් චෝදනා කීපයකින් එකක් අස් කිරීම—නඩු විභාගයෙන් පසු චූදිතයා අනිත් චෝදනාවලට වරදකරුවීම—අපරාධ නඩු විධාන සංග්‍රහයේ 172 ඡේදයට අනුව චෝදනාව වෙනස්කර නොමැති බව—මෙසේ චෝදනාවක් අස්කිරීමෙන් ඇතිවන ප්‍රතිඵලය.

දිස්ත්‍රික් උසාවිය ඉදිරියේ චෝදනා අටක් ඉදිරිපත් කොට මිනිසුන් දෙදෙනෙකුට විරුධව නඩු පවරන ලදුව රජයේ අධිනීතිඥතැන විසින් නඩුවේදී එක් චෝදනාවක් අස්කර ගන්නාලදී. අපරාධ නඩුවිධාන සංග්‍රහයේ 172 වන ඡේදයට අනුව චෝදනා පත්‍රය වෙනස් නොකොට ඉතිරි චෝදනා උඩ නඩුව විභාගවී විත්තිකරුවෝ වරද කරුවෝ වූයෙන් ඇපැල් පෙත්සමක් ඉදිරිපත් විනි.

තීන්දුව :—එක් චෝදනාවක් අස්කර ගැනීමෙන් ඇතිවන ප්‍රතිඵලය නම් චෝදනා පත්‍රය අපරාධ නඩු විධාන සංග්‍රහයේ 202 වන ඡේදයේ පැණවී නොමැති පරිදි වෙනස්වීමයි, එම නිසා එසේ වෙනස් වූනු චෝදනා පත්‍රය අනුව කෙරුණු නඩු විභාගය අක්‍රියාකාරී වීමේ හේතුවෙන් විත්තිකරුවන් නිදහස් විය යුතුය.

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* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයේ 62 වෙනි කා., 96 වෙනි පිට බලනු.

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නීතිඥවරු: කොල්වින් ආර්. ද සිල්වා, ඇම්. ඇල්. ද සිල්වා මහතාන් සමග චූදිත ඇපැල්කරු වෙනුවෙන්.
ඊ. එච්. සී. ජයතිලක, රජයේ අධිනීතිඥ, ඇටෝර්නිජනරාල් වෙනුවෙන්.

ගරු අභයසුන්දර විනිශ්චයකාරතුමා

මේ නඩුවේ පලවෙනි චූදිත ඇපැල් කරුට දෙවෙනි චූදිතයා සමග චෝදනා අටක් අඩංගු චෝදනා පත්‍රයකට හම්බන්තොට දිස්ත්‍රික් උසාවියේදී මුහුන පාන්ට සිදුවී තිබින. නඩු විභාගයේදී ආණ්ඩුවේ අධිනීතිඥතුමා චෝදනා පත්‍රයෙන් අටවෙනි චෝදනාව ඉවත් කිරීමට ඉල්ලා සිටියේය. එම ආයාචනය පිළිගත් බවට නියෝගයක් නැති නමුත්, උගත් දිස්ත්‍රික් නඩුකාර තුමා, නඩු තීන්දුවේ අටවෙනි චෝදනාව ඉවත් කිරීම සඳහන් කර තිබෙන බැවින්, එතුමා විසින් එය පිළිගත් බව පෙනේ.

ශ්‍රේෂ්ඨාධිකරණයේ නඩු විභාගයක මිස, දිස්ත්‍රික් උසාවියේ නඩු විභාගයකදී ඇටෝර්නි ජනරාල් තුමාට චෝදනාවක් චෝදනා පත්‍රයෙන් අස් කරන්ට බලය නැත. අපරාධ නඩු විධාන සංග්‍රහයේ අංක 202 වෙනි ඡේදයට අනුව, නඩු තීරණය සටහන් කරන්ට පෙර කිසියම් චෝදනා පත්‍රයක් වුවත් ඉවත් කිරීමට ඇටෝර්නි ජනරාල් තුමාට බලය තිබේ. දිස්ත්‍රික් නඩුකාර තුමාගේ අවසර ඇතුව, එම අස් කිරීමේ බලය පැමිණිලිපක්ෂයේ නීතිඥතුමාට ද ක්‍රියාවේ යොදන්ට පුලුවන. එවිට ඒ චෝදනාව සම්බන්ධයෙන් එතෙක් පවත්වාගෙන ආ විභාගය නවත්වා, චූදිත අය නිදහස් කළ යුතුවේ. ඉහතකී සංග්‍රහයේ අංක 217 දරන ඡේදයේ උප ඡේද (1) සහ (3) යටතේ, ශ්‍රේෂ්ඨාධිකරණයේ නඩු විභාගයකදී තීන්දුව ප්‍රකාශ කරන්ට පෙර, විත්තිකරුට මුහුනපාන්ට සිදුවී තිබෙන චෝදනා පත්‍රය හෝ එහි අඩංගු චෝදනාවක් හෝ, විනිශ්චයකාරතුමාට දන්වා අස් කිරීමට ඇටෝර්නි ජනරාල් තුමාට බලය ඇත. එමෙන්ම, පැමිණිල්ල බාර නීතිඥතුමාට ද විනිශ්චයකාර තුමාගේ අවසර ඇතුව, චෝදනා පත්‍රය හෝ එහි අඩංගු චෝදනාවක් හෝ ඉල්ලා ඉවත් කරන්ට පුලුවන. එවිට එම චෝදනා පත්‍රය හෝ ඔහු විසින් සඳහන් කරනු ලබන චෝදනා හෝ අවලංගුවී, විත්තිකරු නිදහස් වන්නේය.

මෙම නඩුවේ චෝදනා පත්‍රය අපරාධ නඩු සංවිධාන සංග්‍රහයේ අංක 172 දරණ ඡේදය යටතේ වෙනස් කරන්ට ඉඩ තිබුනු නමුත්, උගත් විනිශ්චයකාර තුමා එය ක්‍රියාත්මක කර නැත. චෝදනා පත්‍රයෙන් එක චෝදනාවක් ඉවත් කළ විට, එසේ වෙනස්වූ චෝදනා පත්‍රයක් අනුව ගෙන යන ලද නඩු විභාගය ද අවලංගුය.

පළමුවෙනි චූදිත ඇපැල්කරු වෙත පමුණුවනු ලබන දඬුවම ඉවත් කොට ඔහු නිදහස් කරන ලෙස මම අන කරමි. මේ නඩුවේ කටයුතු නීතිවිරෝධි බවට මා තීරණය කර තිබෙන හෙයින්, මට අත්වී තිබෙන පරිශෝධන බලය යොදා දෙවන චූදිත කරුහට උගත් දිස්ත්‍රික් නඩුකාරතුමා විසින් දෙන ලද තීරණයත්, එම දඬුවමත් ඉවත් කොට, ඔහු ද නිදහස් කරණ ලෙස මම අණ කරමි.

ගරු හේරත් විනිශ්චයකාරතුමා

මම එකඟ වෙමි.

චූදිතයන් නිදහස් කරන ලදි.

ගරු හේරත් විනිශ්චයකාරතුමා ඉදිරිපිට දී

පියසේන නොහොත් සිරිපාල සහ තවත් අය එ. බෝමිරියේ උප පොලිස් ඉන්ස්පැක්ටර්*

ශ්‍රේෂ්ඨාධිකරනය **1202-1207/1961**— මහේස්ත්‍රාත් උසාවිය, කොළඹ, **29550/බී.**

විවාද කළ හා තීන්දු කළ දිනය: **1962** මැයි **28** දින

දණ්ඩ නීති සංග්‍රහය—අලාභහානි කිරීමේ චෝදනාවක්—අඩි පාරක් භාවිතා කිරීමට විත්තිකරුට හිමිකම තිබීම—එවැනි අඩි පාරක් පටුවන සේ පැමිණිලිකරු වැටක් බැඳීම—විත්තිකරු එම වැට කැපීම—විත්තිකරු වරද කරුවීම—අපරාධ නඩුවිධාන සංග්‍රහයේ **325** වන ඡේදය යටතේ ඇහබැදීම—ඇපැල—එවැනි නියෝගයකට විරුධව ඇපැල් ගැනීමට අවකාශ තිබේද යන්න—සංශෝධන බලය—මෙසේ වරදකරු කිරීම සනාථ කළ හැකිද යන්න.

විත්තිකාර ඇපැල්කරුට අඩි පාරක් භාවිතා කිරීමට අයිතිවාසිකමක් තිබුනි. පැමිණිලිකරු විසින් මෙම අඩි පාර අඩුවනසේ බඳින ලද අලුත් වැට කරණකොටගෙන එම අඩි පාර පටුවී ගියේය. මෙහිදී විත්තිකාර ඇපැල්කරු එම වැට කපා දැමීම නිසා පැමිණිලිකරු ඔවුන්ට විරුධව සාපරාධි ලෙස අලාභ හානි කිරීමේ චෝදනාවක් ඉදිරිපත් කෙළේය. එම අඩිපාර වැටට අයුව තිබුණු බව අනාවරණය වූ පසුත් උගත් මහේස්ත්‍රාත්වරයා ඔවුන් වැරදිකරුවන් බවට පත්කොට අපරාධ නඩුවිධාන සංග්‍රහයේ **325** වන ඡේදය යටතේ ඔවුන් කෙරෙහි ක්‍රියා කළේය. විත්තිකරුවෝ ඇපැල් පෙත්සමක් ඉදිරිපත් කළාහ.

ඇපැලට මූලික විරුධතාවයන් ඉදිරිපත් කරණ ලද මෙම නඩුවේදී මෙසේ තීන්දුවිය:—

තීන්දුව: අපරාධ නඩු විධාන සංග්‍රහයේ **325** වන ඡේදය යටතේ දෙනලද තීන්දුවකට එරෙහිව ඇපැල් ගැනීමට නොහැකිය.

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* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 62 වෙනි කා., 107 වෙනි පිට බලනු.

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සංශෝධන බලය ක්‍රියාවෙහි යෙදීමෙන් මෙසේ තීන්දුවිය :—

අඩිපාර වැටට අසුවී තිබුනු නිසා එහි නීත්‍යානුකූලව භාවිතා කරන්නන් වන විත්තිකරුවන්ට එම බාධකය ඉවත් කිරීමට නීතියෙන් ඉඩතිබේ. පැමිණිලිකරු කෙරෙහි යම්කිසි ද්වේෂ සහගත චේතනා තිබිය හැකි වූ නිසාම නීත්‍යානුකූල අයිතිවාසිකමක් ක්‍රියාවේ යෙදවීම පිණිස කරණ ලද කටයුත්තක් නීති-විරෝධිවිය නොහැක.

නීතිඥවරු : නිමල් සේනානායක, විත්තිකාර-ඇපැල්කරු වෙනුවෙන්.
එච්. බී. වයිට්, රජයේ අධිනීතිඥ, ඇටෝර්නි ජනරාල්තුමා වෙනුවෙන්.

ගරු හේරත් විනිශ්වයකාරතුමා

මෙම නඩුවේ කරුණු පහත දැක්වෙන පරිද්දෙනි. පැමිණිලිකරුට අඩිපාරකින් මායිම සීමාවී ඇති ඉඩමක් තිබේ. පැමිණිලිකරුගේ ඉඩම එම අඩිපාරෙන් වෙන්වී ඇති වැටක් ද එහි ඇත. අඩිපාරෙන් ඔබ්බෙහි අනෙක් පැත්තේ තුන්වන පක්ෂයකට අයත් ඉඩමක් වෙන්වී ඇති තවත් වැටක් ද මෙහි තිබේ. පැමිණිලිකරුගේ වැට අබලන් වී ගිය වරෙක ඔහු එය යලිත් ප්‍රකෘතිමත් කොට සැදුවේය. මෙසේ කිරීමේදී, උගත් මහේස්ත්‍රාත්වරයාට පෙනී ගිය අන්දමට, පැමිණිලිකරු එම අඩිපාරෙන් කොටසක් තම ඉඩමට යාකර ගැනීම නිසා අඩිපාරේ කලින් තිබූ පලල තුනී විය. මෙහි විත්තිකාර ඇපැල් කරුවන්ට මෙම අඩිපාර භාවිතා කිරීමට අයිතිය තිබුණ බව පිළිගත යුතුය. ඔවුහු අළුතින් සාදන ලද වැට කපා දැමූහ. මේ නිසා ඔවුන් විසින් අනර්ථයක් කරන ලදැයි පැමිණිලිකරු විසින් ඔවුන්ට චෝදනා කොට නඩු පවරන ලදී. ප්‍රකෘතිමත් කරන ලද අළුත් වැට ඇතුලට එකී අඩිපාර අසුවී තිබෙනු දැක දැකත් උගත් මහේස්ත්‍රාත්වරයා විත්තිකාර ඇපැල්කරුවන් වරදකරුවන් බවට පත් කෙළේය. තමාගේ අයිතිවාසිකමක් ආරක්ෂා කර ගැනීමට නිර්ව්‍යාජ අදහසින් තමන් ක්‍රියා කරන ලද බව ඔප්පු කල යුත්තේ විත්තිකාර ඇපැල්කරුවන් බව මහේස්ත්‍රාත්වරයා විසින් කියා තිබේ. අපරාධ නඩු විධාන සංග්‍රහයේ 325 වන ඡේදය යටතේ විත්තිකාර ඇපැල්කරුවන් පිළිබඳව ක්‍රියා කරමින් ඔවුන්ගේ ඇප බැඳ තිබේ.

ඇටෝර්නි ජනරාල් තැන වෙනුවෙන් පෙනී සිටි රජයේ අධිනීතිඥ තැන්පත් බැසිල් වයිට් මහතා මූලික විරෝධයක් දක්වමින් කියා සිටියේ 325 ඡේදය යටතේ දෙන නියෝගයකට විරුඩව එම නියෝගය අවසාන තීරණයක් නොවන නිසා ඇපැලක් ඉදිරිපත් කිරීමට නොහැකි බවය. මේ සම්බන්ධයෙන් ඔහු 38 න. නී. වා. (N.L.R.) 428 පිටේ සඳහන්ව ඇති ප්‍රැන්සිස් සූටස් සිරිමතාණන්ගේ නඩු තීන්දුව ද, 2 බාලසිංහම් වාර්තාවේ 122 වන පිටේ ඇති එවකට අග්‍රවිනිශ්වයකාරධුරී ලෙයාර්ඩ් විනිශ්වයකාරතුමාගේ නඩු තීන්දුව ද ගෙනහැර දැක්විය. එහෙත් විත්තිකාර ඇපැල්කරු වෙනුවෙන් පෙනී සිටි උගත් අධිනීතිඥවරයා මෙයට විරුඩව වෙනත් නඩු තීන්දු ඉදිරිපත් කළේය. කෙසේ වෙතත් අභාවප්‍රාප්ත ප්‍රැන්සිස් සූටස් ශ්‍රීමතාණන්ගේ නඩු තීන්දුව අනුව යමින් මම ද විත්තිකාර ඇපැල්කරුවන්ට ඇපල් පෙත්සමක් ඉදිරිපත් කිරීමට අයිතියක් නැති බව පිළිගනිමි.

නමුත් මෙය මෙම කාර්‍යයෙහි අවසානය නොවේ. මෙම නඩුවෙහි කරුනු ගැන කල්පනා කරන විට මට හැඟීයන්නේ මෙම උසාවියෙහි පරිශෝධක බලය (revisionary power) ක්‍රියාවෙහි යෙදවීමට සුදුසු අවස්ථාවක් මතුවී ඇති බවයි. මෙම පරිශෝධක බලය ක්‍රියාවෙහි යොදමින් කරුණු සලකන විට අළුතින් සාදන ලද වැටට අඩිපාර අසුවී තිබූ බවත් මේ නිසා එම අඩිපාර භාවිතා කරන විත්තිකාර ඇපැල්කරුවන්ගේ අයිතිවාසිකම් ආක්‍රමණයවී ඇති බවත් කල්පනාවට ගැනීමේදී අනර්ථයක් කිරීමේ වරදට අවශ්‍ය එක් අංගයක් එනම්, පැමිණිලිකරු සතු දෙයකට අයුතු අලාභයක් කර ඇති බවත් ඔප්පුවී නැතැයි මට හැඟේ. මෙම අඩිපාර සඳෙස් ලෙස ඇඳාගෙන ඇති නිසා එය නීත්‍යානුකූලව භාවිතා කරන්නට එහි ඇති සම්බාධකය ඉවත් කිරීමට නීතියෙන් ඉඩ තිබේ. විත්තිකාර ඇපැල්කරුවන් විසින් කරන ලද්දේ මෙයයි.

සත්‍ය වශයෙන්ම මෙය අයිතිවාසිකමක් ක්‍රියාවෙහි යෙදවීමකි. කරුණු එසේනම් මෙම අයුතු ඇඳාගැනීම ඉවත් කිරීමේදී සිදුවී ඇති අලාභය අයුතු අලාභයක් යයි සැලකිය හැක්කේ කෙසේදැයි මට නොපෙනේ.

මෙම නඩුවෙහි තවත් කරුණක් පෙන්වා දෙන රජයේ උගත් අධිනීතිඥවරයා පැමිණිලිකරු සහ විත්තිකාර ඇපැල්කරුවන් අතර එක් පක්ෂයක් සාමාජිකත්වයක් ලැබූ සමිතියකට අනෙක් පක්ෂය නොබැඳීමේ හේතුවෙන් ඇතිවූ අමනාපයක් තිබූ බව කියා සිටියේය. සමහර විට විත්තිකාර ඇපැල්කරුවන් කරන ලද කටයුත්තට මෙම අමනාපය මූලික චේතනාව වූවා විය හැක. කෙසේ වෙතත් මෙය අප්‍රධාන චේතනාවක් පමණකි. ඔවුන් තමන්ගේ නීත්‍යානුකූල අයිතිවාසිකම ක්‍රියාවෙහි යොදන ලද නම් ඔවුන් තුල පැමිණිලිකරුට විරුඩව වෙන කරුණක් මත යම්කිසි ද්වේෂසහගත හෝ ක්‍රෝධ සහගත හැඟීමක් තිබූ නමුත් එම ක්‍රියාව සදෙස් වන්නේ කෙසේදැයි මට නොපෙනේ.

එම නිසා පරිශෝධක බලය ක්‍රියාවෙහි යොදමින් මෙම නඩුවෙහි කලින් කර ඇති වරදට පත්කිරීම නිෂ්ප්‍රභා කරන මම විත්තිකරුවන් චෝදනා දෙකින්ම නිදහස් කරමි. ඔවුන් එක් රුස්වූයේ දඩුවම් ලැබිය යුතු වරදක් කිරීම පිණිස නොව, නීතියෙන් තමන්ට අවකාශ දී ඇති පරිදි තමන්ගේ අයිතිවාසිකම රැකගැනීමට නිසා නීති විරෝධි ලෙස රංචුගැසීමේ චෝදනාවක් ඇතිවීමට නුපුළුවන.

චූදිතයන් නිදහස් කරන ලදී.

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