The Ceylon Law Weekly

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With a section in Sinhala

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WITH A DIGEST

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DIGEST

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Births and Deaths Registration Act

Births and Deaths Registration Act, No 17 *of* 1951, *sections* 28, 52 (1)*—Registration entry—Mistake as to name and sex—Application to District Court for order directing alteration—Order to Registrar-General made under section* 28 *of the Act—Jurisdiction to make such order*

The 2nd respondent, the child of the 3rd respondent by her husband, the 1st respondent, was born on the 2nd April, 1954. The birth was registered on the 24th April, 1954, the name of the child being registered as "Sunil" and its sex as " male ". In June, 1960, the 3rd respondent made application to the District Court for an order directing the Registrar-General to alter the registration entries relating to name and sex to " Sunila " and " female ", respectively. The District Court, being satisfied that the earlier entries had been made under a mistake, purported to make an order under section 28 of the Births and Deaths Registration Act, No 17 of 1961, directing the Registrar-General to make the alterations prayed for. The Registrar-General applied in the present application to revise this order.

Held : (1) That the order was made without jurisdiction, because—

(*a*) although paragraph (*a*) of section 28 (1) authorized a Court to order the alteration of the names of a person whose birth has been registered, such an order could not be made until the person attains majority ; and

(*b*) section 28 does not provide at all for the alteration of the entry relating to " sex " in a birth registration.

(2) That section 52 (1) (*h*) of the Act would appear to enable the Registrar-General himself to correct an error of fact or substance, but having regard to the context in which that power is conferred, it would be exercisable only if it was clear to the Registrar-General that the registration entry was not in accordance with the particulars furnished to the Registrar in the " information " given under the Act which preceded the registration of the birth.

Per H. N. G. FERNANDO, J.—" . . . the law at present provides no remedy for the situation which, according to the parents of the child, has arisen in this case. The Registrar-General will, no doubt, invite the attention of the proper authorities to the need for some amendment of the law which may deal with such unusual situation ".

THE REGISTRAR-GENERAL *vs.* TIKIRI BANDA AND OTHERS 14

Bribery Act

Bribery Act (Cap. 26), section 14—Offer of a gratification to a member of the House of Representatives—Interpretation of the words " in his capacity as such member " in the section—Should the determination of the meaning be confined to the wording of the Constitution or the Standing Orders of the House or any similar document.

Held : (1) That where a person is charged with offering a gratification to a member of the House of Representatives, an offence punishable under section 14 (*a*) of the Ceylon Bribery Act, No. 11 of 1954, and when the question to be determined is whether the particular offer was made to the member as an inducement for doing any act " in his capacity as such member ", the inquiry is not to be confined to ascertaining whether he was to do something specifically assigned as a member's function in the Constitution Order, or something which was actually a proceeding on the floor of or in the precincts of the House.

(2) That, although there are many things which a member may be invited to do because he is a member and enjoys as such a status and privilege, but in doing which he would not be acting in his capacity

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as a member, the circumstances of any particular case may show in the light of prevailing practices or conventions observed by members of the House, some act, for which an inducement has been offered as sufficiently closely bound up with and analogous to a proceeding in the House as to be properly described as done by a member in his capacity as such.

Per THE JUDICIAL COMMITTEE.—" Where the facts show clearly, as they do here, that a member of Parliament has come into or been brought into a matter of Government action that affects his constituency, that his intervention is attributable to his membership and that it is the recognised and prevailing practice that the Government Department concerned should consult the local M.P. and invite his views, Their Lordships think that the action that he takes in approaching the Minister or his Department is taken by him ' in his capacity as such member ' within the meaning of section 14 (*a*) of the Bribery Act ".

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Caveat

Registration of Documents Ordinance—Section 32—*When it applies.*

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Certiorari

Writs of Certiorari and Mandamus, application for—Affidavit filed by Crown-respondent—Application for permission by petitioner's counsel to cross-examine person who has sworn affidavit—Should such application be allowed.

Held : That according to English practice it is very seldom that a person who has sworn an affidavit in writ proceedings is allowed to be cross-examined on the affidavit. However, such cross-examination may be allowed in special circumstances.

MANSOOR *vs.* MINISTER OF DEFENCE AND EXTERNAL AFFAIRS AND ANOTHER 24

Children and Young Persons Ordinance

Children and Young Persons Ordinance (*Cap.* 23), *sections* 28 (1), 35—*Young person convicted of an Excise offence by Magistrate—Order placing person under supervision of a Probation Officer—Who can make such order—Circumstances under which such an order may be made.*

Held : (1) That it is only a Magistrate's Court sitting as a Juvenile Court that can make an order under section 35 (1) (*d*) of the Children and Young Persons Ordinance placing a child or a young person under the supervision of a Probation Officer.

(2) That such an order can be made only where the child or young person is brought before the Court by any officer of a local authority, or by any police officer or " authorised person ".

PUPALASINGHAM *vs.* SWAN 52

Civil Procedure Code

Section 9—*Jurisdiction to entertain maintenance application.*

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Civil Procedure Code—Amendment of answer—Application on trial date to amend answer by pleading plaintiff's default under Business Names Ordinance—Objection taken to such application—Should amendment be allowed at this stage.

On the date fixed for trial of this case the defendants moved to amend their answer by adding a new paragraph pleading that the contracts sued upon were not enforceable as the plaintiffs had not complied with the Business Names Ordinance. Counsel for the plaintiffs objected to the amendment and the learned trial Judge disallowed it holding that he would allow the amendment later if there was sufficient evidence to warrant it.

Held : (1) That the amendment of the answer should be allowed, on terms and the defendants ordered to file a fresh motion for amendment setting out the particular matter in respect of which a non-compliance with the requirements of the Business alleged.

(2) That the case of *Karuppen Chetty* v. *Harrison & Crosfield, Ltd.*, 24 N.L.R. 317, where it was held that a Judge has a discretion to frame an issue at any stage with respect to compliance with the Business Names Ordinance, had no application to a situation where a defendant seeks to take this plea whether in his answer or by an amendment and thereby to frame Names Ordiance was a relevant issue.

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Civil Procedure Code (*Contd.*)

Sections 21, 38, 46 (2) *and* 93—*Amendment of pleadings—Action for money lent—Denial in defendant's answer that money given as a loan—Plaintiff asserting in evidence that transaction was a loan—Subsequent application by plaintiff to amend plaint by claiming in the alternative that the money was given as part consideration for purchase of an estate—Amendment allowed—Appeal from such order—Meaning of " amendment "—Whether amendment of plaint possible before hearing.*

The plaintiff instituted this action claiming with interest a sum of money which he alleged he had lent to the defendant and the defendant had borrowed from him, particulars of this transaction being appended to the plaint. The defendant filed answer denying these averments in the plaint. On the first date of trial defendant's Counsel stated that the defendant did not deny the receipt of the money but denied that it was given as a loan ; that the defendant's position was that the money was part consideration in respect of an estate which the plaintiff had by a notarial agreement made prior to this action agreed to buy from the defendant. Thereupon both Counsel agreed to an issue in the following terms :—

" Did the defendant borrow from the plaintiff and the plaintiff lend and advance to the defendant the sums of money referred to in the account particulars in the schedule to the plaint ? "

When the trial commenced the defendant admitted the receipt of the money but claimed it was part of the consideration to be paid by the plaintiff for the sale of the estate. The plaintiff in his evidence both in examination-in-chief and under cross-examination, repeatedly maintained that the money was given by way of loan.

On the next date of trial plaintiff's Counsel moved to amend the plaint by deleting all references to the claim for interest and adding that in the alternative the plaintiff claimed the sum of money on the basis that if the money was paid as part consideration in respect of the purchase of the estate the sale had not taken place and that therefore the defendant was under an obligation to return it.

The application to amend was opposed but after hearing counsel the Court made order allowing the application. This appeal was from that order.

Held : (1) That the power given to Court under section 93 of the Civil Procedure Code is limited to the " amendment " of pleadings. An " amendment" is the correction of an error and therefore the power of the Court is limited to the correction of errors in pleadings not the alteration thereof.

(2) That the suggested amendment was not the correction of an error in the pleadings but the setting up of a new case which the plaintiff had himself repudiated in his evidence and that it should therefore not have been allowed.

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Civil Procedure Code section 93—*Amendment of Pleadings—Meaning of the words " at any time . . . before final judgment "—Can an amendment be applied for before hearing of a case—Alternative cause of action—Can it be pleaded by way of amendment—Discretion exercised by a judge—When it will be interfered with by Appeal Court*

The plaintiff instituted this action by summary procedure upon a cheque drawn in his favour. The defendant applied for and obtained leave to appear and defend unconditionally. The plaintiff thereafter moved to amend the plaint by pleading an alternative cause of action for goods sold and delivered claiming the identical amount stated in the original plaint. The District Judge exercised his discretion and made order allowing the amendment and the defendant appealed therefrom

Counsel for the appellant contended :—

(*a*) that the alternative cause of action was a new cause of action and, therefore, the amendment, as a matter of law, should not have been allowed ;

(*b*) that the amendment should not have been allowed because it was sought to be made before the hearing of the action.

For both these contentions he relied on the case of *Lebbe* v. *Sandanam*, reported in 64 N.L.R. 461; 63 C.L.W. 15

Held : (1) That there is no rule that a new or alternative cause of action can never be added. The cause of action sought to be added in this case, being one which is so germane to and so connected with the original cause of action, should be permitted. The real subject-matter being the indebtedness, no prejudice can arise from the amendment.

(2) That the words " at any time . . . before final judgment " in section 93 of the Civil Procedure Code, should not be restricted to mean any time after the hearing. The clear words of the section "postponement of day for filing answer or replication " are sufficient to indicate that amendments can be applied for even before the pleadings are closed.

(3) That the observations of the learned Chief Justice in the case of *Lebbe* v. *Sandanam*, 64 N.L.R. 461, relating to the meaning of the words " at any time . . . before final judgment " were made *obiter* as the amendment in that case was applied for at the trial.

Per SANSONI, J.—(*a*) " After referring to the rule that a Court cannot grant relief to a plaintiff on a case not put forward in his plaint the learned judge said : 'But when the alternative case, which the plaintiff could have made, was not only admitted by the defendant, in his written statement, but was expressly put forward as an answer to the claim which the plaintiff made in the suit, there would be nothing improper in giving the plaintiff a decree upon the case which the defendant himself makes . . . In such circumstances, where no injustice can possibly result to the defendant, it may not be proper to drive the plaintiff to a separate suit '."

(*b*) " Finally, on the question whether we ought to interfere with the order under appeal, there is the

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valuable dictum of Jenkins, L.J., in *G. L. Barker, Ltd.* v. *Medway Building & Supplies, Ltd.*, (1958) 1 W.L.R. 1216, 'There is no doubt whatever that the granting or refusal of an application (for leave to amend) is eminently a matter for the discretion of the judge with which this Court shall not in ordinary circumstances interfere, unless satisfied that the judge has applied a wrong principle or can be said to have reached a conclusion which would work a manifest injustice between the parties'."

Per L. B. de Silva, J.—" Unless the Legislature has passed laws limiting the exercise of this power either directly or by rules or orders having the force of law, the Courts have no power to lay down rigid and inflexible rules for the exercise of a judicial discretion. The normally accepted rules or principles for the exercise of such a discretion enunciated by the Courts of the highest authority, are, therefore, only meant for the practical guidance of other Courts. They do not have the force of law. In that sense, I hold that the statement of the learned Chief Justice laying down what may appear to be rules for the exercise of the discretionary powers of the Courts under section 93, are not rules of law binding on our Courts. We are, therefore, free in this case to consider if there are good reasons to set aside the exercise of the discretion by the learned trial judge who allowed the amendment ".

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Civil Procedure Code, sections 326, 327 *and* 327 *A—Resistance to Fiscal in executing writ of possession—Resistance held to be frivolous and vexatious—Order to issue writ under section* 327 *A—Application to revise said order—Later action filed under proviso to section* 327*A to establish right to possession by person against whom order made—Does revision lie—Power of Court to impose terms on judgment-creditor when ordering him put in possession.*

Held : That the provisions of section 327 A of the Civil Procedure Code do not in any way affect or limit the powers of the Supreme Court to revise an order under that section directing the judgment-creditor be put in possession of property described in the writ of possession.

Per Weerasooriya, J.—" The power given to the Court under that section to make an order that the judgment-creditor be put in possession includes, in my opinion a power to impose such terms as the Court may think fit in regard to the giving of security by the judgment-creditor for the due performance of the decree entered in the action filed in terms of that section by the party against whom the order is passed ".

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Section 816*—Amendment of pleadings—Court of Requests—Proposed amendment inconsistent with evidence—Amendment disallowed—No injustice.*

Dingiribandara *vs.* Kulatunga 83

Sections 188 *and* 408*—Consent decree—Matters outside the subject-matter of the action embodied in such decree—Validity of such decree.*

Where a decree entered in terms of a settlement arrived at by the parties to an action does not deal with matters which were the subject-matter of that action, but embodies matters extraneous to the action and dealing with the subject-matter of other actions between the parties—

Held : That such a decree is not one the Court had power to enter under section 188 of the Civil Procedure Code ; nor is it one that the Court had the power to pass under section 408 of the Code. Such a decree should not be allowed to remain on record.

Held further : That the petitioner's delay in making this application should not, in the circumstances of this case, be a ground for refusing to set aside this decree.

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Sections 756 (1) *and* (3)*—Whether notice of tender of security for costs of appeal given " forthwith ".*

See under—Compensation for Improvements.

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Civil Procedure Code, sections 356, 756 (1), 756 (3) *—Notice of tender of security for costs of appeal—Requirement of section* 756 (1) *that it must be given forthwith "—Meaning of " forthwith " in that section—Failure to comply with section* 756*—Power of the Supreme Court to grant relief under section* 756 (3).

The appellant's Proctor filed a petition of appeal in the District Court, on 16th February, 1957. He took the notice tendering security for costs of appeal to the respondent's Proctor, on 18th February. It was accepted by the respondent's Proctor subject to his right to object to the validity of the notice. The appellant then took the notice to the District Court which stamped it with its seal on 18th February. On 8th March the respondent objected that the notice was bad as it had not been filed " forthwith " upon receipt of the petition of appeal by the Court. The appeal was forwarded to the Supreme Court which upheld the preliminary objection of the respondent that the notice was not given " forthwith ", and treated the notice lodged with the District Court on 18th February as filed too late. The Supreme Court did not give their mind to the question of relief under section 756 (3) because they considered themselves precluded from granting relief by the decision of the Divisional Bench of the Supreme Court in *De Silva* v. *Seenathumma*, 41 N.L.R. 241; XVI C.L.W. 105.

Held : (1) That when the appellant filed notice on 18th February, he had not followed the procedure prescribed by section 756 (1), as the notice was given to the respondent's proctor and not to the respondent himself.

(2) That in the circumstances of this case the respondent was not materially prejudiced by the failure of the appellant to give notice of security to the Court

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for service by the Fiscal on the respondent, and therefore, relief should be granted to the appellant and his appeal entertained.

(3) That there was no limit to the power of the Supreme Court to grant relief under section 756 (3), except that the power should not be exercised to the material prejudice of the respondent. Section 756 (3) is expressed not only in relation to all the provisions of section 756, but also in relation to any mistake, omission or defect.

(4) That in exercising its discretion to grant relief under section 756 (3), the Court will take into account as a material circumstance whether or not there was an excuse for non-compliance with a requirement of the section, but that the section cannot be interpreted as denying relief where there is no excuse for non-compliance.

Per THE JUDICIAL COMMITTEE : " It does not follow that the relief should be given even if the respondent has not been materially prejudiced, but relief should not be lightly withheld, for the effect of refusing relief may be to deprive a litigant of access to the Supreme Court and, if the original judgment is wrong, amount to a denial of justice ".

Held further : (5) That the word " forthwith " in section 756 (1) could not be construed as meaning " on the same day ". The word " forthwith " clearly meant that the notice must be filed as soon as practicable, but what is practicable must depend on the circumstances of each case.

Disapproved :—

(*a*) the opinion of Soertsz, J., in *De Silva* v. *Seenathumma*, 41 N.L.R. 241, that the notice of security must be filed on the same day as the receipt of the petition of appeal ;

(*b*) the distinction drawn by Soertsz, J., in *De Silva* v. *Seenathumma*, between " a failure to comply with ", and " a mistake, omission, or defect in complying with ", the provisions of section 756 ;

(*c*) the view expressed by Fisher, C.J., in *de Silva* v. *Gunasekera*, 31 N.L.R. 184, that the application of section 756 (3) is limited to trivial omissions as distinguished from a substantial non-compliance with the section.

SAMEEM *vs.* ABEYWICKRAMA 97

Compensation for Improvements

Lease—Compensation for improvements—Lessee of one lot in " bona fide " possession of adjacent lots—Right of such person to compensation and to a " jus retentionis ".

Civil Procedure Code, section 756 (1) and (3)—Whether notice to the respondent of the tender of security for the costs of appeal given " forthwith ".

Under a partition decree, dated the 24th July, 1942, six contiguous allotments of land numbered A, B, C, D, E and F were allotted as follows :—

Lot A to the 1st, 2nd and 3rd plaintiffs in that action jointly ;
Lots B, C, D and F to the 1st and 2nd defendants in that action jointly ;
Lot E to all the above-mentioned parties jointly.

On the 15th October, 1946, the 1st, 2nd and 3rd plaintiffs mentioned above leased to the 1st defendant in the present action lot A referred to above. Under one of the covenants to the lease the 1st defendant could erect an addition to the existing building on the leased premises, which the lessors had the option of taking over on payment of compensation. At the time of the lease there was no physical demarcation between lots A, B, C and D, and the 1st defendant admitted that he was given possession of lots B and C in addition to lot A. He thereafter effected necessary repairs to the buildings on lots B and C, and also made certain structural alterations which, it was common ground, he could have made under the covenant referred to above if these lots had, in fact, been part of the leased premises. The plaintiff in the present action became the owner of lots B, C, D and F, and joint-owner of lot E, in 1949, on a deed of sale, and he filed this action in 1957 for a declaration of title to the said lots, ejectment of the 1st defendant therefrom, and damages. The District Judge found that the 1st defendant was in possession of lots B and C under the honest belief that they formed part of the leased premises, and that he was, therefore, a *bona fide* possessor who should be compensated for both the necessary as well as the useful improvements effected by him. The plaintiff appealed, and at the hearing two preliminary objections were taken by the defendant-respondent. Firstly, that the notice of tender of security required to be given to the respondent under section 756 (1) of the Civil Procedure Code was not given " forthwith " as required by that section ; and secondly, that the notices of the tender of security had not been served in time on the 2nd and 3rd respondents.

Held : (1) That, inasmuch as there was a finding by the District Judge that the motion filed in Court along with the notices of tender of security was filed on the 10th July, 1957, and the petition was also filed on the same day, the notices must be taken to have satisfied the requirements of section 756 (1).

(2) That, even though such notices had been served out of time, no prejudice was caused in the circumstances of the present case to the 2nd and 3rd respondents, and that this was a proper case for the grant of relief under section 756 (3).

(3) That the finding that the 1st respondent was a *bona fide* possessor of lots B and C should stand.

(4) That the question whether the plaintiff was entitled to compensation and to a *jus retentionis* must be decided on the basis of the Roman-Dutch Law maxim against unjust enrichment.

(5) That a person who had made improvements upon the land of another, not as possessor but under the mistaken idea that he was a lessee, was entitled to compensation on the same basis as a possessor, subject to an equitable deduction necessitated by the special circumstances of the case.

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(6) That such a person was also entitled to a *jus retentionis* until he had been compensated.

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Contempt of Court

Contempt of Court—Industrial Disputes Act, 1950-1957, *section* 40 *A—Statement to Court by Advocate on instructions from client—Statement containing words indicating that Court is prejudiced against his client and an impartial inquiry could not be had before it—Is the statement privileged—" Bona fides " of Advocate.*

The Supreme Court of Ceylon found the appellant guilty of contempt against or in disrespect of the authority of the Industrial Court under section 40 A (1) of the Industrial Disputes Act, 1950-1957 and ordered him to pay a fine of Rs. 500/-.

The alleged offence was that the appellant, while appearing before the Industrial Court as Advocate representing a Workers' Union, read out from a typewritten document in the following terms :—

" In the circumstances, the Union, having felt that this Court by its order had indicated that an impartial inquiry could not be had before it, has appealed to the Minister to intervene in the matter. The Union is, therefore, compelled to withdraw from these proceedings and will not consider itself bound by an order made *ex parte* which, the Union submits, would be contrary to the letter and spirit of the Industrial Disputes Act."

Having read out the above, the appellant withdrew from the case.

The order referred to in the statement was one made by the Court on an application for postponement and was in the following terms :—

" I am willing to allow another date provided the Union instructs the All-Ceylon Oil Companies Workers' Union to lift the boycott immediately. I put the case off for the 28th instant. If the boycott is lifted before then, the case shall proceed to inquiry, if not, *ex parte* trial shall stand."

The *ex parte* order referred to had been made earlier in default of the Union's appearance before the Court.

Under section 40 A of the said Industrial Disputes Act the Court had to be satisfied on two questions : (*a*) whether the alleged statement by the appellant at the hearing before the Industrial Court brought the Court into disrepute, and (*b*) whether the statement was made without sufficient reason.

Held : (1) That the words in the first sentence of the statement clearly suggested that the Court was prejudiced against the Union and could not be trusted to give impartial consideration to the inquiry, and, therefore, the words used had the effect of bringing the Court into disrepute.

(2) That it cannot be said that the appellant acted in good faith and in accordance with what he believed to be his professional duty as the boycott had not been lifted and there was no necessity for any representation of the Union. The appellant was not entitled to any special privilege on the ground that he was acting on instructions. Therefore, the statement was not made with sufficient reason.

Per THE JUDICIAL COMMITTEE.—" Counsel for the appellant argued that it could not be contempt for counsel to allege partiality of a Court as this would unduly restrict counsel's arguments on a hearing in *certiorari* proceedings. But different considerations apply when an attack is made in a Court of review on the impartiality of a lower Court ".

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Co-operative Societies Ordinance

Co-operative Societies Ordinance, section 53—*Industrial Disputes Act, sections* 31 *B*, 31 *C*, 33 (1)—*Workman employed by a registered co-operative society—Right to invoke the jurisdiction of a Labour Tribunal—Application of the maxim " Generalia specialibus non derogant ".*

The respondent, an employee of a registered co-operative society, who alleged that his employment had been " summarily terminated without notice or reasonable cause " applied to the Labour Tribunal in terms of section 31 B of the Industrial Disputes Act claiming reinstatement, arrears of salary and the return of a sum of money deposited by him as security.

At the inquiry, the appellant society raised two preliminary objections, viz. :—

(i) that the respondent was not a " workman " within the meaning of that term in the Industrial Disputes Act ;

(ii) that section 53 of the Co-operative Societies Ordinance had the effect of depriving a Labour Tribunal of any jurisdiction to entertain the application.

The order of the Labour Tribunal over-ruling both objections was canvassed before the Supreme Court.

It was argued for the appellant-society that section 53 of the Co-operative Societies Ordinance operated as a bar to a Labour Tribunal exercising jurisdiction in terms of the Industrial Disputes Act. Relying on the case of *Sanmugam* v. *Badulla Co-operative Stores Union, Ltd.*, (1952) 54 N.L.R. 16, it was submitted that in the class of disputes contemplated in section 53, the jurisdiction of the Arbitrator and/or Registrar, as the case may be, was exclusive, and could not be taken away except by express words.

The Solicitor-General who appeared as *amicus curiae* submitted on the basis of the maxim : "*Generalia specialibus non derogant* " that since the Co-operative Societies Ordinance is a special statute and the Industrial Disputes Act, though subsequent, is a general statute, the respondent has to confine himself to the machinery of settlement of disputes as established under the earlier special statute.

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Counsel for the respondent argued that there was no conflict of jurisdiction as—

(i) the powers of the Arbitrator and/or Registrar under section 53 of the Co-operative Societies Ordinance are not co-extensive with those of the Labour Tribunal ;

(ii) the Arbitrator and/or Registrar, unlike the Labour Tribunal, has to decide the dispute referred to him according to the legal rights of the parties and, therefore, has no power to make an award which a Court of law itself cannot make.

Held : (*a*) That section 53 of the Co-operative Societies Ordinance does not exclude employees of societies registered under that Ordinance from applying for the ampler reliefs obtainable through the machinery of the Industrial Disputes Act.

(*b*) The maxim *Generalia specialibus non derogant* does not apply as the two statutes do not cover the same territory.

(*c*) The case of *Sanmugam* v. *Badulla Co-operative Stores Union, Ltd.*, (1952) 54 N.L.R. 16, was not concerned with the Industrial Disputes Act, which was passed after the institution of the action in that case.

CEYLON COCONUT PRODUCERS' CO-OPERATIVE UNION, LTD. *vs.* JAYAKODY 47

Co-owners

Co-owners—Building standing on land owned in common—Can a co-owner maintain an action for declaration of title to such building.

Held : That as a building standing on common property accedes to the soil and becomes part of the common property, a co-owner cannot claim a declaration that he is the owner of a house standing on the common property to the exclusion of all others.

PAULIS SINGHO AND ANOTHER *vs.* WILLIAM SINGHO .. 14

All co-owners should be joined in an action for a right of way of necessity.

See under—SERVITUDE.

Court of Criminal Appeal Decisions

THE QUEEN *vs.* RAMASAMY 26

See under—EVIDENCE ORDINANCE

Courts Ordinance

Courts Ordinance, section 79—Application for transfer of case from Court of Requests to District Court—Claim in reconvention by defendant in tenancy action on account of excess payments of rent—Such claim beyond jurisdiction of Court of Requests—Should transfer be allowed.

Held : That in a tenancy action, where the defendant clearly had a claim in reconvention against the plaintiff on account of excess payments of rent and such claim was beyond the jurisdiction of the Court of Requests, it would be necessary to have the case transferred to the District Court so that both the plaintiff's claim and the defendant's claim in reconvention could be determined by a Court having jurisdiction over the whole matter in controversy.

DE FRANSZ *vs.* FERNANDO .. 55

Courts Ordinance section 20—Interim Injunction—Petitioner precluded from bringing action against Town Council without a month's notice given previously—Irreparable mischief to petitioner apprehended if action was not filed immediately—Town Councils Ordinance (Cap. 250) section 218.

In June, 1960, the then Chairman of a Town Council rented out to the petitioner a boutique within the market area. Shortly after, one *K.* started occupying a part of these premises without lawful authority and was sued for ejectment by the Town Council. Pending this action a new Chairman was elected and the petitioner apprehending, in view of certain information received that the new Chairman would recognise *K.* as the rightful tenant, applied to the Supreme Court for an interim injunction to restrain the Chairman from granting *K.* the right to remain in possession of the premises on the ground :—

(*a*) that though he desired to file an action against the Chairman and *K.*, section 218 (1) of the Town Councils Ordinance precluded him from doing so without giving one month's notice in writing ;

(*b*) that irreparable mischief will ensue to him if he delayed the filing of the action till the expiry of the month.

Held : That in the circumstances the petitioner is entitled to the interim injunction asked for under section 20 of the Courts Ordinance.

MOHIDEEN *vs.* TOWN COUNCIL OF KALMUNAI .. 57

Court of Requests

Amendment of pleadings—When allowed.

DINGIRIBANDARA *v.* KULATUNGE 82

Transfer of case therefrom—When permitted.

DE FRANSZ *v.* FERNANDO 55

Criminal Procedure

Criminal Procedure—Summary trial—Right of accused to address Court after the close of the case for the defence—Criminal Procedure Code, sections 6 189, 235, 296.

At the conclusion of the case for the defence counsel for the accused wished to address Court. The Magistrate indicated to him that he could have only five minutes for this purpose. Counsel then stated that he could not point out the contradictions in the case within five minutes whereupon the Magis-

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trate informed counsel that the latter could not address Court at that stage as a matter of right and proceeded to give his verdict convicting the accused.

Held : (1) That the accused in a summary trial has a right to address Court after the case for the defence has been closed.

(2) That in the present case as a result of his counsel's address being limited by the Magistrate to five minutes, the accused had suffered prejudice and his conviction should not be allowed to stand.

MURUGIAH *vs.* OUTSCHOORN .. 68

Criminal Procedure Code

Section 122 (3)—*Admissibility of Evidence.*

QUEEN *vs.* RAMASAMY 26

Section 411—*Failure to comply with—Surety—Forfeiture of Bond—Validity of order of forfeiture.*

In forfeiting a bond given by a surety for the production of an accused person in Court whenever requested to do so, a Magistrate made order in the following terms :—

" Surety is asked to show cause why her bond should not be forfeited. She has no cause to show, I forfeit the surety's bond. In default six weeks' simple imprisonment. Time till 20th March, 1963. Remand 1st accused . . ."

Held : That the order of forfeiture should be set aside as the learned Magistrate had failed to comply with the provisions of section 411 (1) and (4) of the Criminal Procedure Code. He should have recorded the grounds of proof that the bond had been forfeited and it is only if the penalty cannot be recovered by attachment and sale that he could have imposed the sentence of imprisonment.

DE SILVA *vs.* S.I. POLICE, KANDY 109

Section 352

THALIS *vs.* DE SILVA 111

Section 168 (2)—*Penal Code, section* 391—*Criminal breach of trust—Joinder of charges—Period in excess of one year—Illegality or irregularity.*

The accused was convicted under section 391 of the Penal Code with having committed criminal breach of trust of certain quantities of oil " between the 7th day of January, 1959, and 8th day of January, 1960 ".

He appealed to the Supreme Court against his conviction on the ground that the indictment was defective. It was argued that the charge had been framed in violation of section 168 (2) of the Criminal Procedure Code which, while permitting the joinder of more than one act of misappropriation without specifying particular items or exact dates, required that the time included between the first and last of such dates shall not exceed one year.

Held : That the expression "between the 7th day of January, 1959, and 8th day of January, 1960 ", take in a period in excess of one year. The trial has, therefore, proceeded on a charge framed in violation of the provisions of the Code in respect of the framing of charges. Such a charge is illegal and not merely irregular.

The following dictum of Lord Halsbury, L.C., in *Subrahmania Ayyar* v. *The King Emperor*, (I.L.R. 25, Madras 97), was quoted with approval :—

" It is not possible to regard the disobedience to an express opinion as to a mode of trial as a mere irregularity. Such a phrase as irregularity is not appropriate to the illegality of trying an accused person for many different offences at the same time and those offences being spread over a longer period than by law could have been joined together in one indictment."

DE ZYLVA *vs.* THE QUEEN 36

Sections 6, 189, 235, 296.

See under—CRIMINAL PROCEDURE.

Donation

See under—KANDYAN LAW 107

Evidence Ordinance

Evidence Ordinance, sections 25, 26, 27, 59 *and* 91—*Criminal Procedure Code, section* 122 (3)—*Attempt to murder by shooting—Conviction—Evidence of statement made by appellant to Police in consequence of which gun was discovered—Such statement recorded during inquiry under Chapter XII of Criminal Procedure Code—Admissibility—Whether admission led to miscarriage of justice.*

This was an appeal by the accused from a conviction for attempted murder by shooting with a gun

The prosecution, in addition to certain contradictory evidence of eye-witnesses, led the evidence of a Police Sergeant who stated—

(1) that the accused volunteered to make a statement ;

(2) that in the course of the statement the accused said that he was prepared to point out the place where the gun and the cartridges were buried ;

(3) that he and the accused went to the spot which was pointed out by the accused, and there on the the accused unearthing some rubbish he discovered the gun broken into three parts and wrapped in a gunny bag, and a cloth bag containing 12-bore cartridges ;

(4) that he did not assemble the gun but on examination found that it smelt of " fouling " and showed signs of recent firing.

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The Sergeant repudiated the suggestions of cross-examining counsel that the accused did not volunteer any of the statements or do any of the acts referred to above.

It was contended on behalf of the appellant that even if the statement "I am prepared to point out the place where the gun and the cartridges are buried" had been made by him, its reception in evidence was illegal for the following reasons :—

(*a*) That statement being a statement made to a police officer in the course of an inquiry under Chapter XII of the Criminal Procedure Code, cannot be used otherwise than to contradict him or to refresh the memory of the person recording it.

(*b*) That where a fact is deposed to in a statement made in the course of an inquiry under Chapter XII aforesaid, section 27 of the Evidence Ordinance affords no authority for proving that statement.

(*c*) That statements containing information in consequence of which a fact is deposed to as discovered may not be proved in the following cases :—

(i) where the statement is made in the course of an inquiry under Chapter XII aforesaid ; and

(ii) where the statement, not being one falling under (*a*) above, is a confession to a police officer.

(*d*) That in the instant case no fact was either discovered or deposed to as discovered in consequence of the information received from the appellant and that the statement did not come within the ambit of section 27 of the Evidence Ordinance.

Held : (1) That the statement "I am prepared to point out the place where the gun and the cartridges are buried", came within the prohibition in section 122 (3) of the Criminal Procedure Code and should not have been admitted in evidence.

(2) That the rules of interpretation preclude the reading of section 27 of the Evidence Ordinance with the exceptions created by the words used in section 122 (3) of the Criminal Procedure Code.

(3) That the result of the decision in *Regina* v. *Buddharakkita Thera and others*, (63 N.L.R. 433), is that section 122 (3) of the Criminal Procedure Code extends to both oral and written statements made in the course of an inquiry under Chapter XII and, therefore, the oral statement made to a police officer could not be proved under section 27 of the Evidence Ordinance.

(4) That in view of sections 59 and 91 of the Evidence Ordinance, statements made in the course of an inquiry under Chapter XII can only be proved by documentary evidence and not by oral evidence.

(5) That the case of *Rex* v. *Jinadasa*, (51 N.L.R. 529) should no longer be regarded as binding.

(6) That, if any passage in the judgment in *The Queen* v. *O. A. Jinadasa* (59 C.L.W. 97) is in conflict with the instant case, that case should, to that extent, be regarded as over-ruled.

(7) That as the material before the Court disclosed that a substantial miscarriage of justice had occurred, the conviction should be quashed and the appellant acquitted.

Per CURIAM.—"As the question whether in our Evidence Ordinance, too, section 27 should be read as an exception to section 26 alone or to sections 25 and 26 does not arise for decision in this case, we refrain from expressing our opinion on that question, although the matter was argued at length on both sides".

QUEEN *vs.* RAMASAMY 26

Forest Ordinance

Forest Ordinance, section 23—Charge under Regulation 5 made thereunder, relating to transit of forest produce—Whether prosecution can be conducted by forest officer—Whether Regulation 5 "ultra vires" the Forest Ordinance—Ingredients to be established by prosecution in charge under Regulation 5—Meaning of Regulation 5 (1).

Held: (i) That the complainant, being a forest officer, within the meaning of the Forest Ordinance and a public officer within the meaning of the Criminal Procedure Code, was in every way entitled to enter prosecution and to conduct it in the Magistrate's Court.

(ii) That regulation 5 relating to the transit of forest produce made by the Minister under section 24 of the Forest Ordinance is not *ultra vires* the Forest Ordinance.

(iii) That when regulation 5 (1) prohibited removal within or beyond the specified local area, it in effect only prohibited the moving out of the timber from the specified local area to another beyond it.

(iv) That in order to succeed in a prosecution for a contravention of regulation 5 (1) the prosecutor must establish that the timber in question came from the specified local area itself.

Per T. S. FERNANDO, J.—"The learned Magistrate was in error, if I may say so with respect, when he stated that 'an officer of the Forest Department cannot appear in Court except through the Government Agent or the Assistant Government Agent as contemplated in sections 37, 38 and 39 of the Forest Ordinance'."

LOVELL *vs.* SINNATHURAI 65

Fideicommissum

Fideicommissum—Deed of Gift by father in favour of five sons—Interpretation of the words "after their death the said premises shall devolve on their legal children in equal shares".

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A deed of gift executed by a father in favour of five of his sons contained the following clause, which translated into English reads as follows :—

"However, the said donees except possess the said premises, shall not sell, mortgage, gift, exchange or in any way alienate the said premises and after their death the said premises shall devolve on their legal children in equal shares, who shall possess the same or do anything they like with the same."

It was not disputed that the clause had the effect of creating a *fideicommissum*.

Held : That the donor's intention as expressed in the clause was to permit his named sons to possess, and *after they had all died*, that the children of the named sons should take the property absolutely in equal shares.

CAROLIS SINGHO *vs.* HENDRICK SINGHO & OTHERS . . 58

Fraudulent Alienation

See under—PAULIAN ACTION.

Income Tax Ordinance

Income Tax Ordinance (Cap. 188), sections 9 and 10—Expenses incurred by the owner of an income-producing source in fighting out between himself and others their respective claims to the ownership of that source—Whether such expenses were incurred "in the production of income".

On the 16th August, 1949, the respondent obtained from *W.* a deed of transfer under which *W.* sold and assigned to the respondent the assets and goodwill of a business called the Kandy Ice Co. Although the business remained unincorporated, after the respondent's purchase some proposal was made as between the respondent and certain other persons that it should be formed into a limited liability company, but this fell through. Thereafter litigation followed in which the respondent was sued by some of his associates, their claim being that he had acted in the purchase as agent for a syndicate and that, as members of the syndicate, they were entitled to participate in the profits of the business. The litigation ended with agreed terms of settlement, under which the respondent was acknowledged to be the sole owner of the business, he in his turn agreeing to pay the claimants a sum of money. The respondent now asserted that, in the computation of the profits for the three years ending 31st March, 1953, 31st March, 1954, and 31st March, 1955, he could claim to bring in as admissible expenditure the legal expenses he had incurred for each of these years in the aforementioned litigation. His claim was disallowed by the Income Tax Assessor and, on appeal, by the Authorized Adjudicator, but was upheld by the Board of Review on the ground that the sums in question constituted expenditure incurred "in the production of income" within the meaning o fsections 9 and 10 of the Income Tax Ordinance. The Supreme Court on appeal affirmed the decision of the Board of Review. On appeal to the Privy Council—

Held : That the expenditure in question did not fall within the category of expenditure incurred in the production of income, or for the purpose of producing income ; it was simply the costs incurred by the owner of an income-producing source in fighting out between himself and others their respective claims to the ownership of that source.

COMMISSIONER OF INLAND REVENUE *vs.* DAVITH APPUHAMY 7

Industrial Disputes Act

Industrial Disputes Act, No. 43 of 1950, as amended by Acts 25 of 1956, 62 of 1957 and 4 of 1962—Labour Tribunal—Its objects—Is it an unconstitutional body—Difference between judicial and arbitral functions.

Two separate applications between same parties before Tribunal—Tribunal taking into consideration facts of second application in deciding with first and making order on second, too—Misdirection.

R. was employed as an omnibus driver under the Transport Board. He was dismissed after inquiry on charges of insubordination. Thereupon the respondent-union of which he was a member applied to the Labour Tribunal on his behalf to have him "reinstated with all privileges and back wages".

During the pendency of this application *R.* was re-employed by the same employer as a lorry driver. He was again dismissed from that employment on 12th July, 1961, and another application, dated 10th October, 1961, was made to the Labour Tribunal in respect of that dismissal.

In the course of the inquiry into the first application it was admitted that the inquiry in respect of the first dismissal was not a proper one and consequently that the Labour Tribunal should hold an inquiry into the facts afresh.

The Labour Tribunal, after inquiry, held that both dismissals were wrong, although the second application was not before the Tribunal at that inquiry.

On an appeal from this finding, it was contended on behalf of the Ceylon Transport Board that—

(1) The Labour Tribunal is an unconstitutional body for the reason that being a body vested with judicial power, it has not been appointed by the Judicial Service Commission, which alone has the power to appoint such a body.

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(2) The Labour Tribunal had misdirected itself in law in taking into consideration the 2nd dismissal and making an order in respect of that too, at the inquiry into the first.

It was not disputed that the Labour Tribunal had not been appointed by the Judicial Service Commission and that the appointment of persons vested with Judicial power can be made by the Judicial Service Commission alone.

His Lordship after considering the various provisions of the Industrial Disputes Act, No. 43 of 1950, and its amendments—

Held : (1) That the chief objects of the Act are to estabish an expeditious system for preventing and settling industrial disputes by conciliation and arbitration.

(2) That section 15 A of the Act indicates that the intention of the Legislature in creating a new body called the Labour Tribunal was to constitute it an arbitral body and not one vested with judicial power.

(3) That the Labour Tribunal misdirected itself in taking into consideration the matter of the second dismissal in arriving at its decision in the first application.

Per SRI SKANDA RAJAH, J.—" It will be seen that enforcement of the decision or award of the Labour Tribunal is by recourse to the ordinary Courts and all contempts of its authority, except under section 43 (4) are punishable by the Supreme Court.

I would point out that section 43 (4) above is *ultra vires*, as being an attempt to vest the Labour Tribunal with judicial power. The rest of the provisions of the Act regarding the Labour Tribunal are valid because they do not vest the Labour Tribunal with judicial power but only with arbitral power ".

THE CEYLON TRANSPORT BOARD *vs.* THE SAMASTHA LANKA MOTOR SEVAKA SAMITHIYA 42

Are the powers of a Labour Tribunal co-extensive with the powers of an arbitrator and/or registrar under the Co-operative Societies Ordinance.

See under—CO-OPERATIVE SOCIETIES ORDINANCE .. 47

Industrial Disputes Act, section 40 A—Contempt of Court.

See under—CONTEMPT OF COURT 92

Injunction

Interim Injunction.

See under—COURTS ORDINANCE 57

Judicial Functions

Difference between judicial and arbitral functions.

See under—INDUSTRIAL DISPUTES ACT.

Jus Retentionis

See WIJETUNGE *vs.* WILLIE *et al.* 38

Juvenile Court

It is only a Magistrate's Court sitting as a Juvenile Court that can make an order under section 35 (1) (d) of the Children and Young Persons Ordinance placing a child or a young person under the supervision of a probation officer.

PUPALASINGHAM *vs.* SWAN 25

Kandyan Law

Kandyan Law—Deed of gift—Described as " a gift or donation ' inter vivos ' absolute and irrevocable" Revocability of such deed of gift—Kandyan Law Declaration and Amendment Ordinance (Cap. 59), sections 4 (1) and 5 (1).

Where a Kandyan deed of gift executed in 1948 contained a declaration that it was " a gift or donation *inter vivos* absolute and irrevocable"—

Held : That the use of the word " irrevocable " is sufficient to indicate that the donor has expressly renounced his right of revocation. Therefore, section 5 (1) of Kandyan Law Declaration and Amendment Ordinance would make it unlawful for the donor to revoke such a gift.

PUNCHI BANDA *vs.* NAGASENA 107

Labour Tribunal

See under—INDUSTRIAL DISPUTES ACT.

Landlord and Tenant

Notice to quit premises on last day of month—Is this a calendar-month's notice—Validity of such notice.

According to the tenancy agreement in the present case, the tenancy had commenced on the 1st May, 1953. The landlord (plaintiff) had given his tenant (defendant) notice on 13th October, 1959, to quit the premises on the 30th November, 1959. He thereafter filed action to eject the tenant.

Held : That there had been no valid notice to quit, inasmuch as the landlord would have been entitled to take delivery of possession of the premises not on

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the 30th November but only on the 1st December. The plaintiff's action should, therefore, be dismissed.

ABEYWICKRAME *vs.* KARUNARATNE 23

See also under—RENT RESTRICTION

Lease

See under—COMPENSATION FOR IMPROVEMENTS

Legal Maxims

" GENERALIA SPECIALIBUS NON DEROGANT ."

See under—CO-OPERATIVE SOCIETIES 47

" IGNORANTIA JURIS HAUD NEMINEM EXCUSAT."

See under—WORKMEN'S COMPENSATION .. 95

Licensing of Traders Act

Licensing of Traders Act, No. 62 *of* 1961, *sections* 2, 3, 4, 6, 7 (1)—*Licensing of Traders* (*No.* 1), *Regulations,* 1961 *Regulation* 12 *empowering Licensing Authority to delegate its powers—Whether such regulation " ultra vires "—Scope of section* 3 (*b*)—*Invalidity of such delegation.*

Held : (1) That Regulation 12 of the regulations made under the Licensing of Traders Act, was *ultra vires*. Although section 3 (*b*) of the said Act empowered the regulation making functionary to declare by regulation the licensing authority or authorities, it did not empower him to make a regulation authorising such authority or authorities to delegate this power.

(2) That inasmuch as the said Regulation was *ultra vires*, the powers vested in the licensing authority could not have been delegated to the Government agent, Moneragala, as was purported to be done in the present case. The Government Agent of Moneragala had, therefore, no authority in law to punish the appellant or exercise any of the powers of a licensing authority.

HUSSAIN *vs.* TRIBUNAL OF APPEAL 104

Maintenance

Maintenance Ordinance, section 2—Jurisdiction to entertain application for maintenance—Can a Magistrate's Court within whose limits the defendant resides entertain such application—Civil Procedure Code, section 9.

Held : (SINNETAMBY, J., *dissentiente*).—That section 2 of the Maintenance Ordinance contemplates the case of an application being made to the Court where the applicant, having the right to claim maintenance, resides and not to the Court where the defendant resides.

Mandamus

Paddy Lands Act—Mandamus—Application to Commissioner for certified copy of proceedings—Refusal—Right of appeal from Commissioner's order—Right to obtain certified copy of proceedings for purposes of appeal.

Held : That the right of such appeal carries with it rights incidental thereto and the Commissioner must furnish the certified copy of proceedings upon request, although no specific provision has been made to that effect in the Paddy Lands Act, No. 1 of 1958.

DE SOYZA *vs.* COMMISSIONER OF AGRARIAN SERVICES .. 88

See also under—CERTIORARI

Muslim Marriage and Divorce Act

Conditions on which leave to appeal is granted from an order of the Board of Quazis.

MOHAMED ASBER *vs.* PATHUMUTHU 56

Municipal Councils Ordinance

Municipal Councils Ordinance, No. 29 *of* 1947, *section* 313—*Prosecution under section* 148 (3)—*Conviction of accused—Appeal from conviction—Neither counsel nor appellant present at hearing o appeal—Should costs be awarded against accused—Criminal Procedure Cocde, section* 352.

Held : That where an accused charged with a statutory offence under the Municipal Councils Ordinance, is found guilty and files an appeal, but does not take the trouble to be represented or even to be present at the hearing of the appeal, he should be mulcted in costs as the Municipal Council is put to the unnecessary expense in retaining Counsel to represent it.

THALIS *vs.* DE SILVA 111

Notice

Notice to quit given by landlord—Validity thereof.

ABEYWICKREME *v.* KARUNARATNE 23

Paddy Lands Act

Paddy Lands Act, No. 1 *of* 1958—*Sections* 21 (2) *and* (3)—*Summons issued not in accordance with section* 21 (2)—*Order of eviction under section* 21 (3)—*Validity of such order.*

Where a summons issued under sec. 21 (2) (*a*) of the Paddy Lands Act, No. 1 of 1958, stated that the person summoned had failed to deliver possession of a paddy field called *K.* to a person named therein, and that he has thereby " committed an offence punishable under section 21 of the P.L.A." and required

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him to appear with his witnesses on 1st February, 1963, at 9 o'clock, in the forenoon, at the Magistrate's Court, Hambantota, to answer to the said complaint and to be further dealt with according to law :—

Held : (i) That the summons was bad in law as it was not issued in accordance with section 21 (2) (*a*) of the Paddy Lands Act, No. 1 of 1958.

(ii) That consequently an order of eviction made under section 21 (3) of the Act should be set aside.

CAROLIS *vs.* ASST. COMMISSIONER, AGRARIAN SERVICES 110

See also under—MANDAMUS 88

Paulian Action

Fraudulent alienation—Paulian action and action under section 247 of the Civil Procedure Code combined—Nature and scope of these actions—Meanings of the terms " creditor " and " debt " explained.

Alienation in fraud of creditors—Voidable by creditor prejudiced thereby—Not void—Need for debt to be in existence at time of alienation—Claim for unliquidated damages not a debt in such context—Caveat-Registration of Documents Ordinance, section 32—When it applies—Civil Procedure Code, section 653.

On 11th January, 1955, plaintiff instituted action against the 1st defendant for cancellation of two lease bonds, for ejectment and damages and obtained decree on 16th February, 1956. In execution of this decree for damages aggregating to a sum of Rs. 16,000/-, certain premises were seized on 22nd May, 1956. The 2nd defendant preferred a claim to the said premises based on a deed of transfer, No. 369, dated 1st October ,1955, executed by the 1st defendant in his favour and the claim was upheld. The 1st defendant himself had purchased the premises on 1st February, 1955.

Thereupon the plaintiff filed this action praying for a declaration : (*a*) that the said deed, No. 369, was null and void ; (*b*) that the premises in question were liable to be seized and sold in execution of the said decree.

The main issues tried wera : (1) Was the said deed, No. 369, executed by the 1st defendant with the object of defrauding the plaintiff ? (2) By the execution of the said deed, has the 1st defendant left himself without sufficient property to satisfy the plaintiffs' decree ? (3) Did the defendants act collusively in the execution of the said deed ?

The learned District Judge held against the defendant on all these issues and judgment was entered in terms of the prayer aforesaid. The defendant appealed.

It was in evidence : (*a*) that the 2nd defendant had been carrying on a business at the premises in question as a tenant since 1935 ; (*b*) that he became the tenant of the 1st defendant in February, 1955, when the latter purchased the premises for Rs. 17,500/- ; (*c*) that the 2nd defendant purchased the premises from the 1st defendant for Rs. 17,500/- subject to two mortgage bonds for Rs. 5,000/- and Rs. 3,000/-, respectively, plus interest which he paid off ; (*d*) that at the time the 2nd defendant purchased the premises there was in force a caveat which had been presented by the plaintiff on 20th April, 1955 ; (*e*) that the 2nd defendant was informed by his notary that a caveat had been registered, but that he not only paid no heed to it, but authorised the notary to execute the deed without examining the relevant land registers ; (*f*) that judgment had not been entered against the 1st defendant at the time of his alienation to the 2nd defendant. There was no evidence that the 1st defendant was in debt except the said two mortgages which had been discharged.

Their Lordships after discussing the nature and scope of Paulian actions and those under section 247 of the Civil Procedure Code—

Held : (1) That the learned District Judge was wrong in declaring that the deed was *null and void*, because a sale by a debtor, even where it is in fraud of creditors is *not void*, but is liable to be set aside or annulled at the instance of a creditor who has been prejudiced by it, and then only to the extent to which he has been prejudiced.

(2) That the plaintiff was not a creditor at the time of the alienation of his property by the 1st defendant inasmuch as the plaintiff had not obtained judgment at the time of the transfer and there was no judgment-debt in existence. Nor was there a contract-debt as no rent or money payable on the lease bond was claimed. The claim made on the contract of lease was for unliquidated damages and such a claim does not fall within the ambit of the expression " debt ".

(3) That the plaintiff was not entitled to ask for the Paulian remedy or for relief under section 247 of the Civil Procedure Code for the reason that both when the said lease was executed and the action was instituted the 1st defendant not being the owner of the land, it was not open to the plaintiff to say that to his detriment, the defendant got rid of property which at the time of institution he reasonably expected would be available to satisfy the judgment in case he succeeded in the action.

(4) That the remedy in our law against the alienation of his property by the defendant to an action,

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in order to prevent the plaintiff from executing his writ in the event of his succeeding in the action, is found in section 653 of the Civil Procedure Code.

(5) That as the alienation is not void or voidable by the caveator, and as there has been no fraudulent alienation, and as the alienation is not in derogation of the lawful rights of the caveator, no action can be taken under section 32 (5) of the Registration of Documents Ordinance.

MUKTHAR *vs.* ISMAIL 60

Penal Code

Section 391—Criminal Breach of trust—Joinder of charges—Period in excess of one year—Illegality.

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Section 434—Criminal Trespass—Employee (accused) permitted to occupy room in dispensary premises free of rent—Continuing to remain after services terminated—Employer in occupation of entire premises except room occupied by accused—Accused not confined to room but enters other parts of the premises—Can conviction on a charge of criminal trespass be maintained.

The accused was charged with criminal trespass under section 434 of the Penal Code for continuing to occupy a room forming part of a dispensary which he was permitted to occupy by his employer (a doctor) free of rent. After the services of the accused were terminated due to misconduct, the doctor requested him to quit the room, but he refused. The learned Magistrate held that the accused remained in the room with intent to cause annoyance to the doctor and convicted the accused.

In appeal it was contended on behalf of the accused that the conviction could not be sustained as on the authority of *R.* v. *Selvanayagam*, 51 N.L.R. 470, the accused as *de facto* occupier could not have remained in occupation to the annoyance of himself.

Held : That as the charge had not been restricted to the room itself, but is that he remained in premises in the occupation of his employer, which fact is clearly supported by the evidence led, and as the accused could not be said to have any *bona fide* right to enter that part of the premises used for the purposes of the dispensary, the conviction should be upheld.

SILVA *vs.* SALGADO 86

Pleadings

See under—CIVIL PROCEDURE CODE.

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Probation Officer

See under—JUVENILE COURT.

Probation Ordinance

It is not legal to make an order under the Ordinance without proceeding to conviction.

SEBAMALAI *vs.* MARIAMPILLAI 55

Registration of Documents Ordinance

See under—PAULIAN ACTION

Rent Restriction

Rent Restriction Act (Cap. 274), section 13 (1), proviso (c)—Action for ejectment on the ground that the premises are reasonably required for landlord's residence—Financial position of the parties—How far relevant.

Burden of proof—What has plaintiff to prove—Genuine and present need—When will Appeal Court interfere with the trial judge's conclusions regarding balance of hardship.

Plaintiff, as landlord, sought to eject the defendant, her tenant, from rented premises on the ground that they were reasonably required by her for her occupation as a residence.

The defendant alleged that plaintiff's claim was not a *bona fide* one as the action was the result of his refusal to pay a second premium of Rs. 3,600/- for a period of three years from 1958 as was done when the tenancy agreement was first entered into in 1955.

It was n evidence—

(*a*) that the plaintiff was the owner of other houses in Colombo which brought her a monthly rental of Rs. 2,000/- ;

(*b*) that her husband was in receipt of a salary of Rs. 4,000/- per mensem ;

(*c*) that she had four children, three of whom were in England for whom a sum of Rs. 1,850/- had to be remitted monthly to

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England. The fourth child was attending a school in Colombo ;

(*d*) that she borrowed Rs. 60,000/- from an Insurance Company for effecting improvements to her house and that her other liabilities totalled about Rs. 10,000/-.

The defendant was a Government servant drawing Rs. 702.35 a month. He was married and had no children of his own, but he was bringing up two children of a close relative. They were about seven years' old and were attending school in Colombo. He had no property of his own and stated that he could not afford to pay much more than he was doing as house rent.

When plaintiff filed this action she was living in a house temporarily lent to her and her husband, and pending the action they went into a flat at Jawatta paying Rs. 350/- a month. It was not suggested that they had to leave the flat. The defendant, on the other hand, stated that he had tried to find suitable alternative accommodation but without success.

The learned Commissioner after holding that the plaintiff accepted a premium of Rs. 3,600/- in 1955 but that her request for a second premium in 1958 was not proved, gave judgment for the plaintiff stating that " unless the defendant satisfies Court that this requirement of plaintiff is *mala fide* and this action has been filed by plaintiff because of his refusal to accommodate her by giving her a further premium, I have no alternative but to hold that plaintiff requires the premises for her use and occupation as a residence ".

The defendant appealed.

Held : (1) That the passage in the judgment above referred to amounted to a grave misdirection which virtually vitiated the ultimate conclusion.

(2) That the defendant's failure to establish the charge that the plaintiff requested the second premium would have only affected the plaintiff's *bona fides*, on her reasonableness in reqiuring possession.

(3) That the burden of proving that premises were reasonably required for the plaintiff's occupation as a residence was on the plaintiff, who must show " a genuine present need " for the house and not be " moved by considerations of preference and convenience merely ".

(4) That the financial position of the plaintiff was so much better when compared with that of the defendant, that any hardship caused to the plaintiff by the higher rent she had to pay for the flat was more than set off by the hardship which would be caused to the defendant if he had to leave those premises without a suitable alternative as a residence or had to pay key money for another house.

(5) That although it is the law that the question of weighing the balance of hardship is a matter for the trial judge, the Appeal Court will interfere, if on all the evidence there is only one reasonable conclusion to be come to, or alternatively, if the judge has misdirected himself on the facts or on the evidence.

MUTHUWEERA *vs.* CHANDRASOMA 89

Rent Restriction (Amendment) Act, No. 10 of 1961, section 13—Action for ejectment filed on ground that premises reasonably required by landlord for his own use and occupation—Action filed on 24th October, 1960—Such action to be null and void if pending on March 6th, 1961, by virtue of section 13 (3)—Can consent of parties give Court jurisdiction to enter decree for ejectment.

Held : (1) That the effect of sub-section 3 of section 13 of the Rent Restriction (Amendment) Act, No. 10 of 1961, was that where an action of the kind referred to in that sub-section was pending on March 6th, 1961, the Court would have no jurisdiction thereafter to enter a decree for ejectment.

(2) That this want of jurisdiction could not be supplied even by consent of parties, so that a minute of consent filed by the parties consenting to judgment as prayed for being entered, did not confer on the Court jurisdiction to order ejectment. The only order which could lawfully have been made after March 6th, 1961, was an order dismissing the plaintiff's action.

LORENSZ *vs.* ABDUL CADER 111

See also under—LANDLORD & TENANT

Revision

Powers of Supreme Court in revision—Whether affected by section 327 A of Civil Procedure Code.

SOMAWATHIE *v.* COORAY 81

Delay in making application for revision—Not to be a ground for refusing to exercise powers in circumstances of this case.

PERERA HAMINE *v.* APPUHAMY 84

Servitude

Action for right of way of necessity—Should all co-owners of servient tenement be joined.

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Held : That in an action for a right of way of necessity, all the co-owners of a land over which the right of way is sought must be joined as parties, unless there is clear evidence before Court that they do not object to the right of way of necessity being granted.

PORLENTINAHAMY *vs.* MARTINAHAMY 72

Vagrants Ordinance

Vagrants Ordinance (Cap. 26), section 4—Ingredients necessary to constitute offence thereunder—"Mens rea" essential.

The accused was charged with committing an act punishable under section 4 of the Vagrants' Ordinance, the relevant part of the section reading "every person *wilfully* exposing his person in an indecent manner . . . to the annoyance and disgust of others shall be deemed a rogue and vagabond within the true intent and meaning of that Ordinance . . ."

Held : That for liability to arise under the section the mental element must be present.

Held further : That it must be proved that the exposure of person caused annoyance and disgust to others.

EKMON *vs.* HANIFFA 52

Words and Phrases

"amendment" of pleadings.
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"calendar month's notice."
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"forthwith"—in Civil Procedure Code
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"in his capacity as such member"—in Bribery Act.

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"irrevocable"—in deed of gift
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Workmen's Compensation Ordinance

Workmen's Compensation Ordinance, section 60—Acceptance of compensation in respect of injury in accordance with the provisions of the Ordinance—No action for damages maintainable thereafter in respect of that injury—Explanation in Sinhalese of agreement written in English to the effect that sum paid in settlement of claims under the Workmen's Compensation Ordinance—Ignorance that such agreement brought section 60 into operation—"Ignorantia juris haud neminem excusat".

The plaintiff, an employee of the 1st defendant-Company, sued the 1st defendant-Company in damages for a sum of Rs. 10,000/- in respect of an injury caused to him by a fellow-employee of the 1st defendant-Company. The defence set up was that the plaintiff could not maintain this action by reason of section 60 of the Workmen's Compensation Ordinance (Cap. 139), inasmuch as he had agreed with his employer to accept compensation in respec of the injury in accordance with the provisions of the ordinance. It was proved that the plaintiff had signed two memoranda of agreement, D 3 and D 1, written in English, by which he agreed to accept the sums of Rs. 2,520/- and Rs. 840/-, respectively, in full settlement of his claims under the Workmen's Compensation Ordinance. The evidence on behalf of the 1st defendant-Company was that the contents of both memoranda were explained in Sinhalese to the plaintiff. The plaintiff denied that the contents of the memoranda were explained to him ; or that he had knowledge on the first occasion that the payment was made to him as compensation by reason of the accident. He also said that he was unaware that a workman can claim compensation under the Workmen's Compensation Ordinance. According to him he was only told that the document relates to the accident and that it was being paid to him for treatment. The trial judge held that the plaintiff "was not aware when he received the first sum paid as compensation that it was a payment made in terms of the Ordinance".

Held : (1) That on the facts it was in the highest degree unlikely that the memoranda of agreement were not explained in Sinhalese to the plaintiff. To hold otherwise would carry with it the implication that a deliberate deceit had been practised on the plaintiff.

(2) That even conceding that the plaintiff probably did not, in fact, know that his agreement to accept the sums in full settlement of his claim under the Ordinance, would bring section 60 into operation, yet according to the prinicple *ignorantia juris haud neminem excusat* the plaintiff was presumed to know this.

CEYLON MOTOR TRANSIT CO., LTD. *vs.* DAVID .. 95

WRITS

See under—CERTIORARI 24
See under—MANDAMUS 88

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Privy Council Appeal, No. 6 of 1961.

Present : **Viscount Radcliffe, Lord Evershed, Lord Jenkins, Lord Devlin, Mr. L. M. D. de Silva.**

THE ATTORNEY-GENERAL OF CEYLON *vs.* DE LIVERA AND ANOTHER

From

THE SUPREME COURT OF CEYLON

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

DELIVERED THE 5TH NOVEMBER, 1962.

Bribery Act, (Cap. 26) section 14—Offer of a gratification to a member of the House of Representatives—Interpretation of the words " in his capacity as such member " in the section—Should the determination of the meaning be confined to the wording of the Constitution or the Standing Orders of the House or any similar document.

Held : (1) That where a person is charged with offering a gratification to a member of the House of Representatives, an offence punishable under section 14 (*a*) of the Ceylon Bribery Act, No. 11 of 1954, and when the question to be determined is whether the particular offer was made to the member as an inducement for doing any act " in his capacity as such member," the inquiry is not to be confined to ascertaining whether he was to do something specifically assigned as a member's function in the Constitution Order, or something which was actually a proceeding on the floor of or in the precincts of the House.

(2) That, although there are many things which a member may be invited to do because he is a member and enjoys as such a status and privilege, but in doing which he would not be acting in his capacity as a member, the circumstances of any particular case may show in the light of prevailing practices or conventions observed by members of the House, some act for which an inducement has been offered as sufficiently closely bound up with and analogous to a proceeding in the House as to be properly described as done by a member in his capacity as such.

Per THE JUDICIAL COMMITTEE :—" Where the facts show clearly, as they do here, that a member of Parliament has come into or been brought into a matter of Government action that affects his constituency, that his intervention is attributable to his membership and that it is the recognised and prevailing practice that the Government Department concerned should consult the local M.P. and invite his views, Their Lordships think that the action that he takes in approaching the Minister or his Department is taken by him ' in his capacity as such member ' within the meaning of section 14 (*a*) of the Bribery Act. "

Case referred to : *In re Parliamentary Privilege Act*, 1770, 1958 (2) A.E.R. 329 ; 1958 A.C. 331 ; 1958 (2) W.L.R. 912

N. Lawson, Q.C., with *Dick Taverne* and *M. Kanagasunderam*, for the appellant.

E. F. N. Gratiaen, Q.C., with *S. Nadesan, Q.C.*, *J. G. le Quesne, Q.C.*, and *Bala Nadaraja*, for the 1st respondent.

No appearance for the 2nd respondent.

VISCOUNT RADCLIFFE

This appeal raises for decision a single point : What is the proper interpretation of the words " in his capacity as such member " which appear in section 14 (*a*) of the Ceylon Bribery Act (No. 11 of 1954) ? The " member " referred to is a member of the Senate or the House of Representatives and the section, as amended by the addition of a proviso that was added in 1956, runs as follows :—

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> " A person—
>
> (*a*) who offers any gratification to a judicial officer, or to a member of either the Senate or the House of Representatives, as an inducement or a reward for such officer's or member's doing or forbearing to do any act in his judicial capacity or in his capacity as such member, or
>
> (*b*) who, being a judicial officer or a member of either the Senate or the House of Representatives, solicits or accepts any gratification as an inducement or a reward for doing or forbearing to do any act in his judicial capacity or in his capacity as such member,
>
> shall be guilty of an offence punishable with rigorous imprisonment for a term not exceeding seven years or a fine not exceeding five thousand rupees or both :
>
> Provided, however, that it shall not be an offence under the preceding provisions of this section for any trade union or other organization to offer to a member of either the Senate or the House of Representatives, or for any such member to accept from any trade union or other organization any allowance or other payment solely for the purposes of his maintenance."

The respondents were found guilty in the District Court of Colombo of offences under this section, the first respondent, de Livera, of having offered a gratification to a Mr. Munasinghe, member for Chilaw in the House of Representatives, and the second respondent, Fernando, of having abetted the offence. They were sentenced to terms of rigorous imprisonment for nine and six months, respectively. These convictions were set aside on appeal to the Supreme Court of Ceylon by a judgment dated 12th April, 1960, the learned Judges of that Court being of opinion that the gratification offered to Mr. Munasinghe by the first respondent was not offered to him as an inducement for doing any act in his capacity as a member of the House of Representatives.

From this judgment, which, no doubt, has implications of some importance for political and constitutional questions in Ceylon, the Attorney-General of Ceylon has appealed to this Board by special leave. The first respondent was, the second respondent was not, represented at the hearing of the appeal.

The question is not one that is covered by any previous judicial authority. Their Lordships have not derived any aid to its solution from the several decisions that were canvassed in argument or are noticed in the Supreme Court judgments. In their view its answer depends ultimately upon the special facts proved at the trial.

A member of the House of Representatives in Ceylon derives his constitutional status from the Ceylon (Constitution) Order-in-Council, 1946, which prescribed the existing Constitution of the Island. The system thereby established is that of a bi-cameral legislature in the form of a Parliament, which itself consists of the Sovereign, represented by the Governor, the Senate and the House of Representatives ; an independent Judiciary ; and an Executive, the powers of which are vested in the Governor. The general direction and control of government are, however, entrusted to a Cabinet of Ministers under a Prime Minister, and the Cabinet is by section 46 of the Order declared to be " collectively responsible to Parliament ". Moreover, section 49 (2) provides that a Minister must cease to hold this office at the expiration of any period of four consecutive months during which he has not been a member of either Chamber. Thus the Constitution is explicitly designed to secure the subordination of the Executive to the Legislature through their common meeting ground in the procedures of Parliament and, although there are many variations in matters of detail, its general conceptions are seen at once to be those of a Parliamentary democracy founded on the pattern of the constitutional system of the United Kingdom.

With immaterial exceptions, members of the House of Representatives are elected as such by electoral districts which are provided for by Part IV of the Order-in-Council. So far as this Order itself goes, there is nothing in it that lays down either the powers or the duties of a member, except that section 18 inferentially confers the right of voting in the Chamber by enacting that any question proposed for decision for either Chamber is to be determined by a majority of votes of those members present and voting. There is also a section, section 27, which deals with the privileges of the Senate and House of Representatives by declaring (sub-section 1) that " The privileges, immunities and powers of the Senate and House of Representatives and of Senators and Members of Parliament may be determined and regulated by Act of Parliament, but no such privileges, immunities or powers shall exceed those for the time being held or enjoyed by the Commons House of Parliament of the United Kingdom or of its Members ".

The affinity between the Parliamentary conceptions and practices of the United Kingdom and of the Island of Ceylon is underlined by two further considerations. The Parliament (Powers

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and Privileges) Act (No. 21 of 1953), which was enacted under the authority of section 27, contained among other provisions two sections, sections 7 and 8, of which one declared that the House and its members should have, in addition to privileges, immunities and powers conferred by the Act, the same immunities as those enjoyed by members of the House of Commons in the United Kingdom, and the other enacted that in any enquiry touching the privileges, immunities and powers of the Ceylon Parliament or its members, an authorised printer's copy of the Journals of the House of Commons or of its proceedings or of a report of one of its Committees should be received in evidence without further proof. Further, the Standing Orders of the House of Representatives are closely modelled on the detailed procedures of the United Kingdom House of Commons and the influence of passages in Erskine May's " Parliamentary Practice " can be traced with certainty both in the 1953 Act and in the Standing Orders.

Their Lordships think that what has been said is sufficient to show that in seeking to interpret the meaning of the words of the Ceylon Bribery Act which speak of the capacity of a member of the House of Representatives it is proper to draw any assistance that can be obtained from practices, conventions or rulings that govern the conduct of members of the House of Commons of the United Kingdom. The Constitution of Ceylon, it is true, is laid down by a written instrument, unlike that of the United Kingdom, but this distinction is not in their view of any significance for the determination of what is the " capacity " of a member in either country. It is not the purpose of the 1946 Order-in-Council to set out or lay down any list of the functions of an elected member of Parliament beyond providing for the constitutional means of bringing such persons into existence and for their right as a body to legislate through the medium of a majority vote. It would be misleading therefore to confine the idea of a member's capacity entirely within the limit of those activities which the written Constitution specifically notices as falling within his constitutional function, in effect the sole activity of voting upon motions or resolutions of his Chamber. The Standing Orders themselves envisage a wider range of action as appropriate to an individual member, as, for instance, the presentation of petitions to the Chamber, the institution of motions and the putting of questions for answer by the Prime Minister, Minister or Parliamentary Secretary. All these specific activities are certainly tied to what takes place in proceedings on the floor of the House : but Their Lordships are satisfied that in determining what a member does in his " capacity as such " within the meaning of those words in the Bribery Act the answer must be found in what can be learnt of the constitutional conventions and practices of the day rather than by exclusive reference to the wording of the Constitution or the Standing Orders of the House or any similar document.

Their Lordships have thought it right therefore to take account of such consideration as has been given to this matter in connection with the House of Commons of the United Kingdom as well as to ascertain the practices and conventions ruling in Ceylon. In fact, no direct assistance is obtainable from the United Kingdom. The words used in the Ceylon Bribery Act " in his capacity as such " have not presented themselves in that form to the House of Commons, although it is likely that they are themselves an echo of some words that appear in Erskine May's " Parliamentary Practice " (*see*, for instance, the current 16th Edition of Erskine May, at pp. 122, 124). What has come under inquiry on several occasions is the extent of the privilege of a member of the House and the complementary question, what is a " proceeding in Parliament " ? This is not the same question as that now before the Board, and there is no doubt that the proper meaning of the words " proceedings in Parliament " is influenced by the context in which they appear in Article 9 of the Bill of Rights (1 Wm. and Mary, Sess. 2, C. 2) ; but the answer given to that somewhat more limited question depends upon a very similar consideration, in what circumstances and in what situations is a member of the House exercising his " real " or " essential " function as a member ? For, given the proper anxiety of the House to confine its own or its members' privileges to the minimum infringement of the liberties of others, it is important to see that those privileges do not cover activities that are not squarely within a member's true function.

Thus, even in recent years, this question has come under debate ; in the *Sandys* case in 1938, in the *Allighan* case and the *Strauss* case* since the last war ; and, though the occasion does not seem to be noticed in the current edition of Erskine May, in *Henderson's* case in 1945. It would not be useful to examine those debates or proceedings in any detail, since it would be impossible to

* See 1958 A.C. 331

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extract from them any settled constitutional principle that could be regarded as governing the circumstances of this appeal. Views to some extent in conflict with each other have been expressed on different occasions and in the most recent, the *Strauss* case*, the vote of the House was not in accordance with the opinion of its Committee of Privileges or of that of the Select Committee which considered the *Sandys* case in connection with the Official Secrets Act. The most perhaps that can be said is that, despite reluctance to treat a member's privilege as going beyond anything that is essential, it is generally recognised that it is impossible to regard his only proper functions as a member as being confined to what he does on the floor of the House itself. In particular, in connection with his approaches to or relations with Ministers, whether or not on behalf of one of his own constituents, it is recognised that his functions can include actions other than the mere putting down and asking of a Parliamentary question. Indeed, in the *Strauss* debate, speakers, though differing on the issue whether a member approaching a Minister on a departmental matter affecting his constituency was taking part in a proceeding in Parliament, were at one in thinking that he would be performing his duty as a member in so acting. *Henderson's* case, moreover, can only be regarded as directly recognizing that the privilege of Parliament extends beyond the activities of questioning, voting or debate. For there the Committee of Privileges (*see* Reports of Committees, 1945, III, at p. 615) reported in terms that are sufficiently relevant to the case under appeal to justify quotation :—

> " (Para. 2) . . . In the present case the letter invited the Member to take up a matter with a Minister. In such a case a Member need not, of course, raise the matter in Parliament, but he always can put down a question or raise the matter in other ways in the House, and it is mainly because a Member has this power that constituency cases are put to him.
>
> " (Para. 3). Your Committee have no doubt that an offer of money or other advantage to a Member in order to induce him to take up a question with a Minister would be a breach of privilege . . ."

Having said this much by way of preamble, Their Lordships are now in a position to address themselves to the facts of this appeal. They approach them on the basis, as they have now explained, that in considering whether the inducement offered by the first respondent to Mr. Munasinghe, the member for Chilaw, was offered to induce him to act in his capacity as such member the inquiry is not confined to ascertaining whether he was to do something specifically assigned as a member's function in the Constitution Order or something which was actually a proceeding on the floor of or in the precincts of the House. They recognise that there are many things which a member may be invited to do because he is a member and enjoys as such a status and prestige which supply the motive of the invitation but in doing which he would not be acting in his capacity as a member. But, with this recognition made, they are of opinion that the circumstances of any particular case may show that in the light of prevailing practices or conventions observed by members of the House some act for which an inducement has been offered is sufficiently closely bound up with and analogous to a proceeding in the House as to be properly described as done by a member in his capacity as such.

A summary of the material facts of the case is contained in the judgment of Weerasooriya, J., delivered in the Supreme Court. There was no dispute about what had occurred and it is convenient therefore to repeat without variation what was said in that judgment, the relevant part of which is as follows :—

> " At the material time Mr. Munasinghe was the Member for Chilaw in the House of Representatives. He was also the Chief Government Whip and General Secretary of the Sri Lanka Freedom Party. Vincent Estate is situated within his constituency and was owned by the 1st accused. On the 28th October, 1958, Mr. Munasinghe addressed to the Minister of Lands and Land Development the letter P 1 strongly recommending as a matter of urgency the acquisition of the Vincent Estate for alienation to the inhabitants of certain villages in the Chilaw District who had been displaced from their homes as a result of floods. P 1 bears the printed heading ' House of Representatives ' and is signed by Mr. Munasinghe as ' M.P. Chilaw '. At the time the Minister of Lands and Land Development, Mr. C. P. de Silva, was the authority empowered under the Land Acquisition Act, No. 9 of 1950, to initiate acquisition proceedings and to give the necessary directions in that behalf. The question whether Vincent Estate should be acquired or not was, therefore, primarily a matter for him.

* See 1958 A.C. 331

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On the representations contained in P 1 the Minister decided that Vincent Estate should be acquired, and he gave the following directions to the Land Commissioner : ' For early action. M.P. Chilaw asks this land for alienation in 1/2 acre lots for people who got ruined by the floods and those people of Chilaw town who have employment but no houses to live in. Please take acquisition proceedings immediately '. Soon afterwards the Government Agent, Puttalam, called for a report from the Divisional Revenue Officer regarding the proposed acquisition. Before that report was received, the 1st accused who, presumably, had learnt of the steps that were being taken, saw the Government Agent. The object of the visit was clearly to dissuade the authorities from proceeding with the acquisition. The 1st accused told the Government Agent that the estate, in part, was itself liable to floods and therefore not suitable for a housing scheme. The Government Agent referred the 1st accused to Mr. Munasinghe as the Member of Parliament for Chilaw and the person who put forward the proposal to acquire the estate, and he also informed the 1st accused that the final authority on the question whether it should be acquired or not was the Minister of Lands and Land Development.

It is the evidence of Mr. Munasinghe that prior to the 19th December, 1958, the 1st accused was a stranger to him, but he had known the 2nd accused well from about 1947, when Mr. Munasinghe became Chairman of the Madampe Town Council, in which office he continued till 1956 except for a short break of about three months. During that period the 2nd accused was the Secretary of the Madampe Town Council and closely associated with Mr. Munasinghe, whom he often visited in his bungalow. At the time of the alleged offences, however, the 2nd accused was the Secretary of the Puttalam Urban Council while Mr. Munasinghe was residing in Kelaniya. It may be inferred that the 1st accused knew the 2nd accused and also the latter's previous association with Mr. Munasinghe. According to Mr. Munasinghe, the 2nd accused came to his house in Kelaniya on the morning of the 19th December, 1958. The 2nd accused said that he came at the instance of the 1st accused, who was ' pestering ' him for an introduction to Mr. Munasinghe, that the 1st accused was anxious that his estate should not be acquired and was prepared to give Mr. Munasinghe or his party or any person nominated by Mr. Munasinghe a present of money if the acquisition was stopped. Mr. Munasinghe stated that he requested the 2nd accused to come with the 1st accused at 7.30 p.m. on the same day and the 2nd accused went away promising to do so. In the meantime Mr. Munasinghe got in touch with the Police and it was arranged for some Police officers to be present in concealment at the house of Mr. Munasinghe within hearing distance of any conversation that would take place between him and the accused when they met in the evening. Mr. Munasinghe has stated in evidence that at that meeting the 1st accused offered him Rs. 5,000/- in cash to stop the acquisition, that he undertook to give the 1st accused on the 22nd December, at about 9.30 or 10 p.m., being the date and time fixed for their next meeting, a letter addressed to the Minister of Lands and Land Development withdrawing his earlier application for the acquisition of the estate, in return for which the 1st accused was to hand him the sum of Rs. 5,000/-.

On the 22nd December the Police were again present, unknown to the accused, when the latter came to see Mr. Munasinghe as arranged. On that occasion Mr. Munasinghe gave the 1st accused the letter P3 addressed to the Minister in which he withdrew his application for the acquisition of the estate, stating that it was not suitable for housing purposes as a part of it gets submerged during seasonal floods. P 3 is written on notepaper bearing the printed heading ' Chief Government Whip ' and is signed by Mr. Munasinghe as ' M.P. Chilaw '. The 1st accused took the letter and handed to Mr. Munasinghe a wrapped parcel, P 6, containing the Rs. 5,000/-. As for the 2nd accused, apart from being present, he neither did nor said anything. When the accused were about to depart the Police officers came forward, disclosed their identity and took into custody, among other things, the letter P 3 and the parcel P 6."

It is plain from this account that Mr. Munasinghe played a dominating part in the proposal to acquire the Vincent Estate for the accommodation of the flood victims in the Chilaw District. It was he who initiated the proposal by his letter to the Minister of Lands and Land Development dated 28th October, 1958. He might, indeed, have taken this step from more than one standpoint of his personal position—as a prominent local man, as an active politician, general secretary of

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the Sri Lanka Freedom Party, even perhaps as Chief Government Whip. In fact, however, it is to be noted that his letter was headed " House of Representatives " and his signature at the foot had added to it the words " M.P. Chilaw ".

Their Lordships think that the evidence as a whole admits of only one conclusion, that Mr. Munasinghe himself and those dealing with him, including the first respondent, regarded his intervention in the Vincent Estate matter as attributable to his rights and duties as a member of the House of Representatives and not to any other aspect of his general public position ; and in their view he was rightly so regarded. As soon as his letter was received by the Minister, the latter noted on it as the opening of his instructions to the Land Commissioner—" For early action—M.P. Chilaw asks this land for early alienation . . ."

The Minister, evidently, recognised the propriety of the local member's intervention and, however much attention modern democratic theory may accord to Edmund Burke's address to the electors of Bristol and may agree that an elected member once elected is elected to act and vote as one of the representatives of the Commons as a whole, it would be absurd not to recognise that it also accords to him a special responsibility in representing the needs and concerns of his constituents to Ministers with whom he is or may be brought into contact in the relations between the elected assembly and the political executive. The prevailing practice and understanding in Ceylon, Their Lordships think, are shown clearly enough by the two passages of evidence which record : (1) that when the first respondent first learnt of the proposal to expropriate the Vincent Estate, he went to see the Government Agent who referred him to " Mr. Munasinghe as the Member of Parliament for Chilaw and the person who put forward the proposal to acquire the Estate " ; and (2) that the Land Commissioner followed the practice of regularly consulting the local M.P. on such questions of acquisition. To quote from the evidence of Mr. Gunawardene, Land Commissioner, " As Land Commissioner, as soon as I receive the Government Agent's report stating that the land could be acquired I write to the M.P. of the area where the land is situated to find out his views and that is a matter of routine. We write to the M.P. of the area because generally as the representative of the people of the area he might be able to advise us ".

Their Lordships cannot, therefore, accept the view of the Supreme Court that the prosecution has failed to prove that in writing P. 1 or P. 3 Mr. Munasinghe was acting in the exercise of any function as member of Parliament. It is not altogether clear to them whether this view is founded on an interpretation of the words " in his capacity as such " that limits their meaning more narrowly than Their Lordships themselves think correct or on a reading of the facts which leaves it uncertain what character Mr. Munasinghe had assumed in his intervention over the Vincent Estate. The judgments of the two learned members of that Court very likely give somewhat different weight to the varying elements of law and fact that are intermixed in the case. The judgment of Sinnetamby, J., at any rate, seems to found itself on a proposition of law which is expressed in the following passage :—

> " In interpreting section 14, therefore, it seems to me, one must first ask oneself whether the act for the doing of which a gratification is offered is one which the member of Parliament can only do because he is a member of Parliament. If so, it is something which he does in his capacity as such member. If it is something which he could have done even though he were not a member, the mere fact that he is a member does not bring the act within the purview of the section. In the result, in order to decide whether a person is acting in his capacity as a member of Parliament, one has first to ascertain what exclusive legal rights, powers, duties, privileges and so on attach to membership of Parliament. If the act falls outside the exclusive rights, powers, etc., of a member of Parliament, then one cannot say that he is acting in his capacity as such member. "

With all respect to this clear enunciation of principle, Their Lordships are of opinion that it puts too limited a construction on the words of the Act and might in some cases result in defeating the intention expressed by those words. To make the result depend upon an inquiry into the range of the " exclusive " powers and duties of a Member of Parliament is likely to hang it solely upon the actual written provisions of the prevailing Constitution, and to do this may require a virtual ignoring of the plain facts of a particular case. Where the facts show clearly, as they do here, that a member of Parliament has come into or been brought into a matter of Government action that affects his constituency, that his intervention is attributable to his membership and that it is the recognised and prevailing practice that the

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Government Department concerned should consult the local M.P. and invite his views, Their Lordships think that the action that he takes in approaching the Minister or his Department is taken by him " in his capacity as such member " within the meaning of section 14 (*a*) of the Bribery Act.

Their Lordships will humbly advise Her Majesty that the appeal should be allowed and that accordingly the judgment and order of the Supreme Court of Ceylon, dated 4th April, 1960, should be reversed and the convictions recorded against the respondents by the judgment and order of the District Court, dated 2nd May, 1959, should be restored. With regard to the sentences imposed by that Court as a result of the convictions (which were also the subject of appeal to the Supreme Court) Their Lordships think that the convenient and proper course is that the case should be remitted to the Supreme Court to consider what punishment is required in the interests of justice, having regard to the guilt of the respondents as now established. They will humbly advise Her Majesty accordingly.

Appeal allowed

Privy Council Appeal, No. 21 *of* 1962

Present : **Viscount Radcliffe, Lord Evershed, Lord Jenkins, Lord Devlin, Mr. L. M. D. de Silva**

THE COMMISSIONER OF INLAND REVENUE *vs.* A. W. DAVITH APPUHAMY

From

THE SUPREME COURT OF CEYLON

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

DELIVERED THE 12TH NOVEMBER, 1962.

Income Tax Ordinance (*Cap.* 188), *sections* 9 *and* 10—*Expenses incurred by the owner of an income-producing source in fighting out between himself and others their respective claims to the ownership of that source—Whether such expenses were incurred* " *in the production of income* ".

On the 16th August, 1949, the respondent obtained from *W.* a deed of transfer under which *W.* sold and assigned to the respondent the assets and goodwill of a business called the Kandy Ice Co. Although the business remained unincorporated, after the respondent's purchase some proposal was made as between the respondent and certain other persons that it should be formed into a limited liability company, but this fell through. Thereafter litigation followed in which the respondent was sued by some of his associates, their claim being that he had acted in the purchase as agent for a syndicate and that, as members of the syndicate, they were entitled to participate in the profits of the business. The litigation ended with agreed terms of settlement, under which the respondent was acknowledged to be the sole owner of the business, he in his turn agreeing to pay the claimants a sum of money. The respondent now asserted that, in the computation of the profits for the three years ending 31st March, 1953, 31st March, 1954 and 31st March, 1955, he could claim to bring in as admissible expenditure the legal expenses he had incurred for each of these years in the aforementioned litigation. His claim was disallowed by the Income Tax Assessor and, on appeal, by the Authorized Adjudicator, but was upheld by the Board of Review on the ground that the sums in question constituted expenditure incurred " in the production of income " within the meaning of sections 9 and 10 of the Income Tax Ordinance. The Supreme Court on appeal affirmed the decision of the Board of Review. On appeal to the Privy Council—

Held : That the expenditure in question did not fall within the category of expenditure incurred in the production of income, or for the purpose of producing income ; it was simply the cost incurred by the owner of an income-producing source in fighting out between himself and others their respective claims to the ownership of that source.

Cases referred to : *Ward & Co., Ltd.* v. *Commissioner of Taxes*, 1923 A.C. 145 ; 39 T.L.R. 90.
Morgan v. *Tate & Lyle, Ltd.*, 1955 A.C. 21 ; (1954) 2 A.E.R. 413 ; (1954) 3 W.L.R. 85.

Sir John Senter, Q.C., with *R. K. Handoo*, for the appellant.

No appearance for the respondent.

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VISCOUNT RADCLIFFE

In this appeal the Commissioner of Inland Revenue challenges a judgment and decree of the Supreme Court of Ceylon, dated the 10th July, 1961, which allowed to the respondent the deduction of certain expenses in the computation of his income for assessment under the Income Tax Ordinance (c. 188).

The respondent was not represented at the hearing before the Board. The point at issue is a short one, and after hearing the argument presented on behalf of the appellant Their Lordships are satisfied that the decision of the Supreme Court cannot be sustained.

The facts of the case are very simple and they are found in the case stated by the Board of Review, dated the 17th November, 1960, upon which the opinion of the Supreme Court was required. Since the year 1945 the respondent had been interested in a business called The Kandy Ice Co. He seems to have been the owner of it since that year, but at any rate on the 16th August, 1949, a deed of transfer was executed by a Mr. Robert Wilson under which he sold and assigned to the respondent the assets and goodwill of the business.

The business was and remained unincorporated, but after the respondent's purchase some proposal was made as between him and certain other persons to form it into a limited company. The proposal fell through, but litigation followed in which the respondent was sued by some of his associates, their claim being that he had acted in the purchase as agent for a syndicate and that, as members of the syndicate, they were entitled to participate in the profits of business. This claim was successfully repelled by the respondent and the litigation ended on 27th September, 1955, with agreed terms of settlement, under which the respondent was acknowledged to have been as from October, 1945, sole owner of " all the assets movable and immovable , including the goodwill of the business which was and is called and known as ' The Kandy Ice Company ', which forms the subject-matter of this action ", and the plaintiffs withdrew any claim to any right to or interest in the assets or goodwill of that business. The respondent undertook to pay to the plaintiffs a sum of Rs. 76,500, and it was agreed that each party should bear his own costs to date of the litigation.

Under the Income Tax Ordinance the respondent was assessable to tax upon the profits derived by him from his business, The Kandy Ice Co. In the computation of those profits for the three years ending 31st March, 1953, 31st March, 1954 and 31st March, 1955, he claimed to bring in as admissible expenditure the legal expenses which he had incurred in resisting the claims of the members of the alleged syndicate to share with him in the ownership of the business. Thus for the first year he wished to charge Rs. 3,260 under this head, for the second, Rs. 1,100, and for the third, Rs. 2,695.

The Income Tax Assessor disallowed the claim. There was an appeal to the Authorised Adjudicator appointed by the appellant in accordance with the Ordinance. He upheld the Assessor. There was then an appeal to the Board of Review which accepted the argument of the respondent that the sums in question constituted expenditure incurred " in the production of income " within the meaning of the relevant section of the Ordinance and allowed the appeal. A case was asked for and stated for the opinion of the Supreme Court raising the correct legal questions for their determination. The Court, however, dismissed the appeal without answering the questions or giving their reasons, merely saying that they agreed with the decision of the Board of Review.

In Their Lordships' view the questions raised can only be answered in the light of those provisions of the Income Tax Ordinance that provide the rules for assessing income consisting of the profits of a trade or business. The business must, of course, be treated as a distinct " source " of income for this purpose : if it were not, it would not be possible to find the basis upon which to identify the receipts, expenditure and other charges attributable to it. The profit emerging is nothing but the figure of balance that results from setting the expenditure and other charges against the receipts. The business, therefore, must necessarily be treated objectively as a separate entity which has allocated to it certain assets and certain obligations ; and this analysis is required in order to ascertain its profits even though there is only a single individual who is its owner or proprietor. If the task of identifying the source and so its profits is approached in this way, it seems a somewhat inconsistent result that expenses incurred by its proprietor over a dispute with other persons as to their respective rights to share in the ownership of the business should be chargeable against the profits of the business itself. None of its assets is threatened by such litigation nor is their profitability in any way affected. As is correctly stated

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in annexure X.1 to the case stated, which contains the Board of Review's actual Order,

> "If the plaintiffs had succeeded in this litigation the appellant would have become entitled only to a certain share of the income from the business for the past years and only to a share of the income in the future. The result of the litigation would not have affected the profits earned from The Kandy Ice Co., but it could have seriously diminished the income of the appellant from this source." (*see* para. 4).

There is no doubt that that finding states the position accurately ; but Their Lordships think it impossible to say in the light of it that the expenses claimed are permissible deductions under the rules laid down by the Income Tax Ordinance for the ascertainment of profits or income (*see* Chapter III). By section 9 it is provided that " there shall be deducted for the purpose of ascertaining the profits or income of any person from any source all outgoings and expenses incurred by such person in the production thereof" ; and by section 10 no deduction is to be allowed in respect of "any disbursements or expenses not being money expended for the purpose of producing the income". If, then, these litigation expenses related to an issue whose outcome would not have affected the profits of the business one way or the other but would have affected only the respondent's share as owner of them, how can they be said to have been expended in the production of the profits from this taxable source, so as to satisfy the requirements of sections 9 and 10 ?

Words very similar to those used in sections 9 and 10 have already been under the consideration of the Board in dealing with the Land and Income Tax Act 1916 of New Zealand, see *Ward & Co., Ltd.* vs. *Commissioner of Taxes*, (1923) A.C. 145. The rule then in question was expressed in the form that no deduction was to be made in respect of expenditure " not exclusively incurred in the production of the assessable income". In both cases emphasis is thrown upon the criterion that it is the effect of the expenditure in contributing to the income of the designated source that is to be considered. The opinion of the Board, delivered by Lord Cave, held that the disqualification imported by the rule required that allowable expenditure must have been incurred "for the direct purpose of earning profits". This requirement was evidently regarded by them as a highly restrictive one : for it was treated as having the effect of disallowing expenditure intended to influence public opinion against prohibition of intoxicants, a measure which, if introduced, would certainly have had a destructive effect upon the profits of the business of the brewing company, the assessee concerned. Such expenditure though disallowed was related to the maintenance of the business itself, the value of its goodwill and the preservation of its profitability in, at any rate, a recognisable sense. The expenditure in question here has no comparable claim to recognition.

Their Lordships have no wish to assert the principle that the decision in *Ward's* case *supra* lays down a comprehensive rule for deciding all the various cases that may arise with regard to chargeable expenditure, when words such as those found in the New Zealand Act and the Ceylon Ordinance are employed by a legislature. The distinction between expenditure to earn profits and expenditure to avoid losing profits is itself a fine one, and cases may yet arise in which expenditure, though not in a direct or obvious sense creating profits, is yet attributable to the production of them. But this case is not one of them—the expenditure here in question is simply the cost incurred by the owner of an income-producing source in fighting out between himself and others their respective claims to the ownership of that source.

It would not be useful to the determination of this appeal to refer to decisions given in the United Kingdom on questions more or less analogous to this one, because the forms of the respective statutory provisions are not the same and it has been recognised, on the one hand, in the *Ward* case, that English authorities are not necessarily applicable to such legislative rules as those enacted in New Zealand, and, on the other hand, in the majority decision of the House of

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Lords in *Morgan* vs. *Tate & Lyle, Ltd.*, (1955) A.C. 21, that the *Ward* case decision does not necessarily apply to cases arising under the United Kingdom system of taxation. It is sufficient to say that Their Lordships express no view one way or the other as to whether this case ought to be decided differently if it arose under the latter system.

Their Lordships will humbly advise Her Majesty that the appeal should be allowed ; that the decision of the Board of Review, dated the 17th November, 1960, and the judgment and decree of the Supreme Court of Ceylon dated the 10th July, 1961, be reversed ; that in lieu thereof the following answers should be returned to the questions raised by the case stated by the Board of Review on the 29th September, 1960 :—

(1) No,
(2) No,
(3) No,
(4) Yes,
(5) No answer required ;

and that the respondent should be ordered to pay the costs of the appellant of the hearings before the Board of Review and the Supreme Court.

Appeal allowed.

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

TENNE *vs.* EKANAYAKE*

S.C. No. 442/60—*M.C. Matale, No.* 6823.

Argued on : June 6 and 7, 1961.
Decided on : March 30, 1962.

Maintenance Ordinance, section 2—Jurisdiction to entertain application for maintenance—Can a Magistrate's Court within whose limits the defendant resides entertain such application—Civil Procedure Code, section 9.

Held : (SINNETAMBY, J. *dissentiente*) That section 2 of the Maintenance Ordinance contemplates the case of an application being made to the Court where the applicant, having the right to claim maintenance, resides and not to the Court where the defendant resides.

Per BASNAYAKE, C.J.—" Jane Nona's case introduces, wrongly in my view, the Civil Procedure concept of a cause of action."

Per SINNETAMBY, J.—" In my opinion, therefore, an application for maintenance can be made by an applicant whether on his or her own behalf or on behalf of another in any Magistrate's Court, and is in no way affected by the place of residence of the defendant or of the applicant or of the person on whose behalf the application is being made ".

Cases referred to : *Jane Nona* v. *Van Twest*, 30 N.L.R. 449.
Saraswathy v. *Kandiah*, 50 N.L.R. 22 ; XXXVI C.L.W. 11
Dingirimenika v. *Kiriappu*, 52 N.L.R. 378
Fernando v. *Cassim*, 11 N.L.R. 329
Menikhamy v. *Loku Appu*, 1 Balasingham's Reports 161
Anna Perera v. *Nonis*, 12 N.L.R. 236

K. C. Kamalanathan with *M. Shanmugalingam* for the applicant-appellant.

Y. L. M. Mansoor, for the defendant-respondent.

BASNAYAKE, C.J.

This appeal first came up for hearing before my brother, Sinnetamby, but, as a question which appeared to him to be a question of doubt or difficulty arose for adjudication, acting under section 48 of the Courts Ordinance he reserved the question for the decision of more than one Judge of this Court, and under section 48A of that Ordinance I made order constituting a Bench of three Judges for deciding it. The question reserved is whether a Magistrate's Court within whose limits the defendant to an application for maintenance does not reside has no jurisdiction to entertain an application for maintenance.

*For Sinhala translation, see Sinhala section, vol. 5, part 1, p. 1.

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Briefly the material facts are as follows :— On 10th November, 1959, the applicant, R. B. Tenne, complained to the Court that the defendant, V. B. Ekanayake of the Cocoa Research Station, Horticultural Office, Kundasale, who was the husband of his daughter, Veera Ekanayake, refused to maintain her or his male child, Keerthi Ekanayake, aged three. In his evidence he stated that his daughter was since June, 1959, an inmate of the Mental Hospital, Angoda, and that the child, Keerthi, was with him.

It would appear from the following minute made in the record that on his appearance on summons the defendant admitted that he was the husband of the applicant's daughter and the father of the child, Keerthi :—

> "The defendant admits marriage and paternity but has cause to show."

At the trial the defendant did not call any evidence but submitted that the Court had no jurisdiction to entertain the application as he was resident in Dumbara a place outside the territorial jurisdiction of the Magistrate's Court of Matale. It appears to be common ground that the defendant is resident at a place outside the local limits of the Magistrate's Court of Matale. The learned Magistrate upheld the objection on the ground that he was bound by the decisions of this Court, viz., *Jane Nona* v. *Van Twest*, (30 N.L.R. 449) and *Saraswathy* v. *Kandiah*, (50 N.L.R. 22), cited by the defendant's pleader.

Jane Nona's case holds that the Court which has jurisdiction to entertain an application under the Maintenance Ordinance is the Magistrate's Court within whose territorial jurisdiction the cause of action arises. It proceeds on the basis that as the Maintenance Ordinance itself is silent on the question of territorial jurisdiction it is permissible to resort to the Civil Procedure Code for guidance. In *Saraswathy* v. *Kandiah* (*supra*), while following *Jane Nona* v. *Van Twest* (*supra*), which I felt was binding on me, I expressed the view that a Magistrate has jurisdiction to entertain an application under section 2 of the Maintenance Ordinance regardless of the residence of the parties or the place where the cause of action arises. In *Dingirimenika* v. *Kiriappu*, (52 N.L.R. 378), Nagalingam, J., in dealing with the question of jurisdiction to enforce an order of maintenance under section 11 of the Maintenance Ordinance held that the jurisdiction to enforce its order is not taken away from the Court by section 11 merely because the defendant has ceased to reside within its local limits. He states *obiter*—

> "In fact, any Magistrate's Court would have jurisdiction to entertain a plaint irrespective of the question where the applicant or the respondent resides."

Now the first question that has to be considered is whether *Jane Nona's* case has been rightly decided. Is it permissible to apply section 9 of the Civil Procedure Code ? I think not, for the reason that the Civil Procedure Code is made applicable only to actions falling within the ambit of that Code. The Maintenance Ordinance provides a special remedy and a special procedure in regard to what was before its enactment a civil right enforceable under the ordinary procedure. It has been held that since the enactment of the Maintenance Ordinance it is no longer competent for a woman to bring a civil action to recover maintenance for herself and her children as a debt due to her and them by the father (*Menikhamy* v. *Loku Appu*, (1898) 1 Bal. 161). By the enactment of the Ordinance the common law right became a statutory right enforceable by the procedure prescribed in the statute. Certain provisions of the Criminal Procedure Code (Chapter V and VI, sections 338 to 352) and the provisions of the Civil Procedure Code relating to costs so far as they may be applicable, have been expressly made applicable to proceedings under the Ordinance (sections 9, 15 and 17). It has been held (*Anna Perera* v. *Emaliano Nonis*, 12 N.L.R. 236) that it is not permissible to introduce provisions of the Criminal Procedure Code other than those expressly mentioned. By a parity of reasoning it would follow that it is not permissible to introduce provisions of the Civil Procedure Code other than those made applicable by the Ordinance.

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The right conferred by the Maintenance Ordinance is, subject to the limitations laid down therein, a continuing right and resides in the person entitled to it. As the right attends her wherever she may be the aid of the Court within whose local limits she is resident for the time being can be invoked by her. It is not necessary to link this right with the concept of a " cause of action " as known to civil proceedings. This view finds support in section 2 of the Maintenance Ordinance which reads—

> " If any person having sufficient means neglects or refuses to maintain his wife, or his legitimate or illegitimate child unable to maintain itself, the Magistrate may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child at such monthly rate, not exceeding one hundred rupees, as the Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct. Such allowance shall be payable from the date of the order."

It seems to contemplate the case of an application being made to the Court where the applicant having the right to claim maintenance resides and not to the Court where the defendant resides.

The above view is consistent with the Full Bench decision in P.C. Negombo, 29055, Grenier Reports, (1873) P.C. 112, a decision given under the earlier law. In that case this Court held that in cases of maintenance the Court having jurisdiction over the place where a wife or child is left destitute has authority to try a defendant (residing out of such jurisdiction) who is bound to support them. The principle was followed in the later case of *Selestina Fernando* v. *Mohamed Cassim*, (1908) 11 N.L.R. 329, wherein Wendt, J., stated that the Court within the local limits of which an illegitimate child resides has jurisdiction to entertain an application for the maintenance of such child against its putative father although he may be resident outside the local limits of such Court. *Jane Nona's* case introduces, wrongly in my view, the Civil Procedure Code concept of a cause of action. I adhere, therefore, to the view I expressed in *Saraswathy's* case as elaborated above.

In the instant case the applicant is not a person entitled to maintenance ; but one of the persons so entitled, namely, the child, is with him at his house within the jurisdiction of the Magistrate's Court of Matale. The action in that Court can, therefore, proceed in regard to the claim of the child. The claim in regard to the mother should be made in the Magistrate's Court of Colombo, for there is no ground on which jurisdiction can be said to be in the Court within whose limits the applicant resides where the applicant is not the person seeking maintenance.

H. N. G. Fernando, J.

I agree.

Sinnetamby, J.

The question that arises for decision in this case relates to the forum in which an application for maintenance may be made by a wife on behalf of a daughter whom the respondent, her husband, has failed and neglected to maintain. The learned Magistrate to whom the application was made held that he had no jurisdiction because the defendant-respondent resided outside the local limits of the jurisdiction of his Court. He applied the test of the defendant's residence in deciding the question of jurisdiction and in doing so followed two earlier decisions of this Court, viz., *Jane Nona* v. *Van Twest*, 30 N.L.R., p. 449, and *Saraswathy* v. *Kandiah*, 50 N.L.R., p. 22. The case of *Dingirimenika* v. *Kiriappu*, 52 N.L.R., p. 378, was apparently not cited to the learned Magistrate.

When this appeal first came up before me sitting alone, as the matter was one of considerable importance and questions of difficulty arose, I referred it to My Lord the Chief Justice so that steps may be taken to list the case for consideration by a Bench of more than one Judge of this Court. My own inclination was to follow the opinion expressed though *obiter*, by Nagalingam, J., in *Dingirimenika* v. *Kiriappu* (*supra*). His view finds support in the observations of Basnayake, J., as he then was. Basnayake, J., was not disposed to agree with the earlier decisions but, nevertheless, felt obliged to follow *Jane Nona* v. *Van Twest* (*supra*) which was a decision of two Judges. In the course of his judgment, he made the following observations :—

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"My own view is that a magistrate has jurisdiction to entertain an application under section 2 regardless of the residence of the parties or the place where the cause of action arises."

I take this passage to mean that any Magistrate's Court irrespective of the residence of parties, has jurisdiction to entertain an application for maintenance. The mere fact that it is not the person entitled to maintenance who makes the application should not affect the question.

In my opinion, therefore, an application for maintenance can be made by an applicant whether on his or her own behalf or on behalf of another in any Magistrate's Court, and is in no way affected by the place of residence of the defendant or of the applicant or of the person on whose behalf the application is being made.

I, therefore, hold that the Magistrate's Court of Matale had jurisdiction to entertain the application made in this case by the applicant on behalf of her daughter. I would accordingly set aside the order of the learned Magistrate and remit the case to him for further proceedings to be taken according to law. The applicant will be entitled to the costs of this appeal.

Appeal partly allowed.

Present : **H. N G. Fernando, J. and L. B. de Silva, J.**

PERERA & OTHERS *vs.* JAFFERJEE & OTHERS

Application for Revision in D.C. Colombo, No. 6252/M.B.

Argued and decided on : 30th November, 1962.

Civil Procedure Code—Amendment of answer—Application on trial date to amend answer by pleading plaintiff's default under Business Names Ordinance—Objection taken to such application—Should amendment be allowed at this stage.

On the date fixed for trial of this case the defendants moved to amend their answer by adding a new paragraph pleading that the contracts sued upon were not enforceable as the plaintiffs had not complied with the Business Names Ordinance. Counsel for the plaintiffs objected to the amendment and the learned trial Judge disallowed it holding that he would allow the amendment later if there was sufficient evidence to warrant it.

Held ; (1) That the amendment of the answer should be allowed, on terms, and the defendants ordered to file a fresh motion setting out the particular matter in respect of which a non-compliance with the requirements of the Business Names Ordinance was alleged.

(2) That the case of *Karuppen Chetty* v. *Harrison & Crosfield, Ltd.*, 24 N.L.R. 317, where it was held that a Judge has a discretion to frame an issue at any stage with respect to compliance with the Business Names Ordinance, had no application to a situation where a defendant seeks to take this plea whether in his answer or by an amendment and thereby to frame a relevant issue.

Case referred to : *Karuppen Chetty* v. *Harrison & Crosfield, Ltd.*, 24 N.L.R. 317.

(**Editorial Note.**—In this case the defendants had appealed from the order disallowing the amendment of the answer and thereafter moved for a stay of proceedings in the District Court pending the determination of this appeal. The application for a stay was refused. The defendants thereafter filed the present application in revision against this order, also asking for a review of the earlier order disallowing the amendment. The present judgment was delivered at the hearing of this application).

H. V. Perera, Q.C., with *J. M. Jayamanne* and *N. S. A. Goonetilleke*, for the substituted-defendants-petitioners.

H. W. Jayewardene, Q.C., with *B. A. R. Candappa* and *N. E. Weerasooria, (Jnr.)*, for the plaintiffs-respondents.

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H. N. G. Fernando, J.

On the date fixed for the trial of this case, 30th August, 1962, the defendants moved to amend their answer by the inclusion of a new paragraph pleading that the contracts set out in the plaint are not enforceable for the reason that the plaintiffs had made default in furnishing a statement of particulars and/or change in particulars required under the Business Names Ordinance. Objection to this amendment was taken by Counsel for the plaintiffs and the learned District Judge ordered that it was not necessary to amend the pleadings at that stage and that if necessary he would allow the amendment later if there was sufficient evidence to warrant the amendment. It would seem that in making this order the learned District Judge was misled by the decision in 24 New Law Reports, page 317, which held that a Judge has a discretion at any stage to frame an issue with respect to compliance with the Business Names Ordinance. That decision does not apply in a situation where a defendant seeks to plead a breach of the Ordinance whether in his answer or by an amendment and thereby to frame a relevant issue. The present defendants came into this action in substitution for the deceased defendant and the 30th August, 1962, was the first date of trial after their substitution. It seems to us that if the learned Judge had realised that a defendant has a right to raise an issue as to the Business Names Ordinance he would either have allowed this amendment of the answer or else, if he considered the proposed amendment to be insufficient in particulars, would have afforded the defendants an opportunity to alter the form of their amendment so as to include the necessary particulars. This we think should now be done at this stage, but on terms.

After the record is returned to the District Court it will be open to the defendants before December 20th to file a fresh motion setting out the particular matter in respect of which the plaintiffs are alleged to have been in default in furnishing particulars or a change in particulars required under the Business Names Ordinance. If a motion is filed by that date in terms of our order, the District Judge will allow the amendment of the answer.

The plaintiffs will be entitled to the costs of 30th August, 1962, but the costs of this application will be costs in the cause.

L. B. de Silva, J.

I agree.

Application allowed.

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

PAULIS SINGHO & ANOTHER *vs.* WILLIAM SINGHO

S.C. 198*(F)/*59*—D.C. Gampaha, No.* 5975*/L.*

Argued on : May 25 and July 14, 1961.
Decided on : March 6, 1962.

Co-owners—Building standing on land owned in common—Can a co-owner maintain an action for declaration of title to such building.

Held : That as a building standing on common property accedes to the soil and becomes part of the common property, a co-owner cannot claim a declaration that he is the owner of a house standing on the common property to the exclusion of all others.

Cases referred to : *Van Wezel* v. *Van Wezel*, 1924 A.D. 41 417.
De Silva v. *Siyadoris*, 14 N.L.R. 268.
Sopihamy v. *Dias*, 50 N.L.R. 284.
Charles v. *Juse Appu*, 60 N.L.R. 474.

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H. W. Jayewardene, Q.C., with *D. R. P. Goonetilleke* and *L. C. Seneviratne*, for the defendants-appellants.

A. C. M. Uvais, for the plaintiff-respondent.

BASNAYAKE, C.J.

The question that arises for decision on this appeal is whether a co-owner of a land can maintain an action for declaration of title to a building on the common property. The plaintiff claimed that he was entitled to 1/20 share of a land called Medaweraniyewatta situated in the village of Tittapattara and a tiled boutique built thereon by one James Appu his predecessor in title. The defendants claimed that James Appu's father, Belenis, erected the building. That was the only matter in dispute at the trial, it being common ground that the plaintiff was entitled to an undivided 1/20 share of the land. The learned District Judge held that James built the tiled boutique and gave judgment for the plaintiff.

It is contended by learned counsel for the defendants, who have appealed from that decision, that a co-owner is not entitled to maintain an action such as that brought by the plaintiff in the instant case. He submits that where a co-owner desires to put an end to the co-ownership the proper action is an action for partition.

Under our law there can be no ownership of a house apart from the land on which it stands (*Van Wezel* vs. *Van Wezel*, 1924 A.D. 417 at 419). That being so a co-owner cannot claim a declaration that he is the owner of a house standing on co-owned land to the exclusion of all others, for that would amount to a declaration that he is the exclusive owner of the land on which the house stands.

A building on common property accedes to the soil and becomes part of the common property *quid quid inaedificatur solo, solo cedit*. The right of a builder is limited to a claim for compensation which can be determined in an action for partition. The cases of *De Silva* vs. *Siyadoris* (14 N.L.R. 268), *Sopihamy* vs. *Dias* (50 N.L.R. 284), and *Charles* vs. *Juse Appu* (60 N.L.R. 474), all support that view. The learned District Judge was wrong in giving judgment for the plaintiff.

We accordingly set aside his judgment and dismiss the plaintiff's action. The appellant is entitled to costs both here and below.

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

Appeal allowed.

Present : **Basnayake, C.J., Abeyesundere, J., and G. P. A. Silva, J.**

LEBBE *vs.* SANDANAM

S. C. No. 127/59—*D.C. Kandy No. MR.* 7457

Argued on : July 25, 26 and 27, and September 20 and 21, 1962.
Decided on : January 24, 1963.

Civil Procedure Code, sections 21, 38, 46 (2) *and* 93—*Amendment of pleadings—Action for money lent—Denial in defendant's answer that money given as a loan—Plaintiff asserting in evidence that transaction was a loan—Subsequent application by plaintiff to amend plaint by claiming in the alternative that the money was given as part consideration for purchase of an estate—Amendment allowed—Appeal from such order—Meaning of " amendment "—Scope of possible " amendment "—Whether amendment of plaint possible before hearing.*

The plaintiff instituted this action, claiming with interest a sum of money, which he alleged he had lent to the defendant, and the defendant had borrowed from him, particulars of this transaction being appended to the plaint. The defendant filed answer denying these averments in the plaint. On the first date of trial, defendant's Counsel stated that the defendant did not deny the receipt of the money, but denied that it was given as a loan; that the defendant's position was

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that the money was part consideration in respect of an estate which the plaintiff had by a notarial agreement made prior to this action agreed to buy from the defendant. Thereupon both Counsel agreed to an issue in the following terms :—

"Did the defendant borrow from the plaintiff and the plaintiff lend and advance to the defendant the sums of money referred to in the account particulars in the schedule to the plaint ?"

When the trial commenced, the defendant admitted the receipt of the money, but claimed it was part of the consideration to be paid by the plaintiff for the sale of the estate. The plaintiff in his evidence, both in examination-in-chief and under cross-examination, repeatedly maintained that the money was given by way of loan.

On the next date of trial, plaintiff's Counsel moved to amend the plaint by deleting all references to the claim for interest and adding that, in the alternative, the plaintiff claimed the sum of money on the basis that, if the money was paid as part consideration in respect of the purchase of the estate, the sale had not taken place, and that, therefore, the defendant was under an obligation to return it.

The application to amend was opposed, but after hearing counsel the Court made order allowing the application. This appeal was from that order.

Held : (1) That the power given to Court under section 93 of the Civil Procedure Code is limited to the "amendment" of pleadings. An "amendment" is the correction of an error, and, therefore, the power of the Court is limited to the correction of errors in pleadings, not the alteration thereof.

(2) That the suggested amendment was not the correction of an error in the pleadings, but the setting up of a new case which the plaintiff had himself repudiated in his evidence, and that it should, therefore, not have been allowed.

Cases referred to: *Wijewardene* v. *Lenora,* 60 N.L.R. 457 ; LVI C.L.W. 1.
Tildesley v. *Harper*, (1788) 10 Ch.D. 393; 2 Char. Pr. Cas. 87.
Clara Pede & Co. v. *Commercial Union Association,* 32 W.R. 263.
Bakers, Ltd. v. *Midway Building and Supplies, Ltd.*, (1958) 3 A. E.R. 540 ; (1958) 1 W.L.R. 1216
Re Trufort, Trafford v. *Blanc*, 53 L.T.(N.S.) 498; 34 W.R. 56.
Clear v. *Clear*, (1958)1 W.L.R. 467 ; (1958) 2 A.E.R. 353
Sharp v. *Wakefield*, (1891) A.C. 173.
Wickins v. *Wickins*, (1918).P. 265
Blunt v. *Blunt*, 1943 A. C. 517 ; (1943) 2 A.E.R. 76.
Seneviratne v. *Candappa*, (1917) 20 N.L.R. 60.

Per BASNAYAKE, C.J.—(*A*) "The Court may not exercise that power before the hearing or after final judgment. The words 'at any time' in the context mean at any time after the hearing and not at any time before the hearing. That power is conferred on the Court for the reason that it is only at the hearing or at any time thereafter that the Court would be in a position to decide whether having regard to the evidence there should be an amendment of the pleadings."

(*B*) As the power is limited to the correction of errors, it follows then that the Court has no power to make alterations—

(*a*) which set up a new case,
(*b*) which have the effect of converting an action of one character into an action of another character,
(*c*) which have the effect of taking the action out of the provisions governing the limitation of actions in the Prescription Ordinance or any other enactment or law,
(*d*) which have the effect of the addition of a new cause of action,
(*e*) which have the effect of prejudicing the rights of the other side existing at the date of the proposed amendment, and
(*f*) which have the effect of changing the substance of the action.

(*C*) "Sections 21, 38, 46 (2) and 93 of the Civil Procedure Code provide for amendment of the plaint in each of the cases specified in those sections. Except in section 93, the burden of making the amendment is imposed on the plaintiff."

H. V. Perera, Q.C., with *E. A. G. de Silva* and *Maureen Seneviratne,* for the defendant-appellant.

H. W. Jayewardene, Q.C., with *N. R. M. Daluwatte*, for the plaintiff-respondent.

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BASNAYAKE, C.J.

The only question that arises for decision on this appeal is whether the learned District Judge was wrong in allowing the application of the plaintiff's counsel to amend the plaint in terms of the motion dated, 20th August, 1959.

Briefly the facts are as follows :—The plaintiff was clerk of Gondennawa Estate and a business-man who was engaged in several kinds of business such as dealing in estate lands, running cinemas, buying green tea leaf, and lending money on cheques, chits, promissory notes and bonds. He also owned a tea factory which manufactured bought tea leaf. He had known the defendant for a long time and had lent money to him since 1947. On 25th January, 1958, the plaintiff entered into a notarial agreement with the defendant to buy an estate called Hyndford Estate, 377 acres in extent, for a sum of Rs. 538,000/- of which a sum of Rs. 52,500/- was paid by the vendee by way of deposit before the execution of the agreement. The deposit was to be retained by the vendor as liquidated damages if the vendee failed to observe the terms of the agreement or complete the purchase.

On 26th August, 1958, the plaintiff instituted the present action in which he sought to recover from the defendant a sum of Rs. 15,000/- which the plaintiff alleged he had loaned to the defendant. Apart from the plea of jurisdiction the plaint consisted of the prayer and the following two paragraphs :—

" 2. The defendant on the days and dates appearing in the account particulars appended herewith borrowed moneys from the plaintiff and the plaintiff lent and advanced to the defendant monies at his request and for his use.

" 3. No part of the said sum has been paid by the defendant and there is now due and owing to plaintiff upon the said transaction from the defendant a sum of Rs. 15,000/- on account of principal and Rs. 309.72 on account of legal interest together making the sum of Rs. 15,309.72 which sum the defendant has failed and neglected to pay plaintiff though thereto demanded.

" Wherefore the plaintiff prays for judgment against the defendant in the said sum of Rs. 15,309.72 together with further legal interest on Rs. 15,000/- from 10th day of August, 1958, till date of decree and thereafter legal interest on the aggregate amount till payment in full and costs of suit and for such other and further relief as to this Court shall seem meet. "

The " account particulars " referred to read—

	Principal	Legal Interest	Total
1958 February 27th by Cheque ..	5,000	114.59	5,114.59
1958 March 7th by Cheque ..	5,000	109.03	5,109.03
1958 April 9th by Cheque ..	5,000	56.10	5,056.10
	15,000	309.72	15,309.72

In the defendant's answer delivered on 20th January, 1959, he stated :—

" 2. The defendant denies the averments contained in paragraphs 2 and 3 of the plaint and puts the plaintiff to the strict proof thereof.

" Wherefore the defendant prays for dismissal of the plaintiff's action with costs and for such other and further relief as to this Court shall seem meet."

The trial commenced on 28th July, 1959. On that day the plaintiff's counsel suggested the following issues :—

" (1) Did the plaintiff lend and advance to the defendant the several sums of money referred to in the account particulars filed with the plaint ?

" (2) Has the defendant repaid to the plaintiff the said sum of money or any part thereof ?

" (3) If not, what sum of money is the defendant liable to pay to the plaintiff ? "

Learned counsel for the defendant objected to issue (1). In doing so he submitted that the issue

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should be recast in terms of paragraph 2 of the plaint. The learned District Judge's minute of the further submissions made by counsel is as follows :—

" . . . he does not deny the receiving of the money ; what is denied is the borrowing, and that the money was lent and advanced. Making further submissions Mr. Thiagalingam states that in the other case dealt with by the Court this morning, M.R. 7430, there was an agreement to purchase a particular estate, and these monies, which form the subject-matter of this action, were given by the plaintiff to the defendant towards the payment of the consideration ; he suggests instead of issue (1) the following :—

(1) Did the defendant borrow from the plaintiff and the plaintiff lend and advance to the defendant the sums of money referred to in the account particulars in the schedule to the plaint ?

Mr. Thiagalingam moves that it be recorded that if the plaintiff claims to recover this money on some other ground, he has several other defences to it."

Plaintiff's counsel agreed to the issue suggested by the defendant's counsel and the trial proceeded.

The defendant while admitting the receipt of Rs. 15,000/- in three equal instalments denied that it was a loan but claimed that it was an advance towards the purchase of Hyndford Estate.

The plaintiff denied this claim categorically and maintained over and over again in the course of his examination-in-chief and cross-examination that the sum he claimed was a loan. The cross-examination was directed to show that the plaintiff's claim that the transaction was a loan was untrue and that, in fact, it was a case of money given as an advance towards the purchase of Hyndford Estate. These are some of the questions and answers in the cross-examination—

Q. So all the three sums of Rs. 5,000/- were made on the same basis ?

A. As a loan basis.

Q. And you know as far as the defendant was concerned, he received it not as a loan but as an advance ?

A. No, I still say it was a loan ; I understand that it was to be deducted from the consideration payable on Hyndford Estate.

Q. I am telling you now that the defendant's position is that this is not a loan but an advance against the purchase price of Hyndford Estate ; do you accept that or not ?

A. I don't accept it.

Q. You say what the defendant says is false ?

A. Yes.

Q. When the defendant says that it was an advance on Hyndford Estate, it is false ?

A. Yes.

Q. According to you, what was, in fact, the transaction ?

A. All three were loan transactions.

On 28th July, 1959, while the plaintiff was still under cross-examination the trial was adjourned to 21st September. On that date, more than a year after the plaint was filed, plaintiff's counsel moved that the plaint be amended in terms of the motion filed on 20th August, 1959—

" By the deletion of the following words from paragraph 3 :—' on account of the principal and Rs. 309.72 on account of legal interest together making the sum of Rs. 15,309.72 '.

2. By adding after paragraph 3 the following new paragraphs :—

' 4. In the alternative the plaintiff states that on or about the 25th January, 1958, the plaintiff and the defendant entered into an agreement No. 593 attested by M. A. Van Rooyen, Notary Public, whereby the defendant agreed to sell and the plaintiff agreed to purchase certain allotment of land comprising Hyndford Estate for the sum of Rs. 538,000/- of which on the said date the plaintiff paid to the defendant and the defendant acknowledged receipt of a sum of Rs. 52,500/- as an advance and deposit.

5. Thereafter, the defendant, who had been sued in case No. 1617 of this Court, sitting at Gampola, for ejectment from a property of the United Planters Company on which he had trespassed, appealed to the plaintiff on several occasions to advance him moneys to enable him to meet his commitments in connection with the said case, the protracted trial of which was continued for

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over thirty days before the defendant was ultimately ejected.

6. The plaintiff accordingly advanced to the defendant the sums of money referred to in the account particulars filed herewith on the understanding that the plaintiff would be given credit for the said amounts in the event of the sale of Hyndford Estate taking place or in the event of it not taking place the defendant would repay the said amounts to the plaintiff on demand.

7. The plaintiff states that the said sale of Hyndford Estate did not take place and he accordingly demanded the return of the said sum of Rs. 15,000/- and the sum of Rs. 52,500/- referred to above which the defendant refused to pay. The plaintiff has sued the defendant in case No. M.R. 7430 of this Court for the repayment of the said sum of Rs. 52,500/-.

8. The plaintiff states that he has paid the said sum of Rs. 15,000/- to the defendant, who has received the same for his own use and benefit and is now under an obligation to refund the same to the plaintiff but though thereto often demanded the defendant has failed and neglected to pay the said sum or any part thereof.

9. A cause of action has therefore accrued to the plaintiff to sue the defendant for the recovery of the said sum of Rs. 15,000/- together with legal interest thereon from date of decree till date of payment in full.'

3. By amending the prayer by the substitution for Rs. 15,309.72 ' Rs. 15,000/- '.

4. By deleting the last column *re* interest, and 'Total Rs. 15,309.72' in the account particulars."

The plaintiff's counsel maintained that the transaction was a money lending transaction and that the loan had to be repaid if the purchase of Hyndford Estate which the defendant had on 5th January agreed to sell to the plaintiff for a sum of Rs. 538,000/- was not completed. If it was completed on or before 30th April, 1958, the defendant was entitled to retain the money and the amount to be paid in cash as the purchase price was to be reduced by that amount. He asked that he be given an opportunity of amending his plaint so that he may take up the alternative position that the sum of Rs. 15,000/- having been received by the defendant, the plaintiff is entitled in any event to recover it regardless of whether it was a loan or an advance against the purchase of Hyndford Estate. He wanted, he said, to plead an alternative position in the event of it being established that there was no loan. The application was opposed on the following grounds :—

(*a*) That the application to amend was *mala fide*.

(*b*) That it sought to introduce two new causes of action by way of alternative grounds.

(*c*) That the amendments which were asked for were not in accord with the principles enunciated in the case of *Wijewardene* v. *Lenora*, (60 N.L.R. 457).

After hearing counsel the learned District Judge made order granting the plaintiff's prayer that the plaint be amended on the lines set out in the application. This appeal is from that order.

Sections 21, 38, 46 (2) and 93 of the Civil Procedure Code provide for amendment of the plaint in each of the cases specified in those sections. Except in section 93 the burden of making the amendment is imposed on the plaintiff. In that section the power to amend is conferred on the Court. It reads :

> "At any hearing of the action, or any time in the presence of, or after reasonable notice to, all the parties to the action before final judgment, the Court shall have full power of amending in its discretion, and upon such terms as to costs and postponement of day for filing answer or replication, or for hearing of cause, or otherwise, as it may think fit, all pleadings and processes in the action, by way of addition or of alteration, or of omission. And the amendments or additions shall be clearly written on the face of the pleading or process affected by the order ; or if this cannot conveniently be

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done, a fair draft of the document as altered shall be appended to the document intended to be amended, and every such amendment or alteration shall be initialled by the Judge."

The Court may not exercise that power before the hearing or after final judgment. The words "at any time" in the context mean at any time after the hearing and not at any time before the hearing. That power is conferred on the Court for the reason that it is only at the hearing or at any time thereafter that the Court would be in a position to decide whether having regard to the evidence there should be an amendment of the pleadings. The power conferred on the Court is the limited power of amendment. The word "amend" means in legal procedure—

"An amelioration of the thing without involving the idea of any change in the substance or essence."

"The alteration of a pleading, writ, petition or the like, to make it accord with the facts of the case or with the rules of practice." (*Sweet's Law Dictionary*).

"The correction of an error committed in any process, pleading, or proceeding at law or in equity." (*Black's Law Dictionary*).

"A correction of any errors in the writ or pleadings in actions, suits, or prosecutions." (*Wharton's Law Lexicon*).

"The correction of some error or omission, or the curing of some defect, in Judicial proceedings." (*Byrne's Law Dictionary*).

The concept that an amendment is the correction of an error runs through all the definitions cited above and the definitions in the recognised English dictionaries, such as the Oxford English Dictionary, Standard Dictionary, and Webster's New International Dictionary. The Court's power is, therefore, limited to the correction of errors in pleadings. If there is no error, then the Court cannot act under section 93. The words "by way of addition, or of alteration, or of omission" suggest that errors of both commission and omission are contemplated. As the power is limited to the correction of errors, it follows then that the Court has no power to make alterations—

(*a*) which set up a new case,

(*b*) which have the effect of converting an action of one character into an action of another character,

(*c*) which have the effect of taking the action out of the provisions governing the limitation of actions in the Prescription Ordinance or any other enactment or law,

(*d*) which have the effect of the addition of a new cause of action,

(*e*) which have the effect of prejudicing the rights of the other side existing at the date of the proposed amendment, and

(*f*) which have the effect of changing the substance or essence of the action.

In England elaborate rules provide not only for the amendment but also for the alteration of pleadings. They also provide for a variety of cases for which no provision is made in our Code. They are to be found at pages 621 to 650 of the 1963 *White Book* and are as follows :—

"1. The Court or a Judge may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings, in such manner and on such terms as may be just and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.

2. The plaintiff may, without any leave, amend his statement of claim, whether indorsed on the writ or not, once at any time before the expiration of the time limited for reply and before replying, or, where no defence is delivered, at any time before the expiration of four weeks from the appearance of the defendant who shall have last appeared.

3. A defendant who has set up any counter claim or set-off may, without any leave, amend such counter-claim or set-off at any time before the expiration of the time allowed him for answering the reply, and before such answer, or in case there be no reply, then at any time before the expiration of twenty-eight days from defence.

4. Where any party has amended his pleading under either of the last two preceding Rules, the opposite party may, within eight days after the delivery to him

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of the amended pleading, apply to the Court or a Judge to disallow the amendment, or any part thereof, and the Court or Judge may, if satisfied that the justice of the case requires it, disallow the same, or allow it subject to such terms as to costs or otherwise as may be just.

5. Where any party has amended his pleading under Rule 2 or 3, the opposite party shall plead to the amended pleading, or amend his pleading, within the time he then has to plead or within eight days from the delivery of the amendment whichever shall last expire; and in case the opposite party has pleaded before the delivery of the amendment, and does not plead again or amend within the time above mentioned, he shall be deemed to rely on his original pleading in answer to such amendment.

6. In all cases not provided for by the preceding Rules of this Order, application for leave to amend may be made by either party to the Court or a Judge, or to the Judge at the trial of the action, and such amendment may be allowed upon such terms as to costs or otherwise as may be just.

7. If a party who has obtained an order for leave to amend does not amend accordingly within the time limited for that purpose by the order, or if no time is thereby limited, then within fourteen days from the date of the order, such order to amend shall, on the expiration of such limited time as aforesaid, or of such fourteen days, as the case may be, become *ipso facto*, void, unless the time is extended by the Court or a Judge.

8. An indorsement or pleading may be amended by written alterations in the copy which has been delivered, and by additions on paper to be interleaved therewith if necessary, unless the amendments require the insertion of more than 144 words in any one place, or are so numerous or of such a nature that the making them in writing would render the document difficult or inconvenient to read, in either of which cases the amendment must be made by delivering a print of the document as amended.

9. Whenever any indorsement or pleading is amended, the same when amended shall be marked with the date of the order, if any, under which the same is so amended and of the day on which such amendment is made, in manner following, viz.: 'Amended . . . day of . . ., pursuant to order of . . . dated the . . .'

10. Whenever any indorsement or pleading is amended, such amended document shall be delivered to the opposite party within the time allowed for amending the same.

11. Clerical mistakes in judgments or orders, or errors, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court or a Judge on motion or summons without an appeal.

12. The Court or a Judge may at any time, and on such terms as to costs or otherwise as the Court or Judge may think just, amend any defect or error in any proceedings, and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceedings."

I have reproduced above all the rules in the *White Book* in order to show how elaborate they are and to show that they provide for a number of cases not provided for in our section 93. The rule nearest to that section is rule 12; but it is wider in—

(*a*) that it permits the Judge to amend at any time and not only at the hearing or at any time thereafter;

(*b*) that it expressly empowers the Judge to make all amendments necessary for the purpose of determining the real question or issue raised by or depending on the proceedings.

When seeking the aid of English decisions for the solution of questions arising under section 93 of the Code, it is well to examine the specific rule or provision of law which the particular decision whose aid is invoked seeks to interpret or give effect to. A decision given under one rule should not be taken as applying to all cases or to cases which do not fall within the ambit of the particular rule considered in the case. With great respect to the eminent Judges of this Court, who adopted the pronouncements of English Judges on the English Orders and Rules as applying to section 93 of our Code, it seems to me that in doing so they have overlooked the fact that there are material differences between that section and the English Orders and Rules. The learned District Judge has also been guided by English decisions which he has regarded as binding on him without a careful examination of the particular rule considered in each of those cases. The cases referred to in the judgment are *Tildesley* v. *Harper*, (1878) 10 Ch.D. 393, at 396); *Clara Pede & Co.* v. *Commercial Union Association*, (32 W.R. 263); and *Bakers, Ltd.* v. *Midway Building and Supplies, Ltd.*, (1958) 3 All. E.R. 540). All these are cases

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discussed under Order 28 *r.* 1 in the *White Book.* Of these I have not been able to refer to the volume of the report, (32 W.R. 263), in which *Clara Pede & Co's.* case is reported as it is not available in any of the libraries to which I have access. The case of *Tildesley* v. *Harper* (*supra*) a case decided in 1878 deals with Order XIX *rr.* 17 and 22. They are not reproduced in the report, but the observations of the Lords Justices seem to indicate that what was being permitted is he correction of an error in the pleadings. Bramwell, L.J., said :—

> " . . . I confess that if the present case had come before me I should have had some doubt whether the defendant had made a *bona fide* mistake, as the mistake is so very obvious. I should probably have required some affidavit or statement by the solicitor to shew that the slip in the pleading was a *bona fide* one, and if satisfied on the point, I should not have refused leave to amend."

The words of Thesiger, L.J., are to the same effect. They are—

> " . . . The object of these rules is to obtain a correct issue between the parties, and when an error has been made it is not intended that the party making the mistake should be mulcted in the loss of the trial."

It would appear from the words I have quoted above that the words of Bramwell, L.J., quoted by the learned District Judge, " My practice has always been to give leave to amend ", refer to correction of *bona fide* mistakes or slips. The case of *Bakers, Ltd.* v. *Midway Building and Supplies, Ltd.* (*supra*) is a decision in 1958 under Order 28 *r.* 1 and Order 58 *r.* 3 (2). The trial Judge refused the defendant leave to amend, and in appeal leave was granted on the ground that the statement of claim did not show that the plaintiff's claim was to be put on the ground of personal liability in equity as distinct from tracing trust money, and the refusal of leave to the defendants to amend by pleading that they were purchasers for value without notice would deprive them of what would possibly be their only effective defence to a claim so put. The following words of Jenkins, L.J., indicate the basis on which leave was granted :—

> " It is, no doubt, true that the function of a statement of claim is to plead the facts on which the plaintiff relies and that he is not strictly obliged to plead law, but here it does seem to me that any person of ordinary experience reading the statement of claim would consider that the matters in issue were confined to those which I have described and would not appreciate that on this pleading it was intended not merely to make out a claim of tracing in the old and restricted form, but also to rely on the personal liability in equity which was held to exist in *Ministry of Health* v. *Simpson*, (1950) 2 All. E.R. 1137 . . ."

The decisions referred to above, which interpret the scope and meaning of Order 28 *r.* 1, afford no authority for interpreting and determining in the same way the scope of section 93 which is quite a different provision meant to serve a different purpose.

In *Wijewardene's* case I myself referred to *Tildesley* v. *Harper* (*supra*) and certain other English decisions [*Re Trufort : Trafford* v. *Blanc*, 53 L.T. (N.S.) 498 ; *Clear* v. *Clear*, (1958) 1 W.L.R. 467 ; *Sharp* v. *Wakefield*, (1891) A.C. 173, at 179 ; *Wickins* v. *Wickins*, (1918) P. 265, at 272 ; and *Blunt* v. *Blunt*, (1943) A.C. 517, at 525]. But they were all cited in connexion with the discussion of the meaning and effect of the words " as it may think fit ", in section 93 and " it thinks fit " in section 211, and the principles governing the exercise of the discretionary power vested in the Court by those words and not in connexion with the scope of the power to amend ; because in that case the plaintiff sought to supply an omission in his pleading by specifying the names of the persons to whom the alleged defamatory words were spoken. The power to amend was not disputed, but the question was whether the discretion had been properly exercised. The following observations in that case bring out the aspect of the section considered therein—

> " It would be unsafe to lay down any rules as to the limits of the exercise of the discretion vested in the Judge by that section. Nevertheless pronouncements of this Court and of the Superior Courts in England afford some guidance in its exercise. It has been stated by this Court, *Seneviratne* v. *Candappa*, (1917) 20 N.L.R. at 61, quoting with approval the observations of Brett, M.R., in *Clara Pede* v. *Commercial Union Association* (32 W.R. 263), that amendment should be allowed if it can be made without injustice to the other side, however negligent or careless may have been the first omission, and however late the proposed amendment."

My words seek to underline the fact that even where there is a negligent or careless omission, mistake, slip or defect, the discretion cannot be exercised if its exercise will cause injustice to the other side ; but where its exercise does not cause injustice to the other side the fact that the omission or error is due to negligence or carelessness

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however gross does not prevent the Judge from exercising it even though the occasion for its exercise arises at a very late stage of the proceedings. It is important to remember that a condition precedent to the exercise of the Judge's discretion is the existence or disclosure of a mistake, defect, slip or omission in the pleadings.

In recent times there appears to have grown a practice of the respective parties repeatedly altering their pleadings under the guise of amendment as if they have an unlimited right to alter their pleadings as and when they think fit to do so. Judges of first instance appear to ignore the provisions of the Code and act as if Order 28 of the English Rules and Orders and all the rules under it were in force here and the parties themselves had the right to *alter* pleadings and not as if the power was one of *amendment* only and not *alteration* conferred on the Judge alone. This tendency must be arrested and Judges both of appellate and original jurisdiction have to be on their guard against the adoption of the pronouncements of the English Courts without a close scrutiny of he provisions of law and the facts and circumsttances in regard to which they are made.

The amendment that was sought in the instant case is not for the purpose of correcting any mistake, defect, slip or omission, because the plaintiff has repeatedly asserted both in examination-in-chief and cross-examination that the money he claimed was a loan which is the very assertion he makes in his plaint. The plaintiff's counsel seeks to bring into the pleadings a case which the plaintiff himself has repeatedly and emphatically repudiated in his evidence. The amendment is designed to meet a situation which may arise if the defendant succeeds in establishing the version of the facts outlined by his counsel. The Court was wrong in allowing the plaintiff's application.

We, therefore, allow the appeal with costs, both of appeal and the contest in regard to the amendment, set aside the order of the District Judge allowing the amendment, and direct that the record be sent back in order that the trial of the action may proceed.

ABEYESUNDERE, J.
I agree.

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

Appeal allowed.

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

ABEYWICKREMA vs. KARUNARATNE

S.C. 72/'61—*Court of Requests, Colombo*, 75160 (*Rent and Ejectment*).

Argued and decided on : November 8, 1962.

Landlord and tenant—Notice to quit premises on last day of month—Is this a calendar-month's notice—Validity of such notice.

According to the tenancy agreement in the present case, the tenancy had commenced on the 1st May, 1953. The landlord (plaintiff) had given his tenant (defendant) notice on 13th October, 1959 to quit the premises on the 30th November, 1959. He thereafter filed action to eject the tenant.

Held : That there had been no valid notice to quit, inasmuch as the landlord would have been entitled to take delivery of possession of the premises not on the 30th November but only on the 1st December. The plaintiff's action should, therefore, be dismissed.

N. S. A. Goonetilleke, for the defendant-appellant.

M. M. Kumarakulasingham, for the plaintiff-respondent.

SRI SKANDA RAJAH, J.

Two points have been raised in this case—one is the question of sufficiency of notice, and the other is whether the plaintiff can sue after habitually accepting rents some months after they became due. It is not necessary to decide the second question in view of my finding regarding the first.

*For the Sinhala translation, see Sinhala section, Vol. 5, part 1, p. 4

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The actual notice to quit has not been produced. All that can be gathered is what is stated in paragraph 3 of the plaint, which runs thus : " The plaintiff abovenamed on the 13th day of October, 1959, gave due notice to the defendant to quit and deliver peaceful possession of the said premises on the 30th day of November, 1959 . . ." It would be seen from P 1, the tenancy agreement, that the tenancy started on the 1st of May, 1953. The plaintiff, therefore, would have been entitled to take delivery of possession of the premises only on the 1st of December, 1959, but he wanted delivery ot possession on the 30th of November, 1959, which would not amount to a calendar month's notice.

I, therefore, allow the appeal, set aside the judgment of the lower Court and dismiss the plaintiff's action with costs. The defendant to have costs of this appeal.

Appeal allowed.

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

MANSOOR *vs.* MINISTER OF DEFENCE AND EXTERNAL AFFAIRS & ANOTHER

In the Matter of an Application for the issue of a Mandate in the nature of a Writ of Certiorari and for the issue of a Mandate in the nature of a Writ of Mandamus under Section 42 *of the Courts Ordinance, Cap.* 6.

Application No. 349 *of* 1962.

Argued and decided on : 29th January, 1963.

Writ of Certiorari and Mandamus, application for—Affidavit filed by Crown-respondent—Application for permission by petitioner's counsel to cross-examine person who has sworn affidavit—Should such application be allowed.

Held : That according to English practice it is very seldom that a person who has sworn an affidavit in writ proceedings is allowed to be cross-examined on the affidavit. However, such cross-examination may be allowed in special circumstances.

Case referred to : *R.* v. *Stokesley, Yorkshire, Justices. Ex parte Bartram*, (1956) 1 W.L.R. 254; (1956) 1 A.E.R. 563

M. Tiruchelvam, Q.C., with *V. Kumarasamy* for the petitioner.

H. Deheragoda, Crown Counsel, for the 1st and 2nd respondents.

SRI SKANDA RAJAH, J.

In this matter the learned counsel for the petitioner asks that Mr. K. T. Perera who has sworn certain affidavits be tendered for cross-examination on the affidavits. He alleges that his instructions are that these affidavits contain false averments and that the averment that he sent the papers to the Prime Minister is not true.

According to English practice, very seldom a person who has sworn an affidavit in writ proceedings is allowed to be cross-examined on the affidavit. In the case of *Regina* v. *Stokesley, Yorkshire, Justices. Ex parte Bartram*, Chief Justice Goddard said, " This is probably the first case in recent history in which application has been made in Crown proceedings for leave to cross-examine on affidavits. Leave has never been given, or, at least, not for a great number of years. In *Rex* v. *Kent Justices, Ex parte Smith*, Hewart, C.J., sitting with Avory and Shearman, JJ., said, ' For something like fifty or sixty years no order had been made on the Crown side for the cross-examination of a deponent. It was enough to add that such an order was not likely to be made except in very special circumstances, and that no such special circumstances had been shown in the present case' " (*The Weekly Law Reports*, Vol. 1, 1956—page 254, at 257). Lord Goddard allowed leave to cross-examine and at the conclusion of the judgment he said at page 258, " We allowed cross-examination in this case because this is a case of a remarkable character ". In my opinion the present case is also of a remarkable character for the reason that in this application it has been alleged that the papers never went to the Minister concerned, namely, the Minister of Defence and External Affairs. There is no affidavit from the Minister. I consider this an extraordinary circumstance and allow the application for cross-examination of K. T. Perera on the affidavit.

Application to cross-examine allowed.

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Present : **Abeyesundere, J.**

PUPALASINGHAM *vs.* SWAN (Excise Inspector, Mannar)*

S.C. 636/'62—*M.C. Mannar*, 19232.
(*Accused in gaol*).

Argued and decided on : 13th August, 1962.

Children and Young Persons Ordinance (*Cap.* 23), *sections* 28 (1), 35—*Young person convicted of an Excise offence by Magistrate—Order placing young person under supervision of a Probation Officer —Who can make such order—Circumstances under which such an order may be made.*

Held : (1) That it is only a Magistrate's Court sitting as a Juvenile Court that can make an order under section 35 (1) (*d*) of the Children and Young Persons Ordinance placing a child or a young person under the supervision of a Probation Officer.

(2) That such an order can be made only where the child or young person is brought before the Court by any officer of a local authority, or by any police officer or " authorised person. "

Accused-appellant in person.

P. Naguleswaram, Crown Counsel, for the Attorney-General.

ABEYESUNDERE, J.

In this case the accused-appellant was convicted of an offence under the Excise Ordinance after he pleaded guilty. He has no right of appeal except on a point of law. In paragraph (4) (*c*) of his petition he alleges that " proceedings were not initiated in the Juvenile Court of Mannar but instead in the Magistrate's Court of Mannar ". I find that this point of law can be sustained in regard to one of the two orders made in this case under the Children and Young Persons Ordinance. I, therefore, entertain the petition of appeal.

The learned Magistrate convicted the accused-appellant and imposed a fine of Rs. 200 which he ordered, under section 28 (1) of the Children and Young Persons Ordinance, to be paid by the accused-appellant's father. That section is applicable to any Court before which a child or young person is charged with an offence punishable in the case of an adult with a fine. According to section 88 of the aforesaid Ordinance, " child " means a person under the age of 14 years and " young person " means a person who has attained the age of 14 years and is under the age of 16 years. On a reference to the record of this case I find that the Probation Officer's report dated 25th March, 1958, states that the accused-appellant is 13 years old having been born on 22nd September, 1945. The learned Magistrate appears to have been satisfied from this statement of the Probation Officer that the accused-appellant was at the time of his conviction a child within the meaning of the Children and Young Persons Ordinance. I affirm the conviction of the accused-appellant and the sentence in respect of the offence under the Excise Ordinance and the order made by the learned Magistrate under section 28 (1) of the Children and Young Persons Ordinance.

There is also an order made by the learned Magistrate on 28th March, 1958, under section 35 (1) (*d*) of the Children and Young Persons Ordinance placing the accused-appellant under the supervision of a probation officer. The record of this case does not show that when the learned Magistrate made that order his Court was sitting as a Juvenile Court. It is only a Magistrate's Court sitting as a Juvenile Court that can make such an order. Further such an order can be made only where the child or young person is brought before the Court by any officer of a local authority, or by any police officer or authorized person. The accused-appellant was brought before the Court by an Excise Inspector. There was no evidence that the Excise Inspector was an " authorized person " as defined in section 35 (3) of the Children and Young Persons Ordinance. I set aside the order made by the learned Magistrate on 28th March, 1958, placing the accused-appellant under the supervision of a probation officer under section 35 (1) (*d*) of the aforesaid Ordinance, and I also set aside the accused-appellant's conviction and the sentence to pay a fine of Rs. 175/- passed on him on 5th May, 1962, on the ground that he was convicted of an offence in another case while the order placing him under the supervision of a probation officer was in force.

Partly set aside.

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

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IN THE COURT OF CRIMINAL APPEAL

Present : **Basnayake, C.J. (President), Tambiah, J., Herat, J., Abeyesundere, J., and G. P. A. Silva, J.**

THE QUEEN *vs.* MURUGAN RAMASAMY *alias* BABUN RAMASAMY

Appeal No. 2 *of* 1962 *with Application No.* 2 *of* 1962—*S.C.* 14/61, *M.C. Gampola, No.* 3082.

Argued on : November 1, 2, 5, 6, 7, 8, 19, 20 and 21, 1962.
Decided on : December 17, 1962.

Evidence Ordinance, sections 25, 26, 27, 59 *and* 91—*Criminal Procedure Code, section* 122 (3)—*Attempt to murder by shooting—Conviction—Evidence of statement made by appellant to Police in consequence of which gun was discovered—Such statement recorded during inquiry under Chapter* XII *of Criminal Procedure Code—Admissibility—Whether admission led to miscarriage of justice.*

This was an appeal by the accused from a conviction for attempted murder by shooting with a gun.

The prosecution, in addition to certain contradictory evidence of eye-witnesses, led the evidence of a Police Sergeant who stated—

(1) that the accused volunteered to make a statement ;

(2) that in the course of the statement the accused said that he was prepared to point out the place where the gun and the cartridges were buried ;

(3) that he and the accused went to the spot which was pointed out by the accused, and there on the accused unearthing some rubbish he discovered the gun broken into three parts and wrapped in a gunny bag, and a cloth bag containing 12-bore cartridges ;

(4) that he did not assemble the gun but on examination found that it smelt " fouling " and showed signs of recent firing.

The Sergeant repudiated the suggestions of cross-examining counsel that the accused did not volunteer any of the statements or do any of the acts referred to above.

It was contended on behalf of the appellant that even if the statement " I am prepared to point out the place where the gun and the cartridges are buried " had been made by him, its reception in evidence was illegal for the following reasons—

(*a*) That statement being a statement made to a police officer in the course of an inquiry under Chapter XII of the Criminal Procedure Code, cannot be used otherwise than to contradict him or to refresh the memory of the person recording it.

(*b*) That where a fact is deposed to in a statement made in the course of an inquiry under Chapter XII aforesaid section 27 of the Evidence Ordinance affords no authority for proving that statement.

(*c*) That statements containing information in consequence of which a fact is deposed to as discovered may not be proved in the following cases :—

(i) where the statement is made in the course of an inquiry under Chapter XII aforesaid ; and

(ii) where the statement, not being one falling under (*a*) above, is a confession to a police officer.

(*d*) That in the instant case no fact was either discovered or deposed to as discovered in consequence of the information received from the appellant and that the statement did not come within the ambit of section 27 of the, Evidence Ordinance.

Held : (1) That the statement "I am prepared to point out the place where the gun and the cartridges are buried", came within the prohibition in section 122 (3) of the Criminal Procedure Code and should not have been admitted in evidence.

(2) That the rules of interpretation preclude the reading of section 27 of the Evidence Ordinance with the exceptions created by the words used in section 122 (3) of the Criminal Procedure Code.

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(3) That the result of the decision in *Regina* v. *Buddharakkita Thera and others* (63 N.L.R. 433) is that section 122 (3) of the Criminal Procedure Code extends to both oral and written statements made in the course of an inquiry under Chapter XII and, therefore, the oral statement made to a police officer could not be proved under section 27 of the Evidence Ordinance.

(4) That in view of sections 59 and 91 of the Evidence Ordinance, statements made in the course of an inquiry under Chapter XII can only be proved by documentary evidence and not by oral evidence.

(5) That the case of *Rex* v. *Jinadasa* (51 N.L.R. 529) should no longer be regarded as binding.

(6) That, if any passage in the judgment in *The Queen* v. *O. A. Jinadasa* (59 C.L.W. 97) is in conflict with the instant case, that case should, to that extent, be regarded as over-ruled.

(7) That as the material before the Court disclosed that a substantial miscarriage of justice had occurred, the conviction should be quashed and the appellant acquitted.

Per Curiam—" As the question whether in our Evidence Ordinance too, section 27 should be read as an exception to section 26 alone or to sections 25 and 26 does not arise for decision in this case, we refrain from expressing our opinion on that question, although the matter was argued at length on both sides."

Cases referred to : *R.* v. *Jinadasa*, 51 N.L.R. 529.
The Queen v. *O. A. Jinadasa*, LIX C.L.W. 97.
Regina v. *Buddharakkhita Thero and Others*, 63 N.L.R. 433.
Narayana Swami v. *Emperor*, 1939 A.I.R. (P.C.) 47
State of Uttar Pradesh v. *Doeman*, (1960) A.I.R. (Supreme Court) 1125
Kottaya v. *Emperor*, (1947) A.I.R. (P.C.) 67.
Nazir Ahamad v. *King Emperor*, (1936) A.I.R. (P. C.) 253

Colvin R. de Silva with *T. W. Rajaratnam*, *S. S. Basnayake*, *S. C. Crossette-Thambiah*, *R. Weerakoon*, and *K. Viknarajah* (*Assigned*), for the accused-appellant.

A. C. Alles, *Solicitor-General*, with *V. S. A. Pullenayagam*, *Crown Counsel*, *H. L. de Silva*, *Crown Counsel*, and *V. C. Gunatillake*, *Crown Counsel*, for the Attorney-General.

Basnayake, C.J.

The appellant, Murugan Ramasamy *alias* Babun Ramasamy, was indicted on a charge of attempted murder of one Kammalawattegedera Piyadasa by shooting him with a gun on 1st September, 1960. A unanimous verdict of guilty was returned by the jury and the appellant was sentenced to undergo ten years' rigorous imprisonment. This appeal is against that conviction.

The main ground of appeal urged by learned counsel for the appellant is that the judgment of the Court before which the appellant was convicted should be set aside on the ground that a statement made by the appellant to Police Sergeant Jayawardena had been illegally admitted in evidence.

Briefly the material facts are as follows :—Piyadasa, the injured man, was shot on 1st September at Monte Cristo Estate, Nawalapitiya. The estate had both Sinhala and Tamil labourers, a section of whom had gone on strike a few days before the shooting. The appellant belonged to the group that had gone on strike while the injured man and the prosecution witnesses, Heen Banda and Juwanis, belonged to the group that had not. The road to Nawalapitiya runs through the estate. The man or men who shot were in a place below the road whch was known as the " Wadiya ". Piyadasa, the injured man, was working along with the witnesses, Heen Banda, Juwanis and about 24 others, in a section of the estate above the road in field No. 25 in extent about 25 acres. The injured man and the witnesses claimed that they were engaged in weeding at the time the firing took place. This claim was challenged by the defence as the witnesses were unable to give a satisfactory account of what happened to their tools. The witnesses say that about

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10.30 a.m. the sound of some sort of commotion from the "wadiya" attracted their attention. When they looked in that direction they saw the appellant and two others named Muttiah and Sinniah. The appellant had a gun and the other two had stones in their hands. As the first shot was fired they took cover. The second shot injured Piyadasa in the region of the chest as he moved from one position to another. A diary in his breast pocket saved Piyadasa's life as the force of the slug which struck him was broken by it. The resulting injury is described by the doctor as a "lacerated wound skin deep about 1/4 in. long on the left side of the chest about the level of the sternum. There was an abrasion 1 in. long 1/2 in. wide around it." Piyadasa, Heen Banda and Juwanis who were called by the prosecution stated that it was the second shot that caused the injury and that it was the appellant who fired it ; but Heen Banda departed from that position in cross-examination. He said that he did not see any action on the part of the appellant when he heard either the second shot or the third shot.

Learned Counsel maintained that these witnesses did not see the assailant as they took cover after they heard the first shot, and that they were falsely implicating the appellant. They were all cross-examined at length on the question of identification. In support of his contention that they did not identify the assailant learned counsel pointed to the fact that Piyadasa's pocket diary (P4) contained under the date, 1st September, 1960, not the names of Muttiah and Sinniah, but those of Jayasena and Mendis. He also relied on Piyadasa's evidence which threw doubt on his claim that he identified his assailant. When asked why he wrote the names of Jayasena and Mendis, he said : "I wrote down the names of Jayasena and Mendis on the diary because another person who was next bed to me (*sic*) told me that out of the three persons whom I saw, two people, except for Ramasamy, must be Jayasena and Mendis, and not Muttiah and Sinniah". When asked further whether there was a discussion at the hospital in regard to the identity of those who shot, Piyadasa said :

> "At the time I was in the hospital there was a man injured by gun shots in the next bed. At the time Ramasamy shot me, Muttiah and Sinniah were with him. Then the man who was in the next bed said that he including others were shot by Jayasena and Mendis and then I thought that I must be making a mistake."

Piyadasa finally sought to get out of the difficulty in which he found himself by saying that because the man in the adjoining bed had no paper he wrote down in his diary the names of the persons who, he said, were his assailants. But he was unable to give any clue as to who this man in the adjoining bed was. He neither knew his name nor his whereabouts. He was also positive that he was not William, the man who died. The other point made against Piyadasa's testimony was that his statement to the Police was not made till 7 p.m. on the night of the shooting. The defence also made a point of the delay in recording the statements of Heen Banda and Juwanis.

In addition to the evidence of the three eyewitnesses the prosecution sought to prove a statement made by the appellant to Police Sergeant Jayawardena in the course of his inquiry under Chapter XII of the Criminal Procedure Code (hereinafter referred to as the Code), and the learned trial judge permitted Crown Counsel to elicit the following evidence from Sergeant Jayawardena :

> "839. *Q.* You told us yesterday that you took the accused into custody ?
>
> *A.* Yes.
>
> 840. *Q.* And you recorded his statement ?
>
> *A.* On his volunteering to make a statement I recorded his statement.
>
> 841. *Q.* Please refresh your memory from the note-book ; did you bring your note-book ?
>
> *A.* Yes.
>
> (Witness refreshes his memory from the note-book).
>
> 842. *Q.* Did the accused in the course of his statement tell you "I am prepared to point out the place where the gun and the cartridges are buried" ?
>
> *A.* Yes.

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843. *Q*. Thereafter did you and the accused go to a spot near line No. 6 ?
A. Yes.

844. *Q*. Were the gun and the cartridges discovered ?
A. Yes.

845. *Q*. Where were they discovered ?
A. I took the accused to line No. 6 and the accused pointed out a spot to me. He unearthed some rubbish and I discovered the gun broken into three parts and a cloth bag containing 12 cartridges—12-bore cartridges.

846. *Q*. Was the gun wrapped in anything ?
A. It was wrapped in a gunny sack.

847. *Q*. (Shown P2). Was this the gunny bag ?
A. Yes.

848· *Q*. It was produced in the lower Court marked P2 ?
A. Yes.

849. *Q*. You assembled the gun ?
A. I did not assemble the gun. I examined the barrel and there was fouling and there were signs of recent firing.

850. You smelt the barrel ?
A. Yes·

851. *Q*. It smelt fouling ?
A. Yes."

It was suggested to Sergeant Jayawardena in cross-examination that the appellant did not volunteer a statement nor say that he was prepared to point out the place where the gun and cartridges were buried. It was also suggested that he did not point out a spot or unearth some rubbish as deposed to by him. The Sergeant repudiated those suggestions.

It was contended on behalf of the appellant that even if the statement : " I am prepared to point out the place where the gun and the cartridges are buried " had been made by him, its reception in evidence was illegal. Learned Counsel rested his contention on the following grounds :

(*a*) The statement being a statement made to a police officer in the course of an inquiry under Chapter XII cannot be used otherwise than to prove that a witness made a different statement at a different time, or to refresh the memory of the person recording it.

(*b*) That even where a fact is deposed to in a statement made in the course of an inquiry under Chapter XII, section 27, of the Evidence Ordinance affords no authority for proving that statement.

(*c*) That statements containing information in consequence of which a fact is deposed to as discovered may not be proved in the following cases :—

(i) where the statement is made in the course of an inquiry under Chapter XII ; and

(ii) where the statement, not being one falling under (*a*) above, is a confession to a police officer.

(*d*) That in the instant case no fact was either discovered or deposed to as discovered in consequence of the information received from the appellant and that the statement did not come within the ambit of section 27.

Learned Solicitor-General contended that the gun was discovered in consequence of the information. He submitted that although the appellant dug up the heap of rubbish in the place where the gun was, it was Police Sergeant Jayawardena who discovered it. He also contended that section 122 (3) did not bar the proof of information, the proof of which was permitted by section 27. He relied on the decisions of this Court in ***Rex*** v. *Jinadasa*, (51 N.L.R. 529), ***The Queen*** v. ***O. A.*** *Jinadasa*, (59 C.L.W. 97), and ***Regina*** v. ***Mapitigama*** *Buddharakkita Thero and two others*, (63 N.L.R. 433).

The submissions of learned counsel for the appellant will now be discussed. As they are all inter-connected, they will be examined, as a whole. The most important of them is that the statement being one made to a police officer in the course of an inquiry under Chapter XII falls within the

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prohibition in section 122 (3) of the Code. We are of opinion that that submission is sound and we hold that the statement "I am prepared to point out the place where the gun and the cartridges are buried" comes within that prohibition and cannot be admitted in evidence. Certain provisions of law are expressly saved from the operation of section 122 (3) by the words :

> "Nothing in this sub-section shall be deemed to apply to any statement falling within the provisions of section 32 (1) of the Evidence Ordinance, or to prevent such statement being used as evidence in a charge under section 180 of the Penal Code."

The rules of interpretation will not countenance the reading of section 27 into the exception created by those words. Besides such a course cannot be adopted without violating such well-known maxims applicable to the interpretation of statutes as "*expressio unium est exclusio alterius*" (the express mention of one thing implies the exclusion of another), "*Quando aliquid probibetur, prohibetur et omne per quod devenitur ad illud*" (when anything is prohibited, everything relating to it is prohibited), and "*Quando aliquid prohibetur ex directo prohibetur et per obliquum*". (When anything is prohibited directly, it is also prohibited indirectly). Section 27 of the Evidence Ordinance should, therefore, be read as permitting the proof of only statements that do not fall within the prohibition in section 122 (3). In the case of *Buddharakkita* (*supra*) it was held that section 122 (3) extends to both oral and written statements made in the course of an inquiry under Chapter XII. The result of the decision in *Buddharakkita's* case is that the oral statement made to a police officer in the course of an inquiry under section 122 can no longer be proved under section 27. We are in entire agreement with that decision and we are unable to agree with the decision in *Rex* v. *Jinadasa* (*supra*) that although the written statement falls within the prohibition in section 122 (3) the oral statement does not, and may be proved under section 27 of the Evidence Ordinance. The learned Solicitor-General relied on the following passage in the judgment of *Buddharakkita's case* as approving *Rex* v. *Jinadasa* (*supra*) :

> ". . . no decision of the Supreme Court or of this Court has been cited to us in which it was argued and expressly decided that statements made by an accused person to an officer investigating a cognizable offence under Chapter XII may be proved contrary to the prohibition in section 122 (3) except in a case to which section 27 of the Evidence Ordinance applies."

We are unable to agree with his view of that passage. If the language lends itself to such an impression, we wish to make it clear that it should not be understood as implying that the Court held that a statement which cannot be used under section 122 (3) may be proved under section 27. Our decision in the instant case is in accord with that in *Buddharakkita's case*, and the decision in *Jinadasa's case* must not be regarded any longer as binding. It is convenient at this point to dispose of *The Queen* v. *O. A. Jinadasa* (*supra*), the other case on which the learned Solicitor-General relied. The questions that arise for decision here did not arise there, and if any passage in that judgment is in conflict with our decision in the instant case, that case should, to that extent, be regarded as over-ruled.

The opinion we have formed herein is consistent with the view taken by the Privy Council on the corresponding provisions of the Indian Evidence Act and Criminal Procedure Code. In *Narayana Swami* v. *Emperor*, (1939) A.I.R. (P.C.) 47, at 52, Lord Aitkin stated :

> "It is said that to give section 162 of the Code the construction contended for would be to repeal section 27, Evidence Act, for a statement giving rise to a discovery could not then be proved. It is obvious that the two sections can in some circumstances stand together. Section 162 is confined to statements made to a police officer in course of an investigation. Section 25 covers a confession made to a police officer before any investigation has begun or otherwise not in the course of an investigation. Section 27 seems to be intended to be a proviso to section 26 which includes any statement made by a person whilst in custody of the police and appears to apply to such statements to whomsoever made, *e.g.*, to a fellow-prisoner, a doctor or a visitor. Such statements are not covered by section 162 . . . The words of section 162 are in Their Lordships' view, plainly wide enough to exclude any confession made to a police officer in course of investigation whether a discovery is made or not."

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In India all controversy on this topic has been silenced by the addition of section 27 to the exceptions in section 162 which is the corresponding section of the Indian Code.

Where proof of statements made in the course of an inquiry under Chapter XII is permitted, they can only be proved by documentary evidence and not by oral evidence for the reasons that contents of documents cannot be proved by oral evidence (section 59 Evidence Ordinance), and that in all cases in which any matter is required by law to be reduced to the form of a document, no evidence may be given in proof of the terms of such matter except the document itself or secondary evidence where secondary evidence is admissible (section 91 Evidence Ordinance).

Learned Counsel for the appellant sought to place a further limitation on section 27. He argued that it did not apply at all to statements which amount to confessions made to a police officer. His reasoning was as follows : Section 25 bars proof, as against a person accused of an offence, of all confessions made to a police officer whilst in custody or not. Section 26 bars proof, as against the person making them, of all confessions made by him whilst in the custody of a police officer unless it be made in the immediate presence of a Magistrate. As section 25 bars all confessions made to a police officer whilst in custody or not, the only confession to which section 26 can apply are confessions made to persons other than police officers. Proof of statements made to a police officer in the course of an inquiry under Chapter XII of the Code, whether they are confessions or not, is barred by section 122 (3). Proof of all other confessions to a police officer is barred by section 25 of the Evidence Ordinance. As the effect of section 122 (3) of the Code and section 25 of the Evidence Ordinance is to bar the proof of confessions to a police officer regardless of the situation in which they are made, and as section 27 is not among the exceptions to section 122 (3), a confession to a police officer cannot be proved thereunder. The words of section 27 " in the custody of a police officer " are a pointer to the fact that section 26 and not 25 is contemplated therein. The further condition imposed by section 27 is that the person giving the information must not only be in the custody of a police officer but must also be a person accused of an offence. In support of the first part of his contention, that sections 25 and 26 do not overlap in the sense that the former bars all confessions to police officers whether made whilst in their custody or not and that the latter bars all confessions made whilst in their custody, he relied on the decisions of the Indian Courts, the weight of which is in his favour. The learned Solicitor-General conceded that it was so and did not contend that the two sections should be given a different interpretation in Ceylon. He accepted the position that section 25 barred all confessions to a police officer whether made in custody or outside and that section 26 applied to confessions made to others than police officers.

The Indian decisions are referred to in such well-known commentaries on the Indian Evidence Act as Sarkar on Evidence and Monir on Evidence. It is unnecessary to cite them in this judgment. It will be sufficient if reference is made to the recent decision of the Supreme Court of India in *State of Uttar Pradesh* v. *Doeman*, (1960 A.I.R. (Supreme Court), p. 1125). In support of the second part of his contention, that section 27 was a proviso to section 26 alone and not also to section 25, he called in aid passages in the judgments of the Privy Council in cases of *Narayan Swami* v. *Emperor* (*supra*) and *Kottaya* v. *Emperor*, (1947 A.I.R. (P.C.) 67), which are cited below *in extenso*. In the former case Lord Aitken observed at p. 51 *et seq* :

> " In this case the words themselves declare the intention of the legislature. It therefore appears inadmissible to consider the advantages or disadvantages of applying the plain meaning whether in the interests of the prosecution or the accused. It would appear that one of the difficulties that has been felt in some of the Courts in India in giving the words their natural construction has been the supposed effect on sections 25, 26 and 27, Evidence Act, 1872. Section 25 provides that no confession made to a police officer shall be proved against an accused. Section 26— No confession made by any person whilst he is in the custody of a police

officer shall be proved as against such person. Section 27 is a proviso that when any fact is discovered in consequence of information received from a person accused of any offence whilst in the custody of a police officer so much of such information whether it amounts to a confession or not may be proved. (*Here occur the words quoted earlier in this judgment*). . . It only remains to add that any difficulties to which either the prosecution or the defence may be exposed by the construction now placed on section 162 can in nearly every case be avoided by securing that statements and confessions are recorded under section 164."

In the latter case Sir John Beaumont said, at p. 70—

" The second question, which involves the construction of section 27, Evidence Act, will now be considered. That section and the two preceding sections, with which it must be read, are in these terms :—

(*Sections* 25, 26 *and* 27 *are omitted as they are the same as our sections*).

" Sections 27, which is not artistically worded, provides an exception to the prohibition imposed by the preceding section, and enables certain statements made by a person in police custody to be proved. The condition necessary to bring the section into operation is that discovery of a fact in consequence of information received from a person accused of any offence in the custody of a police officer must be deposed to, and thereupon so much of the information as relates distinctly to the fact thereby discovered may be proved . . . Mr. Megaw for the Crown, has argued that in such a case the ' fact discovered ' is the physical object produced, and that any information which relates distinctly to that object can be proved. Upon this view information given by a person that the body produced is that of a person murdered by him, that the weapon produced is the one used by him in the commission of a murder, or that the ornaemnts produced were stolen in a dacoity would all be admissible. If this be the effect of section 27, little substance would remain in the ban imposed by the two preceding sections on confessions made to the police, or by persons in police custody. The ban was presumably inspired by the fear of the Legislature that a person under police influence might be induced to confess by the exercise of undue pressure. But if all that is required to lift the ban be the inclusion in the confession of information relating to an object subsequently produced, it seems reasonable to suppose that the persuasive powers of the police will prove equal to the occasion, and that in practice the ban will lose its effect. On normal principles of construction Their Lordships think that the proviso to section 26, added by section 27, should not be held to nullify the substance of the section . . . The difficulty, however great, of proving that a fact discovered or information supplied by the accused is a relevant fact can afford no justification for reading into section 27 something which is not there, and admitting in evidence a confession barred by section 26. Except in cases in which the possession, or concealment, of an object constitutes the gist of the offence charged, it can seldom happen that information relating to the discovery of a fact forms the foundation of the prosecution case. It is only one link in the chain of proof, and the other links must be forged in manner allowed by law."

The learned Solicitor-General maintained that the passages in the judgment of the Privy Council relied on by the appellant's counsel were *obiter* and not binding on us, and he strenuously argued that section 27 was a proviso to both sections 25 and 26 and claimed that on that point the weight of Indian decisions was on his side. He referred us to some of them. Learned Counsel for the appellant did not contend that it was not so. Those decisions, too, are collected in the Commentaries mentioned above and need not be referred to here. The most recent pronouncement on the subject is in the judgment of the Supreme Court of India in the case of *State of Uttar Pradesh* v. *Doeman* (*supra*). As the question whether in our Evidence Ordinance, too, section 27 should be read as an exception to section 26 alone or to sections 25 and 26 does not arise for decision in the instant case, we refrain from expressing our opinion on that question although the matter was argued at length on both sides.

Before we part with this part of the case it would not be out of place to refer to the decision of the Privy Council in *Nazir Ahmad* v. *King Emperor*, (1936) A.I.R. (Privy Council) 253, which has a bearing on the words in section 26 " unless it be made in the immediate presence of a Magistrate ". There Lord Roche expressed the view that under the Indian Code the only procedure for recording a statement to a Magistrate before the commencement of an inquiry or trial was that prescribed in sections 164 (our section 134) and 364 (our section 302). His reasons are illuminating and bear repetition *in extenso* as they are germane to the matters discussed above. He said ;

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". . . where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden. This doctrine has often been applied to Courts,—*Taylor* v. *Taylor*, (1876) 1 Ch. D. 426, at p. 431—and although the Magistrate acting under this group of sections is not acting as a Court, yet he is a judicial officer and both as a matter of construction and of good sense there are strong reasons for applying the rule in question to section 164.

On the matter of construction sections 164 and 364 must be looked at and construed together, and it would be an unnatural construction to hold that any other procedure was permitted than that which is laid down with such minute particularity in the sections themselves. Upon the construction adopted by the Crown, the only effect of section 164 is to allow evidence to be put in a form in which it can prove itself under sections 74 and 80, Evidence Act. Their Lordships are satisfied that the scope and extent of the section is far other than this, and that it is a section conferring powers on Magistrates and delimiting them. It is also to be observed that, if the construction contended for by the Crown be correct, all the precautions and safeguards laid down by sections 164 and 364 would be of such trifling value as to be almost idle. Any Magistrate of any rank could depose to a confession made by an accused so long as it was not induced by a threat or promise, without affirmatively satisfying himself that it was made voluntarily and without showing or reading to the accused any version of what he was supposed to have said or asking for the confession to be vouched by any signature. The range of magisterial confessions would be so enlarged by this process that the provisions of section 164 would almost inevitably be widely disregarded in the same manner as they were disregarded in the present case."

The next question that arises for decision is whether the conviction should be set aside on the ground of the improper admission of Sergeant Jayawardena's evidence, or whether, while upholding the point taken by learned counsel, the appeal should be dsmissed on the ground that no substantial miscarriage of justice has actually occurred. The onus of satisfying us that no substantial miscarriage of justice has actually occurred in a case in which the point raised in appeal is decided in favour of the appellant is upon the Crown. In the instant case the Crown has failed to satisfy us that no substantial miscarriage of justice has actually occurred. What is more—the material before us discloses that a substantial miscarriage of justice has actually occurred.

We now turn to that aspect of the case. In the first place there is no evidence that the parts of a gun dug up from a rubbish heap near line No. 6 are the parts of the crime gun. Sergeant Jayawardena who says he recovered the gun from the rubbish heap says that he did not at any stage try to reassemble the gun and that he produced it in the Magistrate's Court in three parts. The analyst's evidence is that P 1 which was produced at the trial was received by him in a parcel marked "X" and was in working order. There is no evidence that the parts of a gun recovered by Sergeant Jayawardena constituted a gun that could be fired. Nor is there any evidence that P 1 constitutes a gun formed from the parts recovered from the rubbish heap. In the absence of such evidence there cannot be said to be proof that the gun P 1 constitutes of the parts of a gun recovered from the spot pointed out by the appellant and no inference against him can be drawn from the circumstances of his pointing out and digging up the rubbish heap near line No. 6. What is more—Jayawardena's evidence that the appellant said in a statement which he volunteered, "I am prepared to point out the place where *the* gun and *the* cartridges are buried", has gone to the jury containing a reference to the crime gun. In his summing up the learned Judge said :

" . . . in the afternoon of 1st September this accused, after he had been arrested, took Jayawardena along to some place near line set No. 6 and there dug up the earth under neath which Jayawardena found *this* gun P 1, at that time in three parts along with some bag containing 14 live cartridges."

Again later on his summing-up, he said :

" . . . Jayawardena took the accused away and according to Jayawardena, the accused made a certain statement to him in the course of which, the accused told him that he could point out the place where *the* gun and cartridges were buried. If you believe Jayawardena, that is a question of fact, you can understand the police not wasting any time thereafter. Jayawardena says he at once took him to line No. 6

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and at a certain spot which was indicated by the police, the accused himself dug up the earth and underneath that there was *this* gun in a gunny bag in three parts and there was another bag containing 14 live cartridges which are productions in this case . . ."

Well, the defence has challenged Jayawardena and said he is nothing more than a liar in uniform. That is the suggestion. The defence alternatively argues, even if that suggestion of the defence is not accepted, but Jayawardena is believed when he says that the accused pointed out *the* gun, the statement of the accused is that he could point out a place where a gun and cartridges are buried. The defence, therefore, argues, that means nothing more than that the accused was aware of where a gun and cartridges were buried, not necessarily buried by him. I did not understand the prosecution placing the case any higher than placed by the defence counsel himself. The prosecution does not say that it proves anything more than showing a place where a gun and 14 cartridges were buried, and this was about 3.25 or 3.30 that the cartridges were unearthed."

It was urged by learned counsel that the repeated reference both in the evidence and the summing-up to *the gun* and *this gun* was gravely prejudicial to the appellant if Jayawardena's evidence was meant to prove nothing more than that the appellant was aware of where a gun and cartridges were buried, not necessarily buried by him. He further submitted that the way in which the evidence was presented to the jury is likely to have had the effect of influencing the jurors to attach that amount of weight which they might not otherwise have attached to the evidence of Piyadasa, Heen Banda and Juwanis. In our opinion this submission is well founded.

In the course of the argument there emerged a fact which, if it received sufficient attention at the trial, is likely to have altered the whole course of events. Sergeant Jayawardena in his examination-in-chief, which is reproduced earlier in this judgment in connexion with the discussion of the admissibility of the appellant's statement to him, stated that it was after he had recorded the statement which the appellant volunteered to make that he took him to line No. 6, that the appellant pointed out a spot to him and dug up a heap of rubbish in which he discovered a gun broken into three parts and a cloth bag containing twelve 12-bore cartridges. In cross-examination he gave an entirely different version as would appear from the following questions and answers :—

"934. *Q.* At what time did you commence to record the accused's statement ?

A. After the discovery of the gun and the cartridges.

935. *Q.* At what time did you record it ?

A. At 3.10 immediately on arrival at the estate.

936. *Q.* That is before or after the discovery of the gun ?

A. Before the discovery of the gun.

937. *Q.* You know now that it was after the discovery of the gun ?

A. That was a mistake when I said that.

938. *Q.* I make a further allegation against you. I say that the accused never produced this gun to you ?

A. No.

939. *Q.* He never pointed it out to you ?

A. He did.

940. *Q.* He never made a statement to that effect to you ?

A. He did."

Later on in answer to the presiding judge, he said :

"991. *Q.* Have you made an entry in regard to the finding of the gun by you ?

A. Yes.

992. *Q.* Before that have you made an entry in regard to any statement made to you by the accused ?

A. Yes.

993. *Q.* Can you refresh your memory from what you have recorded and say whether it was after the accused had told you that he could point out the place where the gun and cartridges were buried or before he told you that he could point out the place where the gun and cartridges were buried that you went to a certain place near line No. 6 ?

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A. Before the discovery of the gun and cartridges.

994. *Q.* After the discovery of the gun I take it that you made a record of that fact in your diary ?

A. Yes.

995. *Q.* After that was done did you take a statement of the accused ?

A. No.

996. *Q.* After making a record of the finding of the gun did you settle down to recording a statement of the accused ?

A. Not after the discovery.

(The Sergeant's diary is marked C. by Court).

997. *Q.* At page 144 of your diary did you begin making a statement in regard to the circumstances in which the gun was discovered by you ?

A. Yes.

998. *Q.* And does that entry in regard to the discovery of the gun run into page 145 as well ?

A. Yes.

999. *Q.* And after that entry has been concluded did you record the statement of the accused as well ?

A. Yes.

1000. *Q.* Before the discovery of the gun had you questioned the accused ?

A. I have.

1001. *Q.* And have you recorded that fact before you began making statement in regard to the discovery of the gun. ?

A. Yes."

Under examination by the learned judge Sergeant Jayawardena went back on the position he had stoutly maintained in cross-examination. The repeated reversal of his evidence as to the sequence of events in regard to the finding of the gun and recording of the appellant's statement greatly impaired the value of Sergeant Jayawardena's evidence. What is more—even this final version is contradicted by his own notes of the inquiry which were produced and marked in the proceedings at the instance of the learned trial judge. The record begins :

"On Monte Cristo Estate I interrogated the suspect at length and suspect says that he could point out the place where the gun and cartridges used for the shooting are buried and volunteers to make a statement."

This record contradicts his evidence given in examination-in-chief that the appellant volunteered to make a statement.

The record then proceeds :

"I am now leaving with the P.Cs. 4358, 7326, 5617 and suspect, Ramasamy, to trace the gun.

1.9.60 at 3.25 p.m.—Monte Cristo Estate, Line No. 6. Suspect, Ramasamy, points out to me a place in the garden opposite line No. 6 and dug out the spot. Here I find a Wembley & Scott S.B.B.L. 12-bore gun barrel No. 10973 in three parts wrapped in an old gunny sack and 14 cartridges 12-bore in an oil cloth bag ranging as follows :—2 S.G., 2 No. 6, 2 No. 3, 7 No. 4 and 1 F.N. filled 12-bore cartridges. I smelt the barrel and there is a smell of gun powder and recent fouling in the barrel. I tied both ends covered with paper. I here take charge of them as productions. Here there is (?) a shrub (sic) jungle in the vicinity. I now proceed to record his statement. Ramasamy alias Babun Ramasamy s/o Murugan, age 48 years, labourer of line No. 9, Monte Cristo Estate, states : 'This morning about 8 a.m. I was in my line-room. At this time I heard the shouts of people towards the upper line where I am residing. I came out and saw about 50 to 100 people collected outside the lines and there was pelting of stones. Just then I heard the report of a gun in the direction of Dhoby's line. I then came running to line No. 6 through fear. As I came running to line No. 6 I again heard the report of a gun towards the line of the mechanic. At the time I saw about 40 to 50 men and women including strikers and non-strikers shouting. As I came to the (verandah) back verandah I found a 12-bore gun broken lying on ground and some cartridges in an oil cloth bag. I broke the gun into three pieces, picked up a gunny sack and wrapped the parts of the gun with the bag of cartridges buried in the garden opposite line No. 6. I am prepared to point out the place where the gun and cartridges are buried. I deny having shot at anyone. I am one of the strikers. This is all I have to state. Read over and explained and admitted to be correct. '

I am now leaving with P.Cs. 4358, 7326 and 5617 and suspect, Ramasamy, to trace the gun. 3.25 p.m., Monte Cristo Estate, opposite line No. 6. On the statement made by Ramasamy I recovered one S.B.B.L. 12-bore Wembley & Scott gun, No. 10973, broken in three parts, barrel, butt and handguard wrapped in an old gunny sack and one oil bag containing 14 cartridges, 12-bore, ranging as follows :—2 S.G., 2 No. 6, 2 No. 3, 7 No. 4 and one F.N. filled 12-bore cartridges. I found them buried in the garden where shrub jungle is found. I smelt the barrel. It is smelling of fouling and gun powder. I find the barrel fouled and signs (?) of recent firing. I have (tied) covered and tied both ends and taken charge as productions. At 4.20 p.m. I produced the produc-

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tions, gun and cartridges, and the suspect, Ramasamy, before I.P."

Sergeant Jayawardena's evidence when compared with what is recorded in his note-book discloses a reprehensible attempt on his part at *suggestio falsi et suppressio veri.* His notes speak of the same gun being discovered twice, once before and a second time after the appellant's statement was recorded. In the first case he says that the appellant pointed out the spot where the gun lay buried and in the second case he purports to have discovered the gun on the information received from him. The two statements are irreconcilable and his evidence on the point far from solving the confusion makes "confusion worse confounded". In examination-in-chief he said that he found the gun after recording the statement of the appellant. In cross-examination he first said that he commenced to record the appellant's statement after the discovery of the gun and cartridges (*Q.* 934). He next said that he recorded the statement before the discovery of the gun (*Q.* 936). He then said that he made a mistake when he said that the statement was recorded after the discovery of the gun (*Q.* 937). In answer to the question (*Q.* 993), whether it was after the appellant had told him that he could point out the place where the gun and cartridges were buried or before he told him that he could point out the place where the gun and cartridges were buried that he went to a certain place near line No. 6, he said that it was before the discovery of the gun and cartridges and that after the discovery he made a record of that fact in his diary. Further answering he also said that he did not take a statement of the appellant after he made the record relating to the discovery of the gun (*Q.* 995), and that he did not after making a record of the finding of the gun settle down to recording a statement of the appellant after the discovery of the gun and cartridges (*Q.* 996). In answer to questions 997, 998, 999, 1000 and 1001 he reversed what he had said before. All this shows what an unreliable witness the Sergeant is. He was either deliberately misleading the Court by giving his evidence a complexion which was prejudicial to the appellant or was so confused that he was unable even with the assistance of the written record to give a consistent and unbiased account of what he did that day. Now the learned Judge omitted to warn the jury that they should approach his evidence with caution as he had contradicted himself so many times in the course of his evidence on a vital point in the case. Of the two statements recorded as coming from the appellant in regard to the gun and cartridges, one does not indicate that the appellant was the person who used the gun while the other carries that implication. The Crown sought to prove the one implying guilt when in the course of that very statement the appellant had stated the circumstances in which he found the gun and denied that he shot anyone.

It is difficult to escape the conclusion that the prosecution has not been conducted in the instant case with that fairness and detachment with which prosecutions by the Crown should be conducted. With the statement of the appellant, in which he had expressly denied that he shot, before him, learned Crown Counsel, despite the learned trial Judge's warning of the perils of the course he was seeking to adopt, insidiously persisted in placing before the jury a statement alleged to be made by the appellant which, when taken out of its context, tended to create the impression that he had confessed to the crime and that he had hidden the crime gun himself after the shooting by him.

That, officers on whom the Court is entitled to rely for assistance in the administration of Justice should consciously seek to mislead it, is deplorable. There is no question that the appeal must be allowed and the conviction quashed, and we accordingly do so and direct a Judgment of acquittal to be entered.

Appeal allowed.

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

W. E DE ZYLVA *vs.* THE QUEEN

S.C. No. 28 *of* 1962—*D.C.* (*Criminal*) *Colombo, N* 2087/39676 *D.*

Argued on : 23rd January, 1963.
Decided on : 24th January, 1963.

Criminal Procedure Code, section 168 (2)—*Penal Code, section* 391—*Criminal breach of trust—Joinder of charges—Period in excess of one year—Illegality or irregularity.*

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The accused was convicted under section 391 of the Penal Code with having committed criminal breach of trust of certain quantities of oil " between the 7th day of January, 1959, and 8th day of January, 1960 ".

He appealed to the Supreme Court against his conviction on the ground that the indictment was defective. It was argued that the charge had been framed in violation of section 168 (2) of the Criminal Procedure Code which, while permitting the joinder of more than one act of misappropriation without specifying particular items or exact dates, required that the time included between the first and last of such dates shall not exceed one year.

Held : The expression " between the 7th day of January, 1959, and 8th day of January, 1960 ", take in a period in excess of one year. The trial has, therefore, proceeded on a charge framed in violation of the provisions of the Code in respect of the framing of charges. Such a charge is illegal and not merely irregular.

The following dictum of Lord Halsbury, L.C., in *Subrahmania Ayyar* v. *The King Emperor*, (I.L.R. 25, Madras 97), was quoted with approval :—

" It is not possible to regard the disobedience to an express opinion as to a mode of trial as a mere irregularity. Such a phrase as irregularity is not appropriate to the illegality of trying an accused person for many different offences at the same time and those offences being spread over a longer period than by law could have been joined together in one indictment."

Case referred to : *Subrahmania Ayyar* v. *The King Emperor*, I.L.R. 25, Madras 97.

Colvin R. de Silva with *K. Jayasekera* and *N. M. S. Jayawickrama*, for the accused-appellant.

P. Colin-Thome, Crown Counsel, for the Attorney-General.

T. S. FERNANDO, J.

The charge contained in the indictment laid against the appellant was as follows :—

" That between the 7th day of January, 1959, and 8th day of January, 1960, at Maradana, in the division of Colombo, within the jurisdiction of this Court, you did while being employed in the capacity of a servant, to wit : Store-keeper in C. C. Wakefield & Company, Limited, Colombo, commit criminal breach of trust of 178 (forty-five gallons) and 18 gallons drums of oil valued at Rs. 32,787.92, entrusted to you in your capacity as such servant, and that you have thereby committed an offence punishable under section 391 of the Penal Code."

Before the appellant was called upon to plead to this charge in the District Court, counsel for him contended that the charge was defective in that it had been framed in violation of section 168 (2) of the Criminal Procedure Code. The learned trial judge over-ruled counsel's objection to the validity of the charge on the ground that it is devoid of merit, recorded the appellant's plea of not guilty, proceeded with the trial and convicted the appellant.

The same objection based on the illegality of the charge in the indictment has been pressed before us in appeal and it becomes necessary to examine the provisions of section 168 (2) of the Criminal Procedure Code. That sub-section removed certain difficulties that confronted a prosecution in a case where there were several misappropriations of money or items of other movable property spread over a period of time, but the meaning of the proviso to the sub-section has always to be remembered. The period in respect of which misappropriations of movable property may be so lumped together cannot exceed one year.

The facts of the case have not been examined by us. The objection taken relates to the charge, viz., to the charge as framed. Section 168 (2) which permits the joinder of more than one act of misappropriation relates solely to the framing of the charge. When the proviso to the sub-section enacts that the time included between the first and last of *such dates* shall not exceed one year, the reference is, no doubt, to the expression " dates " in the main body of that sub-section. That reference is obviously to the dates to be specified in the charge to be framed. In whichever way one calculates a year, the expression " between the 7th day of January, 1959, and the

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8th day of January, 1960 ", takes in a period in excess of one year. Accordingly, it is difficult to resist the conclusion that the trial proceeded on a charge framed in violation of the provisions of the Code in respect of the framing of charges. Such a charge is illegal and not merely irregular. As was stated by Lord Halsbury, L.C., in the case of *Subrahmania Ayyar* v. *The King-Emperor*, (I.L.R. 25, Madras 97), it is not possible " to regard the disobedience to an express provision as to a mode of trial as a mere irregularity. Such a phrase as irregularity is not appropriate to the illegality of trying an accused person for many different offences at the same time and those offences being spread over a longer period than by law could have been joined together in one indictment ". No valid trial could have taken place on an illegal charge, and we are, therefore, compelled to quash the conviction and sentence and to direct that the appellant be discharged. To prevent avoidable argument in the future, I would say that the quashing by us of the conviction above does not have the effect of an acquittal on the charge laid in the indictment.

ABEYESUNDERE, J.

I agree.

Accused discharged.

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

WIJETUNGE *vs.* WILLIE *et al.*

S.C. No. 360—*D.C.* (*F*) *Colombo*, 7095/*L.*

Argued on : 31st August and 1st and 2nd September, 1959.
Delivered on : 17th June, 1960.

Lease—Compensation for improvements—Lessee of one lot in " bona fide " possession of adjacent lots—Right of such person to compensation and to a " jus retentionis ".

Civil Procedure Code, section 756 (1) *and* (3)—*Whether notice to the respondent of the tender of security for the costs of appeal given " forthwith ".*

Under a partition decree, dated the 24th July, 1942, six contiguous allotments of land numbered A B, C, D, E and F were allotted as follows :—

Lot A to the 1st, 2nd and 3rd plaintiffs in that action jointly ;
Lots B, C, D and F to the 1st and 2nd defendants in that action jointly ;
Lot E to all the above-mentioned parties jointly.

On the 15th October, 1946, the 1st, 2nd and 3rd plaintiffs mentioned above leased to the 1st defendant in the present action lot A referred to above. Under one of the covenants to the lease the 1st defendant could erect an addition to the existing building on the leased premises, which the lessors had the option of taking over on payment of compensation. At the time of the lease there was no physical demarcation between lots A, B, C and D, and the 1st defendant admitted that he was given possession of lots B and C in addition to lot A. He thereafter effected necessary repairs to the buildings on lots B and C, and also made certain structural alterations which, it was common ground, he could have made under the covenant referred to above if these lots had, in fact, been part of the leased premises. The plaintiff in the present action became the owner of lots B, C, D and F, and joint-owner of lot E, in 1949, on a deed of sale, and he filed this action in 1957 for a declaration of title to the said lots, ejectment of the 1st defendant therefrom, and damages. The District Judge found that the 1st defendant was in possession of lots B and C under the honest belief that they formd part of the leased premises, and that he was, therefore, a *bona fide* possessor who should be compensated for both the necessary as well as the useful improvements effected by him, and declared the 1st defendant entitled to retain possession of lots B and C, until compensation was paid to him. The plaintiff appealed, and at the hearing two preliminary objections were taken by the defendant-respondent. Firstly, that the notice of tender of security referred to be given to the respondent under section 756 (1) of the Civil Procedure Code was not given " forthwith " as required by that section ; and secondly, that the notices of the tender of security had not been served in time on the 2nd and 3rd respondents.

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Held : (1) That, inasmuch as there was a finding by the District Judge that the motion filed in Court along with the notices of tender of security was filed on the 10th July, 1957, and the petition was also filed on the same day, the notices must be taken to have satisfied the requirements of section 756 (1).

(2) That, even though such notices had been served out of time, no prejudice was caused in the circumstances of the present case to the 2nd and 3rd respondents, and that this was a proper case for the grant of relief under section 756 (3).

(3) That the finding that the 1st respondent was a *bona fide* possessor of lots B and C should stand.

(4) That the question whether the plaintiff was entitled to compensation and to a *jus retentionis* must be decided on the basis of the Roman-Dutch Law maxim against unjust enrichment.

(5) That a person who had made improvements upon the land of another, not as possessor but under the mistaken idea that he was a lessee, was entitled to compensation on the same basis as a possessor, subject to an equitable deduction necessitated by the special circumstances of the case.

(6) That such a person was also entitled to a *jus retentionis* until he had been compensated.

Cases referred to : *De Silva* v. *Seenathumma*, 41 N.L.R. 241 ; XVI C.L.W. 105
Soysa et al. v. *Mohideen*, 17 N.L.R. 279.
Lebbe v. *Christie*, 18 N.L.R. 353.
Appuhamy v. *The Doloswala Tea & Rubber Company, Ltd.*, 23 N.L.R. 129 ; 25 N.L.R. 267.
Mohamed Cassim v. *Zaneera Umma et al.*, 59 N.L.R. 160.
Hassanally v. *Cassim*, 61 NL.R. 529.
Bellingham v. *Bloommetje*, 1874 Buchanan's Reports 36
Parkin v. *Lippert*, (1895) 12 S.C.R. 179.
Rubin v. *Botha*, 1911 A.D. 568.
Fletcher v. *Bulawayo Waterways Company, Ltd.*, 1915 A.D. 636.

Sir Lalita Rajapakse, Q.C., with *Carl Jayasinghe* and *D. C. W. Wickremesekera*, for the plaintiff-appellant.

J. A. L. Cooray with *S. M. H. de Silva*, for the 1st defendant-respondent.

WEERASOORIYA, J.

Under the final decree P 1, dated the 24th July, 1942, entered in D.C. Colombo (Partition) Case No. 2216, the six contiguous allotments of land depicted as lots A, B, C, D, E and F in the partition plan P1a were allotted to certain of the parties to that action as follows :—

Lot A to the 1st, 2nd and 3rd plaintiffs jointly :

Lots B, C, D and F to the 1st and 2nd defendants jointly ;

Lot E to all the above parties jointly.

Lot A alone has a public road frontage, and lots B, C and D are situated behind lot A, in that order. Lot E is a pathway commencing from the public road and running alongside lot A, while lot F is a continuation of it alongside lots B, C and D.

On the 15th October, 1946, the 1st defendant in the present action became the lessee of lot A on indenture of lease P 4 granted by the 1st, 2nd and 3rd plaintiffs in the partition action and another. The lease was for a period of seventeen years, and the sum of Rs. 17,000/- being rent for the full period was paid by the 1st defendant at or before the execution of the lease. Under one of the covenants in P 4 the 1st defendant could have erected an addition to the existing building on the leased premises at a cost of Rs. 10,000/- which the lessors had the option of taking over at the expiry of the lease on payment of half that sum.

It would appear that at the time of the lease there was no physical demarcation between lots A, B, C and D. The 1st defendant stated in evidence that his lessors gave him possession of the premises " from the road to the lavatory ". The lavatory referred to is a water-closet on lot C which, under the partition decree, the parties to whom lot A was allotted were declared entitled to use, together with access to it through lot F, as long as lot A was in their " possession ". The 1st defendant admits that he was given possession

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of lots B and C in addition to lot A. He stated that he went into occupation of lots B and C in the *bona fide* belief that they formed part of the leased premises and in that belief he effected necessary repairs to the buildings thereon and also made certain structural alterations which, it is common ground, he could have made under the covenant already referred to in P 4 had these lots been, in fact, part of the leased premises.

The plaintiff in the present action became the owner of lots B, C, D and F and joint-owner of lot E, on deed of sale P 3 of 1949. He filed this action in 1957 for a declaration of title to the said lots, ejectment of the 1st defendant therefrom and for damages.

After the filing of the action, the survey plan 1D1 was prepared for the purposes of this case on a commission issued by Court. Lots A, B, C, D, E and F in the partition plan P1a are identical with lots A1, B1, C1, D1, E1 and F1, respectively, in plan 1D1. The surveyor who prepared 1D1 has stated in evidence that even when he went to the land there was no demarcation of the different lots on the ground. Plan 1D1 shows one continuous building extending from lot A 1 and across the whole length of lots B 1 and C 1. But to what extent this continuity has been brought about by the structural alterations effected by the 1st defendant is not clear.

At the trial the 1st defendant did not seriously dispute the plaintiff's title to the premises in suit, but issues were framed, *inter alia*, as regards the value of the repairs and improvements effected by the 1st defendant and whether he was entitled to a *jus retentionis* until compensated. The amount claimed by the 1st defendant as the value thereof is Rs. 3,000/-. The District Judge held on these issues that the 1st defendant was in possession of lots B 1 and C 1 in plan 1D1 under the honest belief that they formed part of the leased premises, and that he was, therefore, a *bona fide* possessor who should be compensated for both the necessary as well as the useful improvements effected by him, the value of which the Judge fixed at Rs. 2,500/- and declared the 1st defendant entitled to retain possession of lots B 1 and C 1 until that sum was paid to him. From these findings the plaintiff has appealed.

Two preliminary objections were taken by Mr. Cooray, who appeared for the 1st defendant-respondent, against this appeal being entertained by us. Section 756 (1) of the Civil Procedure Code requires an appellant, on filing a petition of appeal, to give notice "forthwith" to the respondent of the tender of security for costs of appeal. The first objection taken was that the plaintiff-appellant failed to give this notice "forthwith" to the 2nd and 3rd respondents in that although the petition of appeal was filed on the 10th July, 1957, the notice was given only on the 12th July. In the case of *de Silva* v. *Seenathumma*, 41 N.L.R. 241, a Divisional Bench of five Judges of this Court held that the requirements in section 756 (1) relating to notice of tender of security are satisfied if the notice, unless waived, is tendered or filed on the same day on which the petition of appeal is received by the Court. The motion was filed in Court in the present case along with the notices of tender of security is dated the 10th July, 1957, but as the date stamp of the District Court office appearing on it bears the date 12th July, 1957, it was alleged that the motion which was filed on the latter date. There is, however, a finding by the District Judge that the motion was filed on the 10th July, with which finding we saw no reason at all to interfere, and we, therefore, overruled this objection.

The other objection was that the notices of the tender of security had not been served on the 2nd and 3rd respondents in time. It is not denied by the appellant that the notices were served out of time. Even this belated service became possible only when, after several attempts at personal service had failed, the Court ordered substituted service. Neither of these respondents was represented by a proctor, nor did they file any answer. The appellant made them parties to this action as they were the vendors on P 3 of the land in suit but claimed no relief against them. Even after substituted service of the notices of tender of security they did not appear in Court and object to the security tendered by the appellant for their costs of appeal, and the same was accepted as sufficient by the District Judge. They were unrepresented even at the hearing of the appeal. I do not think that in the circumstances any prejudice can be said to have been caused to them by the omission on the appellant's part to serve within time the notice of the tender of security on them. In *de Silva* v. *Seenathumma* (*supra*) it was held that in a proper case relief may be granted to an appellant under section 756 (3) of the Civil Procedure Code in respect of such an omission as this. As we were of opinion that this was a proper case in which to grant relief we over ruled this objection too and proceeded to hear the appeal.

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On the merits, one of the matters urged for our consideration by Sir Lalita Rajapakse, who appeared for the plaintiff-appellant, was that the learned District Judge erred in holding that the 1st defendant's possession of lots B 1 and C 1 was in the honest belief that they formed part of the leased premises. But while the evidence on the point is not all in favour of the 1st defendant, I see no ground for reversing that finding. The substantial question that arises for decision is, therefore, whether, conceding the *bona fides* of the 1st defendant, he is entitled to be compensated for the improvements made by him to lots B 1 and C 1 and to a *jus retentionis.*

There are several decisions of this Court dealing with the right of a lessee, as against third parties, to be compensated for improvements made by him to the leased land. None of them appears to have been cited at the trial, nor are they referred to in the judgment of the District Judge. Although not exactly in point (inasmuch as the 1st defendant was not the lessee of lots B 1 and C 1) these decisions cannot be regarded as irrelevant to the consideration of the question that arises in the present case. Of these, the leading case is *Soysa et. al.* v. *Mohideen,* 17 N.L.R. 274, which is referred to as a Full Bench decision, where it was held that a lessee does not stand in the position of a *bona fide* possessor so as to entitle him to compensation for improvements made by him to the leased property and to a *jus retentionis.* To the same effect is the majority decision in *Lebbe* v. *Christie,* 18 N.L.R. 353, (also referred to as a Full Bench decision) and the decisions in *Appuhamy* v. *The Doloswala Tea and Rubber Company, Limited,* 23 N.L.R. 129 ; 25 N.L.R. 267, and *Mohamed Cassim* v. *Zaneera Umma et al.*, 59 N.L.R. 160. Sir Lalita Rajapakse placed much reliance on these decisions for the submissions that even though in the present case the 1st defendant was not the lessee of lots B 1 and C 1 when he made the improvements, he cannot be put in a better position than a lessee would be since the very foundation of his claim is that in making the improvements he acted in the belief that he was the lessee of those lots.

There can be no doubt that at the time when the appeal was argued the point of view urged by Sir Lalita Rajapakse had the backing of substantial authority of this Court. But since then, the whole question has been reviewed by the Judicial Committee of the Privy Council in the judgment (61 N.L.R. 529) recently delivered by Their Lordships on the appeal taken from the decision of this Court in *Mohamed Cassim* v. *Zaneera Umma et al.* (*supra*). Reversing that decision, Their Lordships also held that the case of *Soysa et al.* v. *Mohideen* (*supra*) was wrongly decided. This pronouncement of the Privy Council puts an end to the striking anomaly which has long existed in a branch of the Roman-Dutch Law relating to compensation for improvements as administered in Ceylon, when compared with the law as it developed in South Africa, and to which Bertram, C.J., drew attention in *Appuhamy* v. *The Doloswala Tea and Rubber Company, Limited* (*supra*), when he said that the Courts in South Africa appear to have found it possible to deal with the matter from a broader point of view by the application of the maxim against unjust enrichment, and in that connection he also added : " The pronouncements of our own Courts make it impossible for us to do so, and the result is that the principle, so limited, is in the present case in danger of proving a defective instrument of justice ".

The question whether in the case before us the 1st defendant is entitled to the compensation which he claims and to a *jus retentionis* must, therefore, be decided on the basis of the Roman-Dutch Law maxim against unjust enrichment as applied in the South African cases of *Bellingham* v. *Bloommetje*, (1874) Buchanan's Reports 36; *Parkin* v. *Lippert*, (1895) 12 S.C.R. 179 ; *Rubin* v. *Botha*, (1911) S.C.R. (A.D.) 568 ; and *Fletcher* v. *Bulawayo Waterworks Company, Limited*, (1915) S.A.L.R. (A.D.) 636. The facts of the last mentioned case are indistinguishable from those of the present case. The defendants had there leased a land but by mistake sunk a well beyond its boundary and within the plaintiff's land. When the plaintiff sued in ejectment the defendants claimed compensation for the improvement effected by sinking the well. In upholding that claim Innes, C.J.,

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referred to the case of *Rubin* v. *Botha* (*supra*) as authority for the proposition that a person who had made improvements upon the land of another, not as possessor but under the mistaken idea that he was a lessee, is entitled to compensation on the same basis as a possessor, subject to an equitable deduction necessitated by the special circumstances of the case.

The learned District Judge's award of compensation in favour of the 1st defendant must, therefore, be affirmed. No argument was addressed to us by Sir Lalita Rajapakse in regard to the quantum of compensation. In view of the declaration (which is also affirmed) that the 1st defendant is entitled to a *jus retentionis* until the compensation awarded to him is paid, no question arises of the plaintiff-appellant's right to damages for wrongful occupation as claimed in the plaint.

The appeal is dismissed with costs.

H. N. G. Fernando, J.

I agree.

Appeal dismissed.

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

THE CEYLON TRANSPORT BOARD

vs.

THE SAMASTHA LANKA MOTOR SEVAKA SAMITHIYA

S.C. 32 *of* 1961—*Labour Tribunal, No.* 3625.

Argued on : 19th and 20th November, 1962.
Decided on : 7th January, 1963.

Industrial Disputes Act, No. 43 *of* 1950, *as amended by Acts* 25 *of* 1956, 62 *of* 1957 *and* 4 *of* 1962—*Labour Tribunal—Its objects—Is it an unconstitutional body—Difference between judicial and arbitral functions.*

Two separate applications between same parties before Tribunal—Tribunal taking into consideration facts of second application in deciding first and making order on second too—Misdirection.

R. was employed as an omnibus driver under the Transport Board. He was dismissed after inquiry on charges of insubordination. Thereupon the respondent-union of which he was a member applied to the Labour Tribunal on his behalf to have him " reinstated with all privileges and back wages ".

During the pendency of this application *R.* was re-employed by the same employer as a lorry driver. He was again dismissed from that employment on 12th July, 1961, and another application, dated 10th October, 1961, was made to the Labour Tribunal in respect of that dismissal.

In the course of the inquiry into the first application it was admitted that the inquiry in respect of the first dsmissal was not a proper one and consequently that the Labour Tribunal should hold an inquiry into the facts afresh.

The Labour Tribunal, after inquiry, held that both dismissals were wrong, although the second application was not before the Tribunal at that inquiry.

On an appeal from this finding, it was contended on behalf of the Ceylon Transport Board that—

(1) The Labour Tribunal is an unconstitutional body for the reason that being a body vested with judicial power, it has not been appointed by the Judicial Service Commission, which alone has the power to appoint such a body.

(2) The Labour Tribunal had misdirected itself in law in taking into consideration the 2nd dismissal and making an order in respect of that, too, at the inquiry into the first.

It was not disputed that the Labour Tribunal had not been appointed by the Judicial Service Commission and that the appointment of persons vested with Judicial power can be made by the Judicial Service Commission alone.

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His Lordship after considering the various provisions of the Industrial Disputes Act, No. 43 of 1950, and its amendments—

Held : (1) That the chief objects of the Act are to establish an expeditious system for preventing and settling industrial disputes by conciliation and arbitration.

(2) That section 15A of the Act indicates that the intention of the Legislature in creating a new body called the Labour Tribunal was to constitute it an arbitral body and not one vested with judicial power.

(3) That the Labour Tribunal misdirected itself in taking into consideration the matter of the second dismissal in arriving at its decision in the first application.

Per SRI SKANDA RAJAH, J.—"It will be seen that enforcement of the decision or award of the Labour Tribunal is by recourse to the ordinary Courts and all contempts of its authority, except under section 43 (4) are punishable by the Supreme Court.

I would point out that section 43 (4) above is *ultra vires*, as being an attempt to vest the Labour Tribunal with judicial power. The rest of the provisions of the Act regarding the Labour Tribunal are valid because they do not vest the Labour Tribunal with judicial power but only with arbitral power. "

Cases referred to : *Senadhira* v. *The Bribery Commissioner*, (1961) 63 N.L.R. 313; LX C.L.W. 65
Don Anthony v. *The Bribery Commissioner*, (1962) 64 N.L.R. 93; LXI C.L.W. 100
Piyadasa v. *The Bribery Commissioner*, (1962) LXII C.L.W. 73.
Attorney-General of Australia v. *Reginam* (*The Boilermakers' case*), (1957) 2 A.E.R. 45; 1957 A.C. 288; (1957) 2 W.L.R. 607
Waterside Workers' Federation v. *Alexander*, (1918) 25 C.L.R. 434
Shell Company of Australia, Ltd. v. *Federal Commissioner of Taxation*, 47 T.L.R. 115; 144 L.T. 421; 1931 A.C. 275

G. E. Chitty, Q.C., with *Desmond Fernando*, for the employer-appellant.

S. Shanmugalingam with *Prins Gunasekera* and *M. T. M. Sivardeen*, for the applicant-respondent.

SRI SKANDA RAJAH, J.

This is an appeal from the decision of the Labour Tribunal ordering the reinstatement of a workman and the payment to him of accumulated wages.

The workman, D. S. Randeniya, was employed as an omnibus driver under the Ceylon Transport Board. He was dismissed after inquiry on charges of insubordination. Therefore, the respondent-union, of which Randeniya is a member, applied to the Labour Tribunal on his behalf to have him " reinstated with all privileges and back wages ".

During the pendency of this application the workman was re-employed by the employer-appellant as a lorry driver. He was later dismissed even from that employment on 12th July, 1961, and another application, dated 10th October, 1961, was made to the Labour Tribunal in respect of that dismissal.

In the course of the inquiry into the present application it was admitted by the employer's representative that the inquiry in respect of the first dismissal was not a proper one and that, therefore, " there was no valid dismissal ".

It was agreed at the argument in this Court that when the inquiry by the domestic tribunal was not valid it was open to the Labour Tribunal to hold an inquiry into the facts afresh. That is what happened in this matter. But, though the matter of the second dismissal was not before the Labour Tribunal at this inquiry, it being the subject of another application, the Labour Tribunal proceeded to take that also into consideration and held that the second dismissal, too, was wrong.

Mr. Chitty argued that :

(1) The Labour Tribunal is a body vested with judicial power. Under Article 55 of the Ceylon (Constitution) Order-in-Council, 1946, such a body could be validly appointed by the Judicial Service Commission alone. That has not been done. Therefore, the Labour Tribunal is an unconstitutional body and is not competent to make the orders it purported to make, and

(2) Even if this contention fails, the Labour Tribunal has misdirected itself in law in taking into consideration the second dismissal and making an order in respect of that, too, at the inquiry

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into the matter of the first dismissal, though a separate application is pending regarding that.

It was not contested that appointment of persons vested with judicial power can be validly made by the Judicial Service Commission alone. Suffice it to mention three cases in which this has been decided :

(1) *Senadhira* v. *The Bribery Commissioner*, (1961) 63 N.L.R. 313.
(2) *Don Anthony* v. *The Bribery Commissioner*, (1962) 64 N.L.R. 93.
(3) *Piyadasa* v. *The Bribery Commissioner*, (1962) 62 C.L.W. 73.

Therefore, it is unnecessary to set down Article 55 of the Ceylon (Constitution) Order-in-Council, 1946.

It is not disputed that the Labour Tribunal has not been appointed by the Judicial Service Commission.

In order to consider Mr. Chitty's first submission, it is necessary to examine the nature and scope of the Industrial Disputes Act, No. 43 of 1950, as amended by Acts 25 of 1956, 62 of 1957 and 4 of 1962.

As was pointed out by Viscount Simonds in the case of *Attorney-General of Australia* v. *Reginam* (The Boilermakers' Case), (1957) 2 A.E.R. 45, at 47, the title of the Act is not without importance. It is intituled : " An Act to provide for the Prevention, Investigation and Settlement of Industrial Disputes and for matters connected therewith or incidental thereto. "

Part II of the Act deals with the functions of the Commissioner of Labour and circumstances in which Industrial Disputes will be referred for " settlement by conciliation or arbitration ". In the sections in Part II phrases such as the following are used : " with a view to promoting a settlement ", " settlement of disputes ", " to settle by conciliation ", " settlement by conciliation ", " settlement by arbitration to an arbitrator . . . or to a Labour Tribunal. "

Part III of the Act deals with : (*a*) Collective Agreements, (*b*) Settlement by Conciliation, and (*c*) Settlement by Arbitration.

Section 15 A, which comes under Part III (*c*) runs thus : " In the succeeding provisions of this Act the expression ' Arbitrator ' includes a Labour Tribunal ".

Part IV of the Act deals with Industrial Court. Section 24 states that the Industrial Court shall " take such decision or make such award as may appear to the Court *just and equittable.* "

Part IV A deals with Labour Tribunals. This part is reproduced in its entirety :

" 31A. (1) There shall be established for the purposes of this Act such number of Labour Tribunals as the Minister shall determine. Each Labour Tribunal shall consist of one person.

(2) Regulations may be made prescribing the manner in which applications under section 31B may be made to a Labour Tribunal.

31B. (1) A workman or a trade union on behalf of a workman who is a member of that union, may make an application in writing to a Labour Tribunal for relief or redress in respect of any of the following matters :—

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

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

(*c*) such other matters relating to the terms of employment, or the conditions of labour, or a workman as may be prescribed.

(2) A Labour Tribunal shall—

(*a*) where it is satisfied after such inquiries as it may deem necessary that the matter to which an application under sub-section (1) of this section relates is under discussion with the employer of the workman to whom that application relates by a trade union of which that workman is a member, make order suspending its proceedings upon that application until the conclusion of that discussion, and upon such conclusion shall resume the proceedings upon that application, and, if a settlement is reached in the course of that discussion, shall make order according to the terms of such settlement, and

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(*b*) where it is so satisfied that such matter, constitutes, or forms part of, an industrial dispute referred by the Minister under section 4 for settlement by arbitration to an arbitrator, or for settlement to an Industrial Court, make order dismissing the application without prejudice to the rights of the parties in the industrial dispute.

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

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

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

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

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

(5) Where an application under sub-section (1) is entertained by a Labour Tribunal and proceedings thereon are taken and concluded, the workman to whom the application relates shall not be entitled to any other legal remedy in respect of the matter to which that application relates, and where he has first resorted to any other legal remedy, he shall not thereafter be entitled to the remedy under sub-section (1).

(6) Notwithstanding that any person has ceased to be an employer—

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

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

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

31 C. (1) Where an application under section 31 B is made to a Labour Tribunal, it shall be the duty of the Tribunal to make all such inquiries into that application and hear all such evidence as the Tribunal may consider necessary, and thereafter *make such order as may appear to the Tribunal to be just and equitable.*

(2) Subject to such regulations as may be made under section 39 (1) (ff) in respect of procedure, a Labour Tribunal conducting an inquiry may lay down the procedure to be observed by it in the inquiry.

31 D. (1) Save as provided in sub-section (2) an order of a Labour Tribunal shall be final and shall not be called in question in any Court.

(2) Where the workman who, or the trade union which, makes an application to a Labour Tribunal or the employer to whom that application relates is dissatisfied with the order of the Tribunal on that application, such workman, trade union or employer may, by written petition in which the other party is mentioned as the respondent, appeal to the Supreme Court from that order on a question of law.

(3) Every petition of appeal to the Supreme Court shall bear uncancelled stamps to the value of five rupees and shall be filed in the Supreme Court within a period of fourteen days reckoned from the date of the order from which the appeal is preferred.

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(4) In computing the time within which an appeal must be preferred to the Supreme Court the day on which the order appealed from was made shall be included, but all Sundays and public holidays shal be excluded.

(5) The provisions of Chapter XXX of the Criminal Procedure Code shall apply *mutatis mutandis* in regard to all matters connected with the hearing and disposal of an appeal preferred under this section."

PART VI—GENERAL

" 36 (4) In the conduct of proceedings under this Act, any Industrial Court, Tribunal arbitrator or authorised officer or the Commissioner shall not be bound by any of the provisions of the Evidence Ordinance."

" 43 (4) Any person who in any proceedings before an arbitrator, Industrial Court or Labour Tribunal offers any insult or causes any interruption to such arbitrator, Court or Tribunal or any member thereof, may be tried and punished under sub-section (1) or by such arbitrator, Court or Tribunal and where such person is tried and punished by an arbitrator, Industrial Court or a Labour Tribunal, such arbitrator, Court or Labour Tribunal shall exercise the same powers and perform the same duties as a District Court exercises and performs in similar circumstances under section 381 of the Criminal Procedure Code. "

" 46 A. No suit, prosecution or other legal proceeding shall lie against any person for anything which is *in good faith* done or intended to be done in pursuance of this Act or any regulation made thereunder."

This section affords only a qualified protection to a Labour Tribunal. But, in the case of an officer vested with judicial power the protection is absolute. His acts are privileged even if his acts are not done *bona fide*.

It would, therefore, appear that the chief objects of the Act are to establish an expeditious system for preventing and settling industrial disputes by conciliation and arbitration.

Section 15 A, which has been reproduced above, indicates that the intention of the Legislature in creating a new body called the Labour Tribunal was to constitute it an arbitral body and not one vested with judicial power. It is also clear that the orders and awards made under this Act have to be "*just and equitable* ", quite unlike the decisions of a Court.

To borrow the words of Viscount Simonds in the *Boilermakers'* case (*supra*), at p. 48, such being the title of the Act and such its chief objects, it cannot be denied that its primary purpose, and in effect, its only purpose, is the settlement of industrial disputes by conciliation and arbitration. It is necessary, however, to see what part is to be played by the Labour Tribunal established under the Act in a field apparently so remote from the proper exercise of the judicial function.

It is apparent that there have been vested in the Labour Tribunal arbitral functions. " The function of an industrial arbitrator is completely outside the realm of judicial power and is of a different order. As was said by Isaacs and Rich, JJ., in *Waterside Workers' Federation* v. *Alexander*, (1918) 25 C.L.R. 434, at 463, ' . . . the essential difference is that the judicial power is concerned with the ascertainment, declaration and enforcement of the rights and liabilities as they exist, or are deemed to exist, at the moment the proceedings are instituted ; whereas the function of the arbitral power in relation to industrial disputes 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. " : *Boilermakers' Case* (*supra*), at 49 and 50.

Said Lord Sankey, L.C., in the case of *Shell Company of Australia, Ltd.* v. *Federal Commissioner of Taxation*, 47 *The Times Law Reports*, 115, at 117 :

" The authorities are clear to show that there are tribunals with many of the trappings of a Court which, nevertheless, are not Courts in the strict sense of exercising judicial power . . . it may be useful to enumerate some negative propositions on this subject.

1. A tribunal is not necessarily a Court in the strict sense because it gives a final decision.

2. Nor because it hears witnesses on oath.

3. Nor because two or more contending parties appear before it and between whom it has to decide.

4. Nor because it gives decisions which affect the rights of subjects.

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5. Nor because there is an appeal to a Court.

6. Nor because it is a body to which a matter is referred by another body.

(See *Rex* v. *Electricity Commissioners*, 39 *The Times Law Reports*, 715)."

At page 118 the Lord Chancellor said further :

" An administrative tribunal may act judicially but still remain an administrative tribunal as distinguished from a Court, strictly so called. Mere externals do not make a direction to an administrative officer by an *ad hoc* tribunal an exercise by a Court of judicial power."

It will be seen that enforcement of the decision or award of the Labour Tribunal is by recourse to the ordinary Courts and all contempts of its authority, except under section 43 (4) are punishable by the Supreme Court.

I would point out that section 43 (4) above is *ultra vires*, as being an attempt to vest the Labour Tribunal with judicial power. The rest of the provisions of the Act regarding the Labour Tribunal are valid because they do not vest the Labour Tribunal with judicial power but only arbitral power. For these reasons, I hold that Mr. Chitty's first submission is not valid.

There is substance in the second submission made by Mr. Chitty. I am of opinion that there was a msdirection in law in the Labour Tribunal taking into consideration the matter of the second dismissal, which was the subject of another application, in arriving at its decision in this application.

Therefore I set aside the order. I further direct that the other application be dealt with first by another Labour Tribunal and that this application be dealt with thereafter by still another Labour Tribunal.

The respondent will pay Rs. 157.50 as costs of this appeal to the appellant.

Appeal allowed.

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

CEYLON COCONUT PRODUCERS' CO-OPERATIVE UNION, LTD.

vs.

JAYAKODY

S.C. No. 14 *of* 1960—*Labour Tribunal Case, No.* 2/1915.

Argued on : 31st October and 1st November, 1961.
Decided on : 14th May, 1962.

Co-operative Societies Ordinance, section 53—*Industrial Disputes Act, sections* 31*B*, 31 *C*, 33 (1)—*Workman employed by a registered co-operative society—Right to invoke the jurisdiction of a Labour Tribunal—Application of the maxim :* " *Generalia specialibus non derogant.* "

The respondent, an employee of a registered co-operative society, who alleged that his employment had been " summarily terminated without notice or reasonable cause " applied to the Labour Tribunal in terms of section 31 B of the Industrial Disputes Act claiming reinstatement, arrears of salary and the return of a sum of money deposited by him as security.

At the inquiry, the appellant society raised two preliminary objections, viz. :—

(i) that the respondent was not a " workman " within the meaning of that term in the Industrial Disputes Act ;

(ii) that section 53 of the Co-operative Societies Ordinance had the effect of depriving a Labour Tribunal of any jurisdiction to entertain the application.

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The order of the Labour Tribunal over-ruling both objections was canvassed before the Supreme Court.

It was argued for the appellant-society that section 53 of the Co-operative Societies Ordinance operated as a bar to a Labour Tribuna exercising jurisdiction in terms of the Industrial Disputes Act. Relying on the case of *Sanmugam* v. *Badulla Co-operative Stores Union, Ltd.*, (1952) 54 N.L.R. 16, it was submitted that in the class of disputes contemplated in section 53, the jurisdiction of the Arbitrator and/or Registrar, as the case may be, was exclusive, and could not be taken away except by express words.

The Solicitor-General who appeared as *amicus curiae* submitted on the basis of the maxim : "*Generalia specialibus non derogant*" that since the Co-operative Societies Ordinance is a special statute and the Industrial Disputes Act, though subsequent, is a general statute, the respondent has to confine himself to the machinery of settlement of disputes as established under the earlier special statute.

Counsel for the respondent argued that there was no conflict of jurisdiction as—

(i) the powers of the Arbitrator and/or Registrar under section 53 of the Co-operative Societies Ordinance are not co-extensive with those of the Labour Tribunal ;

(ii) the Arbitrator and/or Registrar, unlike the Labour Tribunal, has to decide the dispute referred to him according to the legal rights of the parties and, therefore, has no power to make an award which a Court of law itself cannot make.

Held : (*a*) That section 53 of the Co-operative Societies Ordinance does not exclude employees of societies registered under that Ordinance from applying for the ampler reliefs obtainable through the machinery of the—the Industrial Disputes Act.

(*b*) The maxim "*Generalia specialibus non derogant*" does not apply as the two statutes do not cover the same territory.

(*c*) The case of *Sanmugam* vs. *Badulla Co-operative Stores Union, Ltd*., (1952) 54 N.L.R. 16, was not concerned with the Industrial Disputes Act, which was passed after the institution of the action in that case.

Cases referred to : *Sanmugam* v. *Badulla Co-operative Stores Union, Ltd.*, 54 N.L.R. 16.
R. v. *National Arbitration Tribunal, ex parte Crowther & Co., Ltd.*, (1947) 2 A.E.R. 693;(1948) 1 K.B. 424; 63 T.L.R. 641.
Seward v *Vera Cruz*, (1884) 10 A.C. 59; 52 L.T. 474; 54 L.J.P. 9.
Walker v. *Hemmant*, (1943) 1 K.B.D. 604; (1943) 2 A.E.R. 160

H. W. Jayawardene, Q.C., with *E. R. S. R. Coomaraswamy* and *C. P. Fernando*, for the appellant.

L. G. Weeramantry, with *R. L. Jayasuriya*, for the respondent.

A. L. S. Sirimanne, Acting Solicitor-General, with *H. Deheragoda* and *A. Mahendrarajah, Crown Counsel*, as *amicus curiae*.

T. S. FERNANDO, J.

This appeal from an order made by a Labour Tribunal raises a question of some importance to employees of societies registered under the Co-operative Societies Ordinance of 1936 (now Cap. 124).

The respondent alleging that his employment as Assistant Secretary of the appellant society was summarily terminated without notice or reasonable cause made an application to a Labour Tribunal claiming in terms of section 31 B of the Industrial Disputes Act, No. 43 of 1950 (now Cap. 131) as amended by the Industrial Disputes Act, No. 62 of 1957, (*a*) reinstatement in employment, (*b*) arrears of salary as from date of termination of employment, and (*c*) a return of a sum of Rs. 1,500/- deposited by him with the appellant as security.

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The appellant-society raised two objections to the maintainability of the application :—(i) that the respondent was not a workman within the meaning of section 31 B of the Industrial Disputes Act, and (ii) that section 53 (formerly 45) of the Co-operative Societies Ordinance has the effect of depriving a Labour Tribunal of any jurisdiction to entertain the application. The Tribunal after hearing argument held against the appellant on both objections, and the appeal before me was designed to canvass the correctness of the order of the Tribunal. At the commencement of the argument, learned counsel for the appellant-society indicated that he did not propose to pursue the point raised in the petition of appeal that the respondent was not a " workman " as defined in the Industrial Disputes Act. He confined his argument to the second objection referred to above, viz., the question of section 53 of the Co-operative Societies Ordinance operating as a bar to a Labour Tribunal exercising jurisdiction in terms of the Industrial Disputes Act.

Section 53 referred to above enacts, *inter alia*, that if any dispute touching the business of a registered society arises between the society and any employee thereof, whether past or present, such dispute shall be referred to the Registrar for decision. The Registrar can either decide the dispute himself or refer it for disposal to an arbitrator. A party aggrieved by an award of the arbitrator can appeal therefrom to the Registrar. The decision of the Registrar and an award of the arbitrator (where no appeal is preferred to the Registrar)—to reproduce the words of the statute—" shall be final and shall not be called in question in any civil Court ". This section came up for consideration by the Supreme Court in the case of *Sanmugan* v. *Badulla Co-operative Stores Union, Ltd.*, (1952) 54 N.L.R. 16, and the Court there held that it had the effect of ousting the jurisdiction of the ordinary Courts over a dispute touching the business of a registered society arising between the persons enumerated in the section. The correctness of this decision of the Supreme Court is not doubted, and, indeed, learned counsel for the respondent advanced his argument in support of the order on the basis that this decision, which was not concerned with the Industrial Disputes Act passed after the institution of the action in that case, in no way affects the soundness of his contention that the Labour Tribunal's jurisdiction acquired under Act. No. 62 of 1957 and now invoked by the respondent is not thereby ousted. Relying on the decision of this Court in *Sanmugam's case* (*supra*) Mr. Jayawardene argued that in the class of disputes contemplated in section 53 the jurisdiction of the arbitrator and/or the Registrar, as the case may be, was exclusive, and could not be taken away except by express words.

The argument on behalf of the respondent was that the question of any conflict between the jurisdiction of the tribunal contemplated in section 53 of the Co-operative Societies Ordinance and that of the Labour Tribunals established after 1957 under Part IV A of the Industrial Disputes Act does not really arise as the powers of the Tribunal under the first-mentioned statute are not co-extensive with those of the Labour Tribunal. As an instance thereof, Mr. Jayasuriya contended that under our common law a dismissed servant cannot claim from any Court of law a right to reinstatement in employment. " The Court will not decree specific performance of a contract for personal service, or of any contract which it would be impracticable or inexpedient for the Court to enforce specifically "—*see* Lee and Honore on *The South-African Law of Obligation*, 1950 ed., page 49, section 195. Section 33 (1) of the Industrial Disputes Act (as amended) enables a Labour Tribunal, on the other hand, to order reinstatement in employment of an employee who has been discontinued. A further contention advanced by him was that an arbitrator or the registrar referred to in section 53 of the Co-operative Societies Ordinance has to decide the matter of a dispute referred to him according to the legal rights of parties and that, therefore, he has no power to make an award which a Court of law itself cannot make. I think the contention that an arbitrator or registrar referred to above has not the power to order reinstatement in employment derives

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support from an examination of the general powers and duties of arbitrators. " It is the duty of an arbitrator, in the absence of express provision in the submission to the contrary, to decide the question submitted to him according to the legal rights of the parties, and not according to what he may consider fair and reasonable in the circumstances "—*see* Russell on Arbitration, 16th ed., p. 126. I might include here also certain observations made in *R.* v. *National Arbitration Tribunal, ex parte Horatio Crowther & Co., Ltd.*, (1947) 2 A.E.R. 693, at 696, a case where a *certiorari* to quash on the ground of want of excess of jurisdiction was allowed in respect of that part of an award made by the National Arbitration Tribunal as related to reinstatement in employment :—

> " There are no express words either in the regulation or in the Order which in terms give the tribunal any power to reinstate, but it is said that as they have power to deal with any question relating to employment or non-employment it follows that they must have the power to make an award of reinstatement. It seems to me a strange thing to say, looking at this regulation which alone gives force to the Order, that a power is thereby impliedly given to the tribunal to grant a remedy which no Court of law or equity has ever considered they had power to grant . . . It is true that this tribunal can do what no Court can, namely, add to or alter the terms or conditions of the contract of service. Express power to do so is given by the regulation, while there are no words conferring a power to reinstate or revive a contract lawfully determined."

It is not in my opinion, an unreasonable inference to make that by taking away the power of the Courts in disputes falling within section 53 of the Co-operative Societies Ordinance and by placing the decision of these disputes in the hands of the arbitrator or the registrar the legislature did not intend either to enlarge or restrict the legal rights of the parties.

So long as it is not disputed that the respondent is a workman within the meaning of the Industrial Disputes Act, is there any good reason to reach a conclusion that remedies wider than those available through resort to the ordinary or regular Courts that may be invoked through the medium of inquiries possible on an application made under section 31 B of the Industrial Disputes Act are not open to employees of societies registered under the Co-operative Societies Ordinance ? I was impressed by the argument advanced by Mr. Jayasuriya for the respondent that to uphold the contention that section 53 of the Co-operative Societies Ordinance excludes employees of societies registered under that Ordinance from maintaining applications for the ampler reliefs obtainable through the machinery of the Industral Disputes Act would operate as a discrimination, unwarranted in law, against employees of co-operative societies who today form numerically a substantial body of this country.

The learned Solicitor-General, who appeared as *amicus curiae* at the instance of the Court and whose assistance at the argument I acknowledge thankfully, suggested that the real question arising hereon may be framed as follows :—Does section 53 of the Co-operative Societies Ordinance create a statutory bar to the respondent taking his dispute with the appellant to the Labour Tribunal ? He submitted that the Co-operative Societies Ordinance is a special statute dealing—so far as the subject-matter of section 53 is concerned—with a special class or special classes of persons described in the said section, while the Industrial Disputes Act is a general statute. Referring to the maxim, " *Generalia specialibus non derogant* ", he submitted that the special statute must be given effect to unless expressly repealed by the later general statute. The matter is referred to—thus in Craies on *Statute Law*, 5th ed., pp. 348-

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349 :—" The general rule, that prior statutes are held to be repealed by implication by subsequent statutes if the two are repugnant, is said not to apply if the prior enactment is special and the subsequent is general ". In the other equally well-known treatise on the *Interpretation of Statutes* by Maxwell, 10th ed., pp. 176-177, it is stated that " a general later law does not abrogate an earlier special one by mere implication ", or to use the words of Lord Selbourne, L.C., in *Seward* v. *Vera Cruz*, (1884) 10 AC. 68, " where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specifically dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered or derogated from merely by force of such general words without any indication of any particular intention to do so ". In such cases it is presumed to have only general cases in view, and not particular cases which have been already otherwise provided for by the special Act. Having already given its attention to the particular subject and provided for it, the legislature is reasonably presumed not to intend to alter that special provision by a subsequent general enactment unless that intention be manifested in explicit language, or there be something which shows that the attention of the legislature had been turned to the special Act and that the general one was intended to embrace the special cases provided for by the previous one, or there be something in the nature of the general one making it unlikely that an exception was intended as regards the special Act. In the absence of these conditions, the general statute is read as silently excluding from its operation the cases which have been provided for by the special one.—Maxwell, 10th ed., p. 177.

Even on the assumption that, in the sense referred to in the passage above quoted, the Co-operative Societies Ordinance is a special Act and the later Act, the Industrial Disputes Act, is a general Act, I find myself unable, with all respect, to agree with the submission made that the respondent on the present appeal has to confine himself to the machinery of settlement of disputes as established under the Co-operative Societies Ordinance. In Maxwell's treatise itself, 10th ed., p. 180, dealing with the maxim " *generalia specialibus non derogant* ", there is the following comment :—" To be affected by this rule, *Acts must cover the same territory* ". In the case of *Walker* v. *Hemmant*, (1943) 1 K.B.D. 604, where the appellant relied on a right of appeal that lay to him under the Criminal Justice Administration Act 1914, and it was argued *contra* that an earlier special Act, the Coal Mines Act of 1911, deprived him of the right of appeal in the particular circumstances, the King's Bench Dvision held that the case was not one where a later and general Act has derogated from earlier and special legislation, but that the later Act provides an extension of the right of appeal granted by the earlier statute. Three Judges of the Court agreed that the maxim did not apply as the two enactments concerned "did not cover the same territory ". It is, in my opinion, not reasonable to conclude that the wider reliefs obtainable by recourse to the machinery of the later act which it is claimed embodies modern ideas designed for the purpose of preventing, investigating and settling industrial disputes, *e.g.*, an order as may appear to the Tribunal to be just and equitable—(section 31 C) or an order directing a reinstatement in service—section 33 (1)—were intended to be excepted in cases of dispute which would but for this later Act have fallen to be dealt with under the earlier special Act. The maxim referred to above does not, therefore, in my opinion, apply.

For the reasons I have indicated above, the second objection also fails, and this appeal is dismissed with costs.

Appeal dismissed.

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

EKMON *alias* AMARADASA *vs.* HANIFFA,
Sub-Inspector of Police, Grandpass.

S.C. N. No. 410 *of* 1961—*M.C. Colombo, No.* 42774/*D.*
(*with Application in Revision, No.* 276 *of* 1961).

Argued on : 9th October, 1961.
Decided on : 13th October, 1961.

Vagrants' Ordinance (*Cap.* 26), *section* 4—*Ingredients necessary to constitute offence thereunder*—" *Mens rea* " *essential.*

The accused was charged with committing an act punishable under section 4 of the Vagrants' Ordinance, the relevant part of the section reading " every person *wilfully* exposing his person in an indecent manner . . . to the annoyance and disgust of others shall be deemed a rogue and vagabond within the true intent and meaning of that Ordinance . . . "

Held : That for liability to arise under the section the mental element must be present.

Held further : That it must be proved that exposure of person caused annoyance and disgust to others.

M. T. M. Sivardeen with *A. H. Moomin*, for the accused-appellant.

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

T. S. Fernando, J.

The accused-appellant has been sentenced to a month's rigorous imprisonment on conviction after being charged with committing an act punishable as provided for in section 4 of the Vagrants' Ordinance (Cap. 26). He has appealed from the conviction but inasmuch as no point of law has been certified as required by section 340 of the Criminal Procedure Code, I must reject his appeal.

Realising, perhaps, that his position of appeal was legally defective, he has presented a petition which seeks to have his conviction and sentence quashed by way of the exercise of this Court's powers of revision in criminal cases. The point taken is that the charge on which the trial proceeded disclosed no act made punishable by law. It has been also contended before me that in any event there was no evidence before Court which could possibly have supported a conviction for the act which the statute seeks to penalise.

The relevant part of the statute—section 4 of the Vagrants' Ordinance—enacts that every person *wilfully* exposing his person in an indecent manner . . . *to the annoyance and disgust of others* shall be deemed a rogue and vagabond within the true intent and meaning of that Ordinance and shall be liable to be imprisoned with or without hard labour for any period not exceeding one month or to a fine not exceeding twenty rupees. The report in terms of section 148 (1) (*b*) of the Crim-

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inal Procedure Code alleged that the accused exposed his person to the annoyance of one Evelyn Devendra. An important element of the punishable act, viz., the mental element, appears to have escaped the attention of the Police officer who prepared this report. Even at the time of drafting the charge in Court this necessary element of the charge was overlooked. This omission was bad enough ; when the evidence was led at the trial, even the question of proving that exposure of person caused annoyance and disgust to others was lost sight of. The accused has, therefore, been convicted not only on a defective charge which discloses no punishable act, but the evidence led establishes nothing that the law declares punishable. In these circumstances I am satisfied that the accused has shown sufficiently good reasons for the exercise of this Court's power to revise the order made by the learned Magistrate.

The conviction and sentence are set aside and the accused is acquitted.

Set aside.

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

THE REGISTRAR-GENERAL *vs.* K. A. TIKIRI BANDA AND OTHERS*

Application under Section 28 *of the Births and Deaths Registration Act, No.* 17 *of* 1951.

S.C. Application 236/1961—*Revision in D.C. Colombo* , 2927/*X*.

Argued on : 7th July, 1961.

Decided on : 15th *December* 1961

Births and Deaths Registration Act, No. 17 *of* 1951 *sections* 28, 52 (1)—*Registration entry–Mistake as to name and sex—Application to District Court for order directing alteration—Order to Registrar-General made under section* 28 *of the Act—Jurisdiction to make such order made.*

The 2nd respondent, the child of the 3rd respondent by her husband, the 1st respondent, was born on the 2nd April, 1954. The birth was registered on the 24th April, 1954, the name of the child being registered as "Sunil " and its sex as "male." In June, 1960, the 3rd respondent made application to the District Court for an order directing the Registrar-General to alter the registration entries relating to name and sex to "Sunila" and "female", respectively. The District Court, being satisfied that the earlier entries had been made under a mistake, purported to make an order under section 28 of the Births and Deaths Registration Act, No. 17 of 1951, directing the Registrar-General to make the alterations prayed for. The Registrar-General applied in the present application to revise this order.

Held : **(1)** That the order was made without jurisdiction, because—

(*a*) although paragraph (*a*) of section 28 (1) authorized a Court to order the alteration of the names of a person whose birth has been registered, such an order could not be made until the person attains majority ; and

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* For Sinhala traslation see Sinhala section, Vol. 5, part 2, p. 6.

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(*b*) section 28 does not provide at all for the alteration of the entry relating to "sex" in a birth registration.

(2) That section 52 (1) (*h*) of the Act would appear to enable the Registrar-General himself to correct an error of fact or substance, but having regard to the context in which that power is conferred, it would be exercisable only if it was clear to the Registrar-General that the registration entry was not in accordance with the particulars furnished to the Registrar in the " information " given under the Act which preceded the registration of the birth.

Per H. N. G. Fernando, J.—" . . . the law at present provides no remedy for the situation which, according to the parents of the child, has arisen in this case. The Registrar-General will, no doubt, invite the attention of the proper authorities to the need for some amendment of the law which may deal with such unusual situations. "

Mervyn Fernando, C.C., for the petitioner.

F. C. Perera, for the respondents.

H. N. G. Fernando, J.

This is an application made by the Registrar-General for the revision of an order made by the District Court of Colombo under the Births and Deaths Registration Act, No. 17 of 1951. It would appear that the present 2nd respondent was born on 2nd April, 1954, being the child of the 3rd respondent by her husband the 1st respondent. The birth was registered on 24th April, 1954, the name of the child being registered as " Sunil " and its sex as "Male."

In June, 1960, the 3rd respondent made an application to the District Court for an order directing the Registrar-General to alter the registration entries relating to the name and sex of the child to the female name "Sunila" and to "Female," respectively. After recording some evidence, and being satisfied that by some mistake or " twist of fate ", there had been an error at the time of the registration of the birth (as to the name and sex of the child) the District Judge made order allowing the application, and directing the Registrar-General to effect the alterations. This order was made purportedly under section 28 of the Ordinance. It is, however, manifest—

(1) that, although paragraph (*a*) of section 28 (1) authorises a Court to order the alteration of the names of a person whose birth has been registered, such an alteration cannot be made until the person attains majority ;

(2) that section 28 does not provide at all for the alteration of the entry relating to sex in a birth registration.

The order of the District Judge made on February 21st, 1961, directing the alterations prayed for, was clearly made without jurisdiction and is hereby set aside.

The mistake, if any, made in regard to the registration of the birth was an unusual one, and it is not surprising that the Act does not provide for such a situation. Section 52 (1) (*h*) of the Act would appear to enable the Registrar-General himself to correct an error of fact or substance, but having regard to the context in which that power is conferred it would in my opinion be exercisable only if it is clear to the Registrar-General that the registration entry is not in accordance with the particulars furnished to the Registrar in the " information " given under the Act which preceded the registration of the birth. I have no doubt that if such has been the case in this instance, the Registrar-General will after due inquiry rectify the position under section 52 (1) (*h*). But if such has not been the case, the Law at present provides no remedy for the situation which, according to the parents of the child, has arisen in this case. The Registrar-General will, no doubt, invite the attention of the proper authorities to the need for some amendment of the Law which may deal with such unusual situations.

Sinnetamby, J.

I agree.

Application allowed.

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

S. de FRANSZ *vs.* S. M. FERNANDO

Application No. 479/1962 *for the transfer of C.R., Colombo, Case No.* 82833 *to the District Court of Colombo.*

Argued and decided on : 30th November 1962.

Courts Ordinance, section 79—Application for transfer of case from Court of Requests to District Court—Claim in reconvention by defendant in tenancy action on account of excess payments of rent—Such claim beyond jurisdiction of Court of Requests—Should transfer be allowed.

Held : That in a tenancy action, where the defendant clearly had a claim in reconvention against the plaintiff on account of excess payments of rent and such claim was beyond the jurisdiction of the Court of Requests, it would be necessary to have the case transferred to the District Court so that both the plaintiff's claim and the defendant's claim in reconvention could be determined by a Court having jurisdiction over the whole matter in controversy.

V. Arulambalam, for the defendant-petitioner.

N. R. M. Daluwatte, for the plaintiff-respondent.

ABEYESUNDERE, J.

This is an application under section 79 of the Courts Ordinance by the defendant in case No. 82833 of the Court of Requests of Colombo for an order to transfer that case to the District Court of Colombo on the ground that the defendant's claim in reconvention is in the sum of Rs. 2,800 which is beyond the jurisdiction of the Court of Requests. That sum is alleged by the defendant to consist of money paid by him to the plaintiff in excess of the authorised rent of the premises in suit. The plaintiff himself has disclosed in paragraph (6) of his plaint that he has received as damages certain sums in excess of the authorised rent.

The transfer of the aforesaid case to the District Court of Colombo is necessary to enable the plaintiff's action and the defendant's claim in reconvention to be determined by a Court having jurisdiction over the whole matter in controversy. I, therefore, order that case No. 82833 of the Court of Requests of Colombo be transferred to the District Court of Colombo. If it is practicable to do so, the District Court shall deal with this case early. The applicant is entitled to the costs of his application

SRI SKANDA RAJAH, J.

I agree.

Application allowed.

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

SEBAMALAI *vs.* MARIYAMPILLAI, Police Sergeant, Batticaloa*

S.C. 836/1962—*M.C. Batticaloa, No.* 2309.

Argued and decided on : 29th January, 1963.

Probation Ordinance, section 3 (1), —*Order thereunder without proceeding to conviction—Is this legal ?*

Held : That it is not legal to make an order under the Probation Ordinance without proceeding to conviction.

J. A. P. Cherubim, for the accused-appellant.

G. P. S. de Silva, Crown Counsel, for the Attorney-General.

*For Sinhala translation, see Sinhala section, Vol. 5, part 2, p. 8

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Sri Skanda Rajah, J.

The magistrate after careful consideration held that the charge had been made out. That is to say, he did not proceed to conviction. He was acting only under section 325 (1) of the Criminal Procedure Code. In order to make use of the Probation Ordinance an accused person has to be convicted. Section 3 (1) of the Probation Ordinance is as follows : " Where any person is *convicted* by any Court of any offence committed in a proclaimed judicial division . . ." I am, therefore, of the view that it was not legal to make an order under the Probation Ordinance without proceeding to conviction. In this particular case the magistrate was justified in not proceeding to conviction. The accused woman had given reasons which provoked her because the complainant was intimate with the accused's husband.

I set aside the order of probation made by the learned magistrate and without proceeding to conviction I discharge the accused with an admonition and order the accused to pay Rs. 25/- as costs.

Order of probation set aside.

Present : **Weerasooriya, J., and L. B. de Silva, J.**

MOHAMED ASBER *vs.* PATHUMUTHU

S.C. No. 4 *of* 1961—*Leave to appeal from the order of the Board of Quazis, No.* 248, *Alutgamaveediya, No.* 316 (*Kaikuli*)

Argued and decided on: 27th January, 1961.

Muslim Marriage and Divorce Act, (*cap.* 115) *section* 62 (1)—*Procedure in appeal from order of Board of Quazis.*

Conditions on which leave to appeal is granted from an order of the Board Quazis.

C. Ranganathan with *M. T. M. Sivardeen*, for the petitioner.

H. Ismail, for the respondent.

Weerasooriya, J.

Leave to appeal is granted to the respondent-petitioner on the following conditions :—

(*a*) The petitioner to deposit a sum of Rs. 150/- with the Registrar of this Court as security for the costs of the applicant-respondent and hypothecate the sum with the Registrar. These requirements in respect of security to be complied with within 30 days from today ;

(*b*) Within one week of the requirements of (*a*) above being complied with, the petitioner to file in this Court his petition of appeal ;

(*c*) At the time the petitioner files his petition of appeal, he shall also make an application to the registrar for such number of type-written copies as he wishes to obtain on payment of the fees in terms of the schedule to the civil Appellate rules, 1938 ;

(*d*) At the time he files his petition of appeal the petitioner shall also file with the Registrar a notice of appeal for service on the applicant-respondent.

L. B. de Silva, J.

I agree.

Leave to appeal granted.

[**Editorial Note** :—Section 62 (1) of the Muslim Marriage and Divorce Act, (Vol. 5, Chap. 115, page 281,) provides for the Judges of the Supreme Court or any five of them, of whom the Chief Justice shall be one, to make rules regulating the mode of applying for leave to appeal to the Supreme Court and of prosecuting appeals to the said Court from the orders of the Board of Quazis and for regulating any matters relating to the costs of such applications for leave to appeal and of appeals. So far no such rules have been framed. Meanwhile Applications for leave to appeal have come before Their Lordships' Court and Their Lordships' have granted leave subject to certain conditions being complied with by the petitioner. The above is a complete order by His Lordship Weerasooriya, J., (with L. B. de Silva, J. agreeing). The said order had been followed in the following application:—S. C. 512/1962—Leave to appeal from the Order of the Board of Quazis in Case No. 628 (Maintenance) Quazi Court of Colombo South, Supreme Court Minutes of 9-2-1962.]

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

MEERA MOHIDEEN *vs.* TOWN COUNCIL OF KALMUNAI & ANOTHER*

Application for an Injunction under Section 20 *of the Courts Ordinance.*
Application No. 520/62.

Argued and decided on : 12th December, 1962.

Courts Ordinance, section 20—*interim Injunction—Petitioner precluded from bringing action against Town Council without a month's notice given previously—Irreparable mischief to petitioner apprehended if action not filed immediately—Town Councils Ordinance* (*Cap.* 250), *section* 218.

In June, 1960, the then Chairman of a Town Council rented out to the petitioner a boutique within the market area. Shortly after, one *K.* started occupying a part of these premises without lawful authority and was sued for ejectment by the Town Council. Pending this action a new Chairman was elected and the petitioner apprehending, in view of certain information received, that the new Chairman would recognise *K.* as the rightful tenant, applied to the Supreme Court for an interim injunction to restrain the Chairman from granting *K.* the right to remain in possession of the premises on the ground:

(*a*) that though he desired to file an action against the Chairman and *K.*, section 218 (1) of the Town Council Ordinance precluded him from doing so without giving one month's notice in writing ;

(*b*) that irreparable mischief will ensue to him if he delayed the filing of the action till the expiry of the month.

Held : That in the circumstances, the petitioner is entitled to the interim injunction asked for under section 20 of the Courts Ordinance.

Case referred to : *Silva* v. *Tambiah*, 63 N.L.R. 228.

M. Tiruchelvam, Q.C., with *A. R. Munsoor* and *A. Nassim*, for the petitioner.

G. P. A. SILVA, J.

The petitioner in this case is a rate-payer of the Town Council of Kalmunai and the second respondent is the Chairman of the Town Council. Boutique No. 2 within the market area of this Town Council had been given to the petitioner on a monthly rental of Rs. 27.03 by the previous Chairman of the Town Council in June, 1960. Shortly after that one S. M. Kanagaratnam started occupying a part of these premises without any lawful authority and on a complaint being made by the petitioner to the Town Council action was filed in the District Court of Kalmunai by the Town Council, Kalmunai, in case No. 885/L against S. M. Kanagaratnam for ejectment. While this case was still pending in the District Court of Kalmunai a new Chairman was elected for this Town Council and, in view of certain information, the petitioner apprehends that the new Chairman will recognise the said Kanagaratnam as tenant of this boutique of which the petitioner is the rightful tenant. The petitioner, therefore, desires to file an action in the District Court against the 1st and 2nd respondents and in view of the provisions of the Town Council Ordinance, section 218 (1) he is unable to bring an action against the 1st and 2nd respondents without giving one month's notice in writing as required by the section. The action which the petitioner proposes to file is—

(*a*) for a declaration that he is in lawful possession of Boutique No. 2 in Kalmunai Market ;

(*b*) for a permanent injunction restraining the respondents from entering into a contract of tenancy with the aforesaid Kanagaratnam granting him the right to remain in possession of or occupy any part of the aforesaid boutique No. 2 in the Kalmunai Market ;

*For Sinhala translation, see Sinhala section, Vol. 5, part 3, p. 9

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(*c*) for an interim injunction restraining the respondents from entering into a contract with the aforesaid Kanagaratnam granting him any right to remain in possession of boutique No. 2 in Kalmunai Market pending an action in the District Court of Kalmunai.

The notice according to Mr. Tiruchelvam who appears for the petitioner, had been already given a few days ago and the petitoner apprehends that, before he could file the necessary papers in the District Court, irreparable mischief will ensue to the petitioner unless an injunction is issued by this Court in terms of section 20 of the Courts Ordinance restraining the respondent from entering into a contract of tenancy in respect of boutique No. 2 with the said Kanagaratnam. It has been laid down in the case of *R. Arnolis Silva* v. *D. Tambiah* reported in 63 N.L.R., at page 228, that there is no requirement for the Supreme Court to hear the opposite party before an application for injunction is granted where the Court is satisfied, on the application of one party, that irremediable mischief would result unless an injunction is granted and that delay would defeat the object of such an injunction.

In these circumstances I make order granting the interim injunction under section 20 of the Courts Ordinance restraining the respondents or their agents from entering into a contract of tenancy with the said S. M. Kanagaratnam and granting the said Kanagaratnam the right to remain in possession and to occupy the said boutique No. 2 in the Kalmunai market. The interim injunction will be in force for a period of six weeks from today. I make no order as to costs.

Application allowed.

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

V. CAROLIS SINGHO *vs.* V. HENDRICK SINGHO AND OTHERS*

S.C. No. 602 (*Final*) *of* 1959—*D.C. Gampaha No.* 7145/*P*

Argued on : 13th February, 1962
Decided on: 2nd November, 1962

Fideicommissum—Deed of Gift by father in favour of five sons—Interpretation of the words " after their death the said premises shall devolve on their legal children in equal shares. "

A deed of gift executed by a father in favour of five of his sons contained the following clause, which translated into English reads as follows :—

" However, the said donees except possess the said premises, shall not sell, mortgage, gift, exchange or in any way alienate the said premises and after their death the said premises shall devolve on their legal children in equal shares, who shall possess the same or do anything they like with the same."

It was not disputed that the clause had the effect of creating a *fideicommissum*.

Held : That the donor's intention as expressed in the clause was to permit his named sons to possess, and *after they had all died*, that the children of the named sons should take the property absolutely in equal shares.

Cases referred to : *Abeyratne* v. *Jagaris*, (1924) 26 N.L.R. 181.
Fernando v. *Fernando*, (1924) 27 N.L.R. 321.

H. W. Jayewardene, Q.C., with *M. L. S. Jayasekara* and *L. C. Seneviratne* for the plaintiff-appellant.

H. A. Koattegoda for the 1st & 2nd defendants-respondents.

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* For Sinhala translation, see Sinhala section, Vol. 5, part 3, p. 10

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T. S. Fernando, J.

The question that arises on this appeal from a dismissal of a partition action is the correct interpretation of a clause of a certain deed of gift, P 1 of 26th February, 1911. By this deed, one Vithanage Harmanis Appu gifted the allotment of land sought to be partitioned in this case to five of his sons, Sediris Appu, Hendrick Appu (1st defendant), John Singho, James Appu, and Cornelis (2nd defendant). The deed conains a clause which translated into English reads :—

> " However the said donees except possess the said premises, shall not sell, mortgage, gift, exchange or in any way alienate the said premises and after their death the said premises shall devolve on their legal children in equal shares who shall possess the same or do anything they like with the same."

It was not disputed at any stage that this clause had the effect of creating a *fideicommissum* in favour of the children of the donees. The plaintiff in this partition action is a brother of these very donees, and it was admitted that the donor, Harmanis Appu, had other children besides these five donees. Of the five donees, James Appu had not been heard of for some twenty years. He is presumed dead and has left no children. Two other donees, Sediris Appu and John Singho, have died unmarried and issueless. The other two donees are still living and are, in fact, the 1st and 2nd defendants to the partition action and respondents to this appeal. The 1st defendant has three children living while the 2nd defendant has no children.

The learned District Judge, after trial, holding that, so long as even one donee leaves behind legal children, intestate heirs of the donees without children are excluded from taking any benefit under P 1 dismissed the partition action with costs.

The plaintiff has appealed, and on his behalf it was contended that, on the death of each of the brothers Sediris Appu and John Singho as well as on James Appu being presumed dead, the share of each devolved, in the absence of children, on his intestate heirs. Counsel relied on the decision in the case of *Abeyratna* v. *Jagaris*, (1924) 26 N.L.R. 181, where the Court, being called upon to construe a deed by which the donor purported " to give, grant, assign, etc., unto E and O, their heirs, executors, administrators and assigns as a gift absolute and irrevocable " certain premises subject to the condition that the said E and O " shall not sell, mortgage, or otherwise alienate the said premises . . . and after their death the said premises shall go to, and be possessed by, their children as their absolute property ", held that the deed created a *fideicommissum*, and that on the death of either E or O his interests passed to his children. Bertram, C.J., (with whom Jayewardene, A.J., agreed) stated there that the phrase " their death " ought to be construed as though it read " their death, respectively ", or " the death of E and O, respectively ", and the phrase " their children " should be construed as though it read " their respective children ". These same two judges, however, in a case decided by them three months later—*Fernando* v. *Fernando*, (1924) 27 N.L.R. 321,—called upon to construe a deed of gift whereby property was given to C.D. and M.F., the daughter and son-in-law of the donors, subject to the following condition,

> "That the said C.D. and M. F. or either of them shall not sell, mortgage or otherwise alienate or encumber the said premises..................but shall possess them and take and enjoy the rents, profits and income thereof, during their natural life, and upon their death, the said premises shall devolve absolutely on their lawful children",

and where the daughter, C.D., had died, leaving her surviving her husband, M.F., and a child, held that the child acquired no right to the property until the death of both their parents.

Bertram, C.J. (with whom Jayewardene, A.J., again agreed)—it is interesting to note—stated

> "We must in the first instance interpret the expression 'upon their death.' *Prima facie*, this must mean upon the death of both parents. It is true that, where the context demands it, such an expression must be interpreted distributively. Thus in *Abeyratne v. Jagaris* (*supra*). where property was left to two brothers and 'after their death' to their children, we were able to interpret these words as meaning after their respective deaths. But there is no occasion for such a construction in the present instance."

In construing a deed of gift the words employed by the donor must be examined to understand his true intention. In the case of the deed of gift P 1, where property was being gifted by the father to some only of his children merely to be possessed by those children, and after their death to go to their legal children *in equal shares*, the latter to possess or to do anything they like with the property, it seems to me clear that the property cannot vest in the children till the death of the last surviving of the five sons of the donor

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named in P 1. The other construction contended for, viz., that with the death of each son so named in P 1, that son's share either passed to his children or, where he left no children, to his other heirs, would render it impossible to pass title *in equal shares* to the children of the five sons of Haramanis named in P 1. The donor's intention as expressed in P 1 was, in my opinion, to permit his named sons to possess and, after they had all died, that the children of the named sons should take the property absolutely in equal shares. The learned trial judge was, therefore, right in the conclusion he reached, and this appeal must be dismissed with costs.

HERAT, J.

I agree.

Appeal dismissed.

Present : **Basnayake, C.J., Herat, J., and Abeyesundere, J.**

MUKTHAR *vs.* ISMAIL

S.C. No. 123/58—*D.C. Kandy, No. L* 4877.

Argued on : July 4, 5 and 6, 1962.
Decided on : October 10, 1962.

***Fraudulent** alienation—Paulian action and action under section* 247 *of the Civil Procedure Code combined—Nature and scope of these actions—Meanings of the terms " creditor " and " debt " explained.*

Alienation in fraud of creditors—Voidable by creditor prejudiced thereby—Not void—Need for debt to be in existence at time of alienation—Claim for unliquidated damages not a debt in such context—Caveat, Registration of Documents Ordinance, section 32 *—When it applies—Civil Procedure Code, section* 653.

On 11th January, 1955, plaintiff instituted action against the 1st defendant for cancellation of two lease bonds, for ejectment and damages and obtained decree on 16th February, 1956. In execution of this decree for damages aggregating to a sum of Rs. 16,000/-, certain premises were seized on 22nd May, 1956. The 2nd defendant preferred a claim to the said premises based on a deed of transfer, No. 369, dated 1st October, 1955, executed by the 1st defendant in his favour and the claim was upheld. The 1st defendant himself had purchased the premises on 1st February, 1955.

Thereupon the plaintiff filed this action praying for a declaration: (*a*) that the said deed, No. 369, was null and void ; (*b*) that the premises in question were liable to be seized and sold in execution of the said decree.

The main issues tried were : (1) Was the said deed, No. 369, executed by the 1st defendant with the object of defrauding the plaintiff ? (2) By the execution of the said deed, has the 1st defendant left himself without sufficient property to satisfy the plaintiffs' decree ? (3) Did the defendants act collusively in the execution of the said deed ?

The learned District Judge held against the defendant on all these issues and judgment was entered in terms of the prayer aforesaid. The defendant appealed.

It was in evidence : (*a*) that the 2nd defendant had been carrying on a business at the premises in question as a tenant since 1935 ; (*b*) that he became the tenant of the 1st defendant in February, 1955, when the latter purchased the premises for Rs. 17,500/- ; (*c*) that the 2nd defendant purchased the premises from the 1st defendant for Rs. 17,500/- subject to two mortgage bonds for Rs. 5,000/- and Rs. 3,000/-, respectively, plus interest which he paid off ; (*d*) that at the time the 2nd defendant purchased the premises there was in force a caveat which had been presented by the plaintiff on 20th April, 1955 ; (*e*) that the 2nd defendant was informed by his notary that a caveat had been registered, but that he not only paid no heed to it, but authorised the notary to execute the deed without examining the relevant land registers ; (*f*) that judgment had not been entered against the 1st defendant at the time of his alienation to the 2nd defendant. There was no evidence that the 1st defendant was in debt except the said two mortgages which had been discharged.

Their Lordships after discussing the nature and scope of Paulian actions and those under section 247 of the Civil Procedure Code,

Held : (1) That the learned District Judge was wrong in declaring that the deed was *null and void*, because a sale by a debtor, even where it is in fraud of creditors is *not void*, but is liable to be set aside or annulled

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at the instance of a creditor who has been prejudiced by it, and then only to the extent to which he has been prejudiced.

(2) That the plaintiff was not a creditor at the time of the alienation of his property by the 1st defendant inasmuch as the plaintiff had not obtained judgment at the time of the transfer and there was no judgment-debt in existence. Nor was there a contract-debt as no rent or money payable on the lease bond was claimed. The claim made on the contract of lease was for unliquidated damages and such a claim does not fall within the ambit of the expression " debt ".

(3) That the plaintiff is not entitled to ask for the Paulian remedy or for relief under section 247 of the Civil Procedure Code for the reason that both when the said lease was executed and the action was instituted the 1st defendant not being the owner of the land, it is not open to the plaintiff to say that to his detriment the defendant got rid of property which at the time of institution he reasonably expected would be available to satisfy the judgment in case he succeeded in the action.

(4) That the remedy in our law against the alienation of his property by the defendant to an action, in order to prevent the plaintiff from executing his writ in the event of his succeeding in the action, is found in section 653 of the Civil Procedure Code.

(5) That as the alienation is not void or voidable by the caveator, and as there has been no fraudulent alienation, and as the alienation is not in derogation of the lawful rights of the caveator, no action can be taken under section 32 (5) of the Registration of Documents Ordinance.

H. W. Jayawardene, Q.C., with *G. T. Samarawickreme, M. Rafeek* and *D. S. Wijewardene*, for the 2nd defendant-appellant.

H. V. Perera, Q.C., with *Vernon Jonklaas* and *M. T. M. Sivardeen*, for the plaintiff-respondent.

BASNAYAKE, C.J.

In this action the plaintiff seeks to obtain a decree declaring that the Deed No. 369, dated 1st October, 1955, attested by T. M. A. Sally, Notary Public of Matale, is null and void, and that the premises described in the schedule to the plaint are liable to be seized and sold under writ in D.C. Kandy, Case No. L. 4408.

Shortly the material facts are as follows :— On 11th January, 1955, the plaintiff instituted D.C. Kandy, Case No. L. 4408, against the 1st defendant for a cancellation of two indentures of lease bearing numbers 719 and 7435, for his ejectment from the land called Benveula Estate of 40 acres 1 rood and 10 perches situated in Matale, and for the recovery of damages. He obtained judgment in his favour, and on 16th February, 1956, the following decree was entered :—

" It is ordered and decreed that the Indenture of lease No. 7435, dated 1st February, 1954, be and the same is hereby declared cancelled.

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

It is further ordered and decreed the that defendant do pay to the plaintiff damages Rs. 5,500/- up to January, 1955, and further damages at Rs. 200/- per mensem till possession is yielded.

It is further ordered and decreed that the defendant do pay plaintiff Rs. 300/- per mensem from 1st February, 1954, till 16th February, 1956.

And it is further ordered and decreed that the defendant do pay the plaintiff Rs. 20/- a month from 2nd June, 1954, till 16th February, 1956.

And it is further ordered and decreed that the defendant do pay to the plaintiff his costs of this action as taxed by the officer of this Court."

In execution of the decree, premises bearing 101, Trincomalee Street, Matale, were seized on 22nd May, 1956. The 2nd defendant preferred a claim to the premises seized, and on 26th July, 1956, his claim was upheld. He based his claim on the Deed of Transfer No. 369 executed by the 1st defendant on 1st October, 1955, of the premises which the 1st defendant himself had purchased on 1st February, 1955, after the institution of the plaintiff's action on the lease.

At the trial it was admitted—

(*a*) that Deed No. 369 was executed on 1st October, 1955 ;

(*b*) that the plaintiff had seized the premises affected thereby in execution of a

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decree in his favour in D.C. Kandy, Case No. L. 4408 ;

(*c*) that the 2nd defendant had claimed the land and the claim was upheld on 26th July, 1956 ;

(*d*) that the 1st defendant is the judgment-debtor in D.C. Kandy, L. 4408 ;

(*e*) that the amount of the decree in D.C. Kandy, L. 4408, was Rs. 16,000/-.

The matters on which the parties were at variance were stated in the form of the following issues :—

"(1) Was the said Deed No. 369 executed by the 1st defendant with the object of defrauding the plaintiff ?

(2) By the execution of the said deed, has the 1st defendant left himself without sufficient property to satisfy the plaintiff's decree ?

(3) Did the defendants act collusively in the execution of the said deed ?"

All these issues were answered against the defendant and judgment was accordingly given for the plaintiff declaring Deed No. 369 null and void and the property affected thereby liable to be seized and sold in execution of the writ in D.C. Kandy, Case No. L. 4408. The present appeal is from that judgment.

The instant case is a combination of a Paulian action and an action under section 247 of the Civil Procedure Code. What is a Paulian action ? Planiol, Vol. 2, Pt. I, p. 179, (Louisiana State Law Institute Translation) defines it thus :

> "This action which is referred to as the 'Paulian' or 'revocatory action' can be defined as an action given to creditors to obtain the revocation of acts done by their debtor in fraud of their rights."

The action is a creation of the Praetorian Law and is named after the praetor Paulus who introduced it. The word "revocatory" in the definition is also of Roman origin and owes its origin to the word "*revocare*" used by the Roman Jurisconsults in connection with the Paulian action in the phrase "*per quam quae in fraudem creditorum alienata sunt revocantur*" (Digest, Bk. XXII, Tit. I, s. 4). The fraud in the case of a Paulian action consists in the debtor's intention to put his assets beyond the reach of his creditors. An action under section 247 is a statutory remedy provided by the Civil Procedure Code in cases in which the circumstances prescribed in that section exist. The section reads—

> "The party against whom an order under section 244, 245, or 246 is passed may institute an action within fourteen days from the date of such order to establish the right which he claims to the property in dispute, or to have the said property declared liable to be sold in execution of the decree in his favour ; subject to the result of such action, if any, the order shall be conclusive."

To understand the scope of the action under section 247 it is necessary to see what the orders referred to in the section are. The Court is empowered—

(*a*) under section 244 to make an order releasing the property wholly or partly from seizure,

(*b*) under section 245 to make an order disallowing the claim, and

(*c*) under section 246 to make an order continuing the sequestration or seizure subject to an existing mortgage or lien.

An action under section 247 cannot be brought unless an order under section 244, 245, or 246 is made. Such an action can only be brought by the party against whom an order under any of those sections has been made and must be instituted within 14 days of the order. The object of an action under section 247 is either to establish the right which the plaintiff claims to the property in dispute or to have the property declared liable to be sold in execution of the decree in his favour. The 247 action is available only to a decree-holder while a creditor who is not a decree-holder may bring a Paulian action. Section 247 does not empower the Court to revoke a sale by the judgment-debtor while the Paulian action does. The reliefs sought by the plaintiff in the instant case are—

(*a*) that the deed by which the 1st defendant transferred the land in question be declared null and void, and

(*b*) that the property be declared liable to be seized and sold under writ issued in D.C. Kandy, Case No. L. 4408.

The learned District Judge has granted a decree in terms of the prayer and declared the deed null and void. A sale by a debtor even where it is in

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fraud of creditors is not void, but is liable to be set aside or annulled at the instance of a creditor who has been prejudiced by it and then only to the extent to which he has been prejudiced. In that sense a deed in fraud of creditors may be declared null, but not null and void. Unless and until it is set aside by the judicial decree the sale is good, and where the purchaser from the debtor sells the property the creditors cannot reach it in the hands of third persons. Planiol explains the matter thus :

"But the nullity which results from the Paulian action is not a nullity like the others ; the fraudulent act is only annulled in the interest of the defrauded creditor and remains effective with all its consequences with regard to all other persons ; thus it is more proper, in referring to it, to use the expression 'revocatory action', which indicates its special nature.

In thus acquiring an effect which approaches that of actions in nullity the revocatory action has preserved the fundamental character which it has always had in accordance with the principle of its institution ; it has not ceased to be an action for an indemnity arising from an illicit act ; it always tends to repair the damage suffered by the creditor and belongs to the group of delictual actions. The nullity which is its consequence is the most direct and simple means of assuring to the creditor the reparation to which he has a right."

The learned Judge was therefore wrong in declaring that the deed was null and void. Now what are the circumstances in which a sale which is alleged to be in fraud of creditors be set aside ? They are stated thus by Domat who discusses the subject with greater clarity than Voet—

"1635. The alienations of movables and immovables which debtors make, upon another score than that of liberty, to persons who purchase with an honest intention, and for a valuable consideration, knowing nothing of the prejudice done thereby to creditors, cannot be revoked, whatever intention of defrauding the debtor may have had. For the debtor's knavish intention ought not to cause a loss to those who deal with him in a lawful commerce, and who have no share in his fraud.

1636. Although the fraudulent alienation be made for a valuable consideration, such as a sale, yet if it be proved that the purchaser has been a partaker in the fraud, that he might profit by it, getting the thing upon that account at a cheaper rate, the alienation will be revoked, without any restitution of the price to the purchaser who is an accomplice in the fraud, unless the money which he paid for it be still in being, in the hands of the debtor who sold the thing to him.

1637. To oblige him who purchases a thing of a a debtor to make restitution of it, it is not enough that the purchaser knew that the said debtor had creditors ; but he must have been privy to the design of defrauding them. For many of those who have creditors are not insolvent, and one does not become an accomplice in the fraud except by taking part in it."

Voet's comment is in Book XLII, Tit. 8, section 2 (Gane's translation, Vol. 6, p. 408), he states—

"Nay it only arises from some disgraceful act, to wit the fraud not only of the alienator, but more especially of the person to whom alienation has been made, inasmuch as, to make it possible for a place to be found for this action, the alienation must have been made by the debtor in fraud of creditors with the knowledge of such person . . ."

Now turning to the facts of this case with the above propositions of law before me it would appear that the 2nd defendant who carried on business at the premises in question had been in occupation of those premises as tenant since 1935. He became the tenant of the 1st defendant in February, 1955, when the latter purchased the premises from Mrs. Croos for Rs. 17,500/-, and on 1st October, 1955, the 2nd defendant purchased them himself from the 1st defendant for a sum of Rs. 17,500/- subject to two mortgage bonds, Nos. 1628 and 1629, dated 1st February, 1955. The latter was a bond for Rs. 5,000/- carrying interest at 18% per annum. Judgment was obtained on that bond and decree was entered on 26th December, 1955, for a sum of Rs. 5,225/-. The former was a bond for Rs. 3,000/-. These debts the 2nd defendant paid. At the time the 2nd defendant purchased the premises there was in force a caveat which had been presented by the plaintiff on 20th April, 1955. The notary who gave evidence said that he informed the 2nd defendant that a caveat had been registered ; but he not only paid no heed to it, but also authorised the notary to execute the deed without examining the relevant land registers. But whatever may be the consequences of the 2nd defendant's action in purchasing the land despite the caveat the question is whether the 1st defendant's alienation was in fraud of creditors. Judgment had not been entered in the action against the 1st defendant at the time of the alienation. That was done only in January, 1956. There is no evidence that the 1st defendant was in debt, except that there were two mortgages on this very land, a primary and a secondary mortgage. The alienation did not effect the mortgage creditors. There is no evidence that other creditors, if any, were affected by it.

The question that arises for decision is whether the plaintiff was a creditor at the date of the alienation of his property by the 1st defendant. For it is only a creditor *in esse* that can claim that an alienation was made to his prejudice, (Planiol, Vol. 2, Pt. 1, p. 186). To answer that question

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it is necessary to decide who is a creditor. Sweet's Law Dictionary defines the expression thus :

> "Creditor is a person to whom a debt is owing by another person called the debtor. The creditor is called a simple contract creditor, a speciality creditor, a bond creditor, or a judgment creditor, according to the nature of the obligation giving rise to the debt ; and if he has issued execution to enforce a judgment he is called an execution creditor. He may be a sole or joint creditor."

A creditor being a person to whom a debt is owing by another person the next question that arises for decision is—What is a debt ? To that question, too, Sweet's Law Dictionary provides an answer. It states—

> "In the strict sense of the word a debt exists when a certain sum of money is owing from one person (the debtor) to another (the creditor). Hence 'debt' is properly opposed : (1) to unliquidated damages, (2) to 'liability' when used in the sense of an inchoate or contingent debt ; and (3) to certain obligations not enforceable by ordinary process. 'Debt' denotes not only the obligation of the debtor to pay, but also the right of the creditor to receive and enforce payment.
>
> Debts are of various kinds, according to their origin."

The author next goes on to describe the different kinds of debts such as, statutory debts, specialty debts, simple contract debts, debts arising from privity of estate, Crown debts, secured debts, bankruptcy, and preferential debts.

With these definitions in mind I shall now address myself to the facts of the instant case to determine the nature of the debt, if any, owed by the 1st defendant to the plaintiff at the date of the transfer. It would appear from the plaint that there was a contract of lease between the plaintiff and the 1st defendant (Lease Bond No. 7435, dated 1st February, 1954) and that the plaintiff had sued the 1st defendant for damages for breach of the terms of that contract. As the plaintiff had not obtained judgment at the time of the transfer on 1st October, 1955, there was no judgment debt in existence, nor was there a contract debt or more specially what is called in English law a specialty debt as no rent or money payable on the lease bond was claimed. The claim made in the action on the contract of lease was for unliquidated damages.

A claim for unliquidated damages does not fall within the ambit of the expression "debt". As there was no debt due from the 1st defendant the plaintiff was not a creditor of the 1st defendant at that date and the transfer cannot be said to be in fraud of him.

In the instant case the 1st defendant became the plaintiff's lessee on 1st February, 1954. Action for cancellation of the lease, damages and ejectment was instituted on 11th January, 1955. The 1st defendant purchased the premises in question on 1st February, 1955, and on 3rd October, 1955, sold it to the 2nd defendant. It was not till 16th February, 1956, that decree was entered in favour of the plaintiff. He can have no grievance because when the lease was executed the 1st defendant was not the owner of the land, nor was he the owner of the land when the action was instituted. So that it is not open to him to say that to his detriment the defendant got rid of property which at the time of institution of his action he reasonably expected would be available to him for execution of his judgment debt in the event of his succeeding in the action. The 1st defendant purchased it after the action was instituted and sold it before judgment. The Paulian remedy does not lie in such a case and no relief under section 247 can be claimed. It may be asked what safeguards does our law provide against the alienation of his property by the defendant to an action in order to prevent the plaintiff from executing his writ in the event of his obtaining judgment. They are to be found in our statute law. Section 653 of the Civil Procedure Code provides—

> "If a plaintiff in any action, either at the commencement thereof or at any subsequent period before judgment, shall, by way of motion on petition supported by his own affidavit and *vice voce* examination (if the Judge should consider such examination necessary) satisfy the Judge that he has a sufficient cause of action against the defendant, either in respect of a money claim of or exceeding two hundred rupees or because he has sustained damage to that amount, and that he has no adequate security to meet the same, and that he does verily believe that the defendant is fraudulently alienating his property to avoid payment of the said debt or damage ; and if he shall at the same time further establish to the satisfaction of the Judge by affidavit or (if the Judge should so require) by *viva voce* testimony such facts that the Judge infers from them that the defendant is fraudulently alienating his property with intent to avoid payment of the said debt or damage, or that he has with such intent quitted the Island leaving therein property belonging to him, such Judge may order a mandate (form No 104, First Schedule) to issue to the Fiscal, directing him to seize and sequester the houses, lands, goods, money, securities for money and debts, wheresoever or in whose custody soever the same may be within his district, to such value as the Court shall think reasonable and adequate and shall specify in the mandate, and to detain or secure the same to abide the further orders of the Court."

In the instant case if the plaintiff wished to safeguard himself he should have sought the protection offered by the above cited section. Not

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having invoked section 653 he cannot complain afterwards and resort to the Paulian action for the purpose of obtaining the relief afforded by section 653.

There remains for consideration only the question of the effect of the purchase of a land in respect of which there has been entered in the appropriate land register a caveat. Provision for the registration of a caveat is made in section 32 of the Registration of Documents Ordinance which reads—

"(1) Any person (in this Ordinance called a 'caveator') may present for registration a caveat in the prescribed form requiring to be served with notice of the presentation for registration of any instrument affecting the land described in the caveat.

(2) The Registrar shall on receiving a caveat register it in the same manner as other instruments, but shall retain the caveat.

(3) A caveat shall be in force for such period as may be specified therein, not being longer than the period covered by the fee paid on the caveat.

(4) The notice to be given to the caveator shall be in the prescribed form and shall be sent by registered letter to the address mentioned in the caveat.

(5) If, while a caveat is in force, an instrument affecting the land described in the caveat is presented for registration, and in an action commenced by the caveator in a competent Court within thirty days from posting of the notice required by sub-section (4) it is proved to the satisfaction of the Court that the instrument presented for registration is or was at the time of registration void or voidable by the caveator or fraudulent as against him or in derogation of his lawful rights, the Court may order the instrument to be rectified or cancelled as may be necessary to preserve the rights of the caveator, and may order the necessary correction to be made in the register.

(6) Nothing in this section shall affect any other power which may be possessed by any Court of ordering any instrument to be rectified or cancelled."

As the alienation is not void or voidable by the caveator, and as there has been no fraudulent alienation, and as the alienation is not in derogation of the lawful rights of the caveator, no action under section 32 (5) can be taken. The judgment of the learned District Judge is, therefore, reversed and the plaintiff's action dismissed with costs.

The appellant is entitled to the costs of appeal.

HERAT, J.
I agree.

ABEYESUNDERE, J.
I agree.

Appeal allowed.

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

R. LOVELL, RANGE FOREST OFFICER, JAFFNA *vs.* T. SINNADURAI AND ANOTHER

S.C. No. 193 *of* 1961—*M.C. Chavakachcheri,* 13741.

Argued on : 10th November, 1961 and 4th April, 1962.
Decided on : 5th June, 1962

Forest Ordinance, section 23—Charge under Regulation 5 made thereunder, relating to transit of forest produce—Whether prosecution can be conducted by forest officer—Whether Regulation 5 "ultra vires" the Forest Ordinance—Ingredients to be established by prosecution in charge under Regulation 5—Meaning of Regulation 5 (1).

Held : (i) That the complainant, being a forest officer, within the meaning of the Forest Ordinance and a public officer within the meaning of the Criminal Procedure Code, was in every way entitled to enter prosecution and to conduct it in the Magistrate's Court.

(ii) That regulation 5 relating to the transit of forest produce made by the Minister under section 24 of the Forest Ordinance is not *ultra vires* the Forest Ordinance.

(iii) That when regulation 5 (1) prohibited removal within or beyond the specified local area, it in effect only prohibited the moving out of the timber from the specified local area to another beyond it.

(iv) That in order to succeed in a prosecution for a contravention of regulation 5 (1) the prosecutor must establish that the timber in question came from the specified local area itself.

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Per T. S. Fernando, J.—" The learned Magistrate was in error, if I may say so with respect, when he stated that 'an officer of the Forest Department cannot appear in Court except through the Government Agent or the Assistant Government Agent as contemplated in sections 37, 38 and 39 of the Forest Ordinance'."

Case referred to : *Lushington* v. *Mohamadu* (1913) 16 N.L.R. 366

A. C. Alles, Deputy Solicitor-General with *V. S. A. Pullenayagam* and *E. D. Wikramanayake, Crown Counsel*, for the complainant-appellant.

No appearance for the accused-respondents.

Colvin R. de Silva with *M. L. de Silva*, as *amicus curiae*, at the request of Court.

T. S. Fernando, J.

When this appeal came on for hearing there was no appearance for the accused-respondents. I reserved order after I had heard the learned Deputy Solicitor-General in support of the appeal but, deeming it necessary that I should hear argument contra, I requested that counsel's assistance be furnished to me, and I must here express my indebtedness to Mr. Colvin R. de Silva for the assistance he has rendered in this matter.

The charge against the two accused persons as framed in the Magistrate's Court was as follows :—

> " That they did, at Elephant Pass, on 3rd August, 1960, after sunset and before sunrise, within the limits of an area specified by the Conservator of Forests by notification published in Government *Gazette*, No. 10743, of December 10, 1954, and amended by notification published in Government *Gazette*, No. 10772, of March 4, 1955, for the purpose of section 24 (1) (*b*) of the Forest Ordinance as an area within or beyond the limits of which timber of any species specified in that notification may not be removed without a permit or pass, to wit, the Jaffna District, remove in lorry No. CN 6966 without a permit or pass issued by an authorised officer one palu and nine satinwood logs valued at Rs. 385.05, in breach of Regulation 5 (1) of the Regulations relating to the transit of forest produce published in Government *Gazette*, No. 8057, of June 8, 1954, as amended by the Regulations, made by the Minister of Lands and Land Development by virtue of powers vested in him under section 24 of the Forest Ordinance as modified by the proclamation published in Government *Gazette Extraordinary* No. 9773, of September 24, 1947, published in Government *Gazette*, No. 10424, of July 11, 1952, and amended by notification in Government *Gazette*, No. 10743, of December 10, 1954, and that they did thereby commit an offence punishable under the second proviso to section 25 of the Forest Ordinance read with section 40 of the same Ordinance."

The charge reproduced above is undoubtedly unwieldy and verbose in the extreme but, having regard to the requirements of the Criminal Procedure Code and the practice relating to the framing of charges in criminal cases that has developed in this country, it is not uncommon to come across charges as cumbersome as this, particularly in the case of offences under the Forest Ordinance and the Shop Act.

The learned Magistrate has found on the evidence led before him at the trial that the accused did transport by lorry the ten logs of timber specified in the charge and that they were detected while doing so by the complainant who is a forest officer within the meaning of the Forest Ordinance. They had neither a permit nor a pass of any kind in respect of such transporting. The Magistrate was satisfied that the officer authorised by law to issue a permit or pass was the Divisional Revenue Officer of Pachihilapallai. He, however, acquitted the accused because he came to the conclusion : (1) that the regulation alleged to have been contravened by the accused was *ultra vires* the Forest Ordinance ; and (2) the complainant had no authority to prosecute the accused in the Magistrate's Court.

In regard to the second reason given by the learned Magistrate to support the order he made, viz., the lack of authority in the complainant to enter a prosecution, both Mr. Alles and Mr. de Silva were agreed that that reason was invalid. Indeed, the case of *Lushington* v. *Mohamadu*, (1913) 16 N.L.R. 366, which was cited also to the Magistrate is conclusive on the point. Said Perera, J., in that case :—" But assuming property has been seized, I think the procedure under section 39 (of the Forest Ordinance) is merely cumulative : it does not displace the procedure of the Code ". The complainant, being a forest officer within the meaning of the Forest Ordinance and a public officer within the meaning of the Criminal Procedure Code, was in every way entitled to enter prosecution and to conduct it in the Magistrate's Court. The learned Magistrate was in error, if I may say so with respect, when he stated that " an officer of the Forest Department cannot appear in Court except through the Government Agent or the Assistant Government Agent as contemplated in sections 37, 38 and 39 of the Forest Ordinance. "

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The first reason given by the learned Magistrate was also canvassed by Mr. Alles who contended that the matters described in clause *(b)* of section 24 (1) of the Forest Ordinance as being some of the matters in respect of which regulations may be made by the Minister are only illustrative of but do not determine the powers of the Minister.

Section 24 (1) of the Ordinance declares that the Minister may make regulations respecting the transit of all forest produce by land or water. While the expression " forest produce " has been defined in the interpretation section 78, section 24 (2) declares that in section 24 the terms " forest produce " and " timber " shall, unless the context otherwise requires, include timber cut in any land or property, whether the property of the Crown or any private individual. The Minister, therefore, has been vested with power to make regulations respecting the transit of timber, whether the property of the Crown or any private individual. Acting under the power granted to him by section 24, the Minister has made the regulation—regulation 5 published in *Gazette*, 10,743 of December 10, 1945—reproduced below :—

" 5 (1). Within or beyond the limits of any area specified by the Conservator of Forests by notification in the *Gazette* for the purposes of section 24 (1) *(b)* of the Forest Ordinance as an area within or beyond the limits of which timber of any species specified in that notification may not be removed without a pass, no person shall remove or cause to be removed any such timber without a pass issued by the Conservator of Forests, or other forest officer or person authorised in that behalf by the Conservator of Forests.

(2). No person shall transport timber of any species specified in a notification under paragraph (1) from an area other than an area specified in such notification without a pass issued by the Conservator of Forests, or other forest officer, or the nearest authorised headman stationed within the first-mentioned area.

(3). For the purposes of paragraph (2), the expression ' authorised headman ' means any headman duly authorised by the Government Agent or the Assistant Government Agent to issue passes under that paragraph."

The accused were found, within the limits of an area specified by the Conservator of Forests by notification as contemplated in clause *(b)* of section 24 (1), *i.e.*, within Jaffna District, transporting timber of species prohibited by notification from being removed without a pass. The learned Magistrate concluded that regulation 5 was *ultra vires* as, in his opinion, it was not competent for the Minister to make a regulation in derogation of the statute—(section 24 (1) *(b)*). Citing section 17 (1) *(c)* of the Interpretation Ordinance which provides that no rule made under the authority of an enactment shall be inconsistent with the provisions of any enactment, the Magistrate held that, where the statute provides that regulations may be made prohibiting removal of timber without a pass from the landholder from whose land it was brought or from an officer duly authorised to issue a pass, when the regulation prohibited removal without a pass issued by the Conservator of Forests or other forest officer or person authorised in that behalf by the Conservator of Forests, the regulation was inconsistent with the provisions of the Ordinance under which it purports to have been made, and was, therefore, *ultra vires*. The Deputy Solicitor-General has argued that the learned Magistrate has here assumed that the only power the legislature has conferred on the Minister is the power described in paragraph *(b)* of section 24 (1) of the Ordinance and has overlooked the existence of the power conferred without qualification in section 24 (1) itself by the following words :—

" The Minister may make regulations respecting the transit of all forest produce by land or water."

He argued that the regulation in question has been made under the power referred to immediately above which sets no limitation on the Minister in regard to the nature of the regulations he may make for the purpose indicated in the opening sentence of that section. The plenitude of the power so conferred on the Minister is nowise affected, in my opinion, by the circumstance that the legislature has instanced some of the matters that may form the subject of regulations to be made under the section in question.

Mr. de Silva, while not conceding to the prosecution the point as to whether the regulation is *ultra vires*, raised a number of arguments against the conviction, the most important of which was that, even if the regulation 5 (1) was *intra vires*, it penalised only a *removal from* a specified local area and not a *moving* from one place to another within that specified local area. As I find myself in agreement with him as to the meaning of regulation 5 (1) so contended for, I shall set down shortly my reasons therefor.

If, as the prosecution contends, regulation 5 (1) prohibits the moving or transporting without a pass of specified timber from one place to another within the specified local area, having regard to the meaning of " timber " in section 24 (2), it really means that no person may move without a pass such timber, although belonging to him as

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his private property, from one part of his land or estate to another part of the same land or estate within the specified local area. A regulation producing this result is obviously most unreasonable and I do not think a Court of law should pronounce in favour of an interpretation leading to such a result unless for some compelling reason it is driven to do so. The meaning which the prosecution seeks to place on this regulation 5 (1) would involve placing on the word " remove " occurring therein the meaning of moving in the sense of a mere change of position. Construing what is in substance a penal provision, the Court should, in my opinion, incline towards an interpretation which not only preserves the ordinary meaning of the word " remove " (which is to take away from one place or another beyond it) but also renders immune from penalty an otherwise ordinary dealing with one's own private property. It seems to me that when regulation 5 (1) prohibited removal within or beyond the specified local area, it in effect prohibited a moving out of the timber from the specified local area to another beyond it. It follows, therefore, that in order to succeed in a prosecution for a contravention of regulation 5 (1) the prosecutor must establish that the timber in question came from the specified local area itself. Proof on this point was not offered and the prosecution in my opinion was, therefore, bound to fail. Mr. de Silva also contended that where there was no removal to a place beyond the specified local area as the seizure took place at Elephant Pass, within the Jaffna District, and on this point, too, the prosecution failed to establish the charge.

If one examines regulation 5 (2) it will be seen that to maintain successfully a charge in respect of transport of timber from an area other than a specified local area into or through a specified local area without a pass the prosecution must prove that the timber came from an area other than a specified local area.

Mr. Alles and Mr. de Silva were both agreed on this point. If that be so, there does not appear to be anything unreasonable in expecting from the prosecution on a charge of a contravention of regulation 5 (1) proof that the timber had its origin in the specified local area.

I might add that Mr. de Silva contended that if the expression " within or beyond " was capable of the meaning which the prosecution has sought in this case to place upon it, then the charge here framed is open to attack on the ground of duplicity. As I have already interpreted that expression in this context to mean nothing more than " from ", and in view of the meaning indicated by me of the word " remove " occurring in regulation 5 (1), it is unnecessary to examine this last contention.

The appeal is dismissed.

Appeal dismissed.

Present : **Tambiah, J.**

MURUGIAH *vs.* OUTSCHOORN, (Inspector of Police, Haputale)

S.C. 677/'62—*M.C. Badulla, Haldumulla*, 36222.

Argued on : 6th February, 1963.
Decided on : 12th February, 1963.

Criminal Procedure—Summary trial—Right of accused to address Court after the close of the case for the defence—Criminal Procedure Code, sections 6, 189, 235, 296.

At the conclusion of the case for the defence, counsel for the accused wished to address Court. The Magistrate indicated to him that he could have only five minutes for this purpose. Counsel then stated that he could not point out the contradictions in the case within five minutes, whereupon the Magistrate informed counsel that the latter could not address Court at that stage as a matter of right and proceeded to give his verdict convicting the accused.

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Held : (1) That the accused in a summary trial has a right to address Court after the case for the defence has been closed.

(2) That in the present case, as a result of his counsel's address being limited by the Magistrate to five minutes, the accused had suffered prejudice and his conviction should not be allowed to stand.

Distinguished : *Sumanasekere* v. *S.I. Police, Ella*, 61 N.L.R. 424

Referred to : *The King* v. *Peiris Appuhamy*, 43 N.L.R. 412 ; XXIII C.L.W. 101
The King v. *Geekiyanage John Silva*, 46 N.L.R. 73.
Rasiah v. *Suppiah*, 50 N.L.R. 265 ; XL C.L.W. 10
Romel v. *Perera*, 24 N.L.R. 456.
The King v. *Vallayan Sittambaran*, 20 N.L.R. 257.
R. v. *Wainright and Another*, (1875-77) 13 Cox's Criminal Law Cases 173

Colvin R. de Silva with *D. R. Wijegoonewardena* and *N. M. S. Jayawickrama*, for the accused-appellant.

R. I. Obeyesekera, Crown Counsel, for the Attorney-General.

[**Editorial Note :** At the hearing of this appeal the following submissions were made on behalf of the accused:

(*a*) The scheme of the Criminal Procedure Code is to grant every accused person the right to address Court on his behalf. *Vide* sections 161, 189, 211, 212, 234 (3), 235, 237 (2) and 296.

(*b*) The rules to be observed in a summary trial cannot be gathered merely from the provisions of the Criminal Procedure Code alone, and one must read the provisions of the law of evidence into the Code to evolve the rules to be observed. Therefore, the right to cross-examine prosecution witnesses which is specifically granted by the Evidence Ordinance impliedly grants the right to an accused to comment on the discrepancies in the prosecution evidence.

(*c*) The right of an accused person to be defended by a pleader is expressly granted by the Criminal Procedure Code—*Vide* section 287. It is a well-established rule of interpretation that when a right is granted, everything indispensable to its proper and effectual exercise is impliedly granted. The right to defend would be meaningless without the right to address.

(*d*) The right of the defence to address in reply is recognised in England. This right is, therefore, available in Ceylon in view of section 6 of the Criminal Procedure Code which enacts that the English Law will be applicable if the Code is silent on any matter.]

TAMBIAH, J.

The appellant was charged in the Magistrate's Court with having voluntarily caused grievous hurt to one Andy of Kalupahana Estate, Haputale, by assaulting him with a club. The learned Magistrate, after trial, found the appellant guilty and sentenced him to a term of six months' rigorous imprisonment. At the conclusion of the case for the defence, the appellant's counsel wished to address Court and the learned Magistrate indicated to him that he could have only five minutes for this purpose. Counsel then stated that he could not point out the contradictions in the case within five minutes, whereupon the learned Magistrate informed counsel that the latter could not address Court at that stage as a matter of right and proceeded to give his verdict. The appellant has appealed from the learned Magistrate's verdict *inter alia*, on the ground that the procedure adopted by the learned Magistrate is not only contrary to principles of natural justice but also is unwarranted by the provisions of the Criminal Procedure Code and consequently the appellant has suffered prejudice.

No proposition has been more clearly established than that a man cannot incur the loss of liberty for an offence in a judicial proceeding until he has had a fair opportunity of presenting his case. This sacrosant right, founded on the plainest principles of natural justice, has been one of the cherished possessions of every individual in a democratic society and continues to be one of the corner-stones of our criminal jurisprudence even today. An examination of the salutary provisions of the Criminal Procedure Code, and other enactments pertaining to criminal law, shows

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that the Legislature, far from imposing any curb on this cardinal principle, has in many instances impliedly recognised it or has taken it for granted.

The Criminal Procedure Code (Cap. 20) (hereinafter referred to as the Code), after stating that an accused shall, in summary trials, be permitted to cross-examine all witnesses called for the prosecution and called or recalled by the Magistrate (*vide* section 189 (2)), proceeds to enact that, in such cases, " the complainant and accused or their pleaders shall be entitled to open their respective cases, but the complainant or his pleader shall not be entitled to make any observations in reply upon the evidence given by or on behalf of the accused ". (*Vide* section 189 (3)). Since no curb has been placed on the defence counsel to make any observations regarding the case for the prosecution and the defence, the right of an accused to comment on the prosecution case has been tacitly assumed in this provision.

Even in trials before the Supreme Court, the defence is given the right to address the jury at the end of the case for the defence (*vide* sections 235 and 296 of the Code). It must be noted, in this connection, that the rule that the defence counsel, in his address to the jury, cannot be deprived of his right to comment on the prosecution evidence, has acquired the hard lineaments of law, despite the fact that no express provisions to this effect could be found in the Criminal Procedure Code.

Section 296 (2) of the Code, which applies to summary and non-summary trials alike, enacts as follows :—

> " When at any trial the evidence for the defence consists only of the evidence of the person or persons charged as the case may be, the prosecution shall not have the right of reply."

A right of reply pre-supposes a previous address by the defence and, therefore, the above section assumes that the defence has the right to address Court even in a summary trial.

The Code also provides that the failure at any trial of any accused, to give evidence shall not be made the subject of adverse criticism by the prosecution (*vide* section 296 (3)). By implication, therefore, the failure of an accused to give evidence at his trial could be a matter of comment by not only the judge (*vide The King* v. *Peiris Appuhamy*, (1942) 43 N.L.R. 412 ; *The King* v. *Geekiyanage John Silva*, (1945) 46 N.L.R., p. 73), but also by the defence. Indeed, if the Legislature desired to prohibit an address or comment by the defence counsel, it would have said so in clear express terms.

Further, the rules to be observed in a summary trial cannot be gathered merely from the provisions of the Criminal Procedure Code alone. In a summary trial, for example, where a witness gives evidence which differs materially from a previous statement made by him to the Police, it is open to the prosecution to prove such statement, although no express sanction for this procedure could be found in the Criminal Procedure Code (*vide Rasiah* v. *Suppiah* (*S.I. Police*), (1949) 50 N.L.R. 265). In *Rasiah* v. *Suppiah*, (50 N.L.R. 265, at 268), Canekeratne, J., said—

> " The rules to be observed in a summary trial cannot be gathered from the provisions of the Criminal Procedure Code alone. One must read the provisions of the law of evidence into the Code to evolve the rules to be observed. By so reading one can find three phases. First, the prosecution case—the complainant can open his case ; secondly, the case for the defence, the accused can open his case and if he adduces evidence and closes his case he can address the Magistrate. Subsequent to this : (*a*) evidence may be called by the Magistrate himself (*vide* sections 190 and 429), (*b*) where it is necessary to impeach the credit of a person, this may be called proof in rebuttal, if the word rebuttal is used in a very wide sense, but it is speaking strictly not rebutting evidence. After his adversary has closed his proof, a party having the affirmative can only be heard in adducing proofs contradictory of statements of the other side or directly rebutting the proofs given by his adversary."

In this dictum the right of the defence to address Court in a summary trial is clearly stated. Dias, J., in the same case, characterises the right of reply as " highly prized " (*vide* page 270). Basnayake, J., (as he then was) after referring to the right given by section 155 of the Evidence Ordinance to impeach the credit of a witness in certain ways, states (*vide* at page 273) :

> " It is a well-established rule of interpretation that when a right is granted everything indispensable to its proper and effectual exercise is impliedly granted."

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The right to cross-examine prosecution witnesses is specifically granted by the provisions of the Evidence Ordinance (*vide* Cap. XII). Therefore, the right to point out the discrepancies in the prosecution evidence is also impliedly granted by the legislature.

In *Rowel* v. *Perera*, (1922) 24 N.L.R., p. 456, counsel argued that there was nothing in the Criminal Procedure Code which expressly conferred on the defence the right to comment on the prosecution evidence. Meeting this contention, Bertram, C.J., observed (*vide* at page 457) :

> " Nothing is expressly said of the right of the pleader for the defence to comment on the evidence of the prosecution, but in many cases a pleader cannot effectually open his case without commenting on the evidence of the prosecution. It is impossible to believe that the Code intended to impose an artificial restriction on advocacy."

Again, the right of the defence counsel to address Court, in a summary trial, is not only impliedly recognised by the Code, but also receives sanction by the introduction of English law on this matter. Section 6 of the Code enacts that " where no special provision have been made by the Code, or by any other law for the time being in force in Ceylon, the law relating to Criminal Procedure for the time being in force in England shall be applied ". Many rules of English procedure have been adopted in our Court by virtue of this section. Thus, the English practice whereby a prisoner has the right to make an unsworn statement from the dock, instead of giving evidence from the witness box, has been adopted in Ceylon, although there is no provision on this subject in the Code (*vide The King* v. *Vallayan Sittambaran*, (1918) 20 N.L.R. 257 (F.B.). In England, the right of the defence to address Court was first recognised by the Criminal Procedure Act of 1865 (*vide* Benham's Act, 28 and 29 Vict. Cap. 18, section 2), and continues to be one of the treasured rights of an accused person even today. This right is available in Ceylon in view of section 6 of the Code which enacts that the English Law will be applicable if the Code is silent on any matter.

As Cockburn, C.J., observed in *Reg*. v. *Wainright and another*, (1875-1877), 13 Cox's Criminal Law Cases, at p. 173, the prisoner's counsel, in summing up the evidence for the defence, is not to be restricted merely to remarks on the witnesses, but if anything occurs to him as desirable to say on the whole case, he is at liberty to say it.

The learned Crown Counsel urged that the ruling in *Sumanasekere* v. *Sub-Inspector of Police, Ella*, (1957) 61 N.L.R., p. 424, supports the view of the learned Magistrate. After a careful examination of that case, I am inclined to think that it could be distinguished from the facts of the instant case. In that case, the Magistrate gave the defence counsel the right to address the Magistrate. After the counsel had addressed the Magistrate for about half an hour, the Magistrate made the following minute : " I am refusing to hear Mr. Nadarajah further as he has addressed me for about half an hour ", and then proceeded to find the charges proved. In appeal, H. N. G. Fernando, J., stated (*vide* at page 425) :

> " It would seem, therefore, that the right of an accused or his pleader to be heard after the close of the case for the defence in a Magistrate's Court is not statutory, but arises from practice which has apparently hardened into a rule. But there must be in reason a residuum of discretion in the Court to impose a time limit on the length of the address having regard to the circumstances of each particular case."

I respectfully agree with H. N. G. Fernando, J.'s observation that " there must be a residuum of discretion in the Court to impose a time-limit on the length of the address having regard to the circumstances of each particular case ". If a judge cannot have control over his judicial proceedings, then judicial work would come to a standstill. But in a summary trial, a Magistrate is not entitled to tell counsel for the defence that the latter has no right to address him.

In the instant case, I am of opinion that the learned Magistrate has erred in taking the view that the defence counsel had no right to address Court. Further, by limiting the counsel's address to a mere five minutes, the accused has been made to suffer prejudice. For these reasons, I set aside the order of the learned Magistrate and direct that there should be a fresh trial before another Magistrate.

Re-trial ordered.

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Present : **Herat, J.**

PORLENTINAHAMY AND ANOTHER *vs.* MARTHINAHAMY AND OTHERS

S.C. 134/'61—*C.R. Chilaw*, 4319.

Argued and decided on : February 15, 1963.

Civil Procedure—Action for right of way of necessity—Should all co-owners of servient tenement be joined.

Held : That in an action for a right of way of necessity, all the co-owners of a land over which the right of way is sought must be joined as parties, unless there is clear evidence before Court that they do not object to the right of way of necessity being granted.

K. C. de Silva, for the 1st and 2nd defendants-appellants.

No appearance for the plaintiffs-respondents.

HERAT, J.

The 1st plaintiff-respondent in this case was granted, by the learned Commissioner of Requests, a right of way of necessity from her dominant tenement over the servient tenement of the defendants-appellants to a public road. The right of way of necessity so granted has to traverse certain other intervening lands before abutting on the public road. The right of way depicted in plan P 2 shows one of those intervening lands as land No. 1 adjoining the public road.

The short point taken up by the present defendants-appellants is that there is no evidence that all the co-owners of this land No. 1, have consented to this right of way of necessity being granted, and, that there are admittedly co-owners of land No. 1 who have not been made parties to this action.

The defendants-appellants have produced in evidence a partition plan and the final decree by which land No. 1 was partitioned and that partition plan has been located with reference to land No. 1 in plan P 2 by the surveyor who has given evidence in this case. The final decree shows that there are co-owners of that land No. 1 who have not been made parties. There is no evidence, not even the mere *ipse dixit*, of the plaintiff-respondent that these outstanding co-owners have not objected to the right of way of necessity claimed by her. Even a right of way of necessity is a servitude and a decree granting it must be final and binding on all the servient tenants over whose tenements it passes. It is, no doubt, undoubted law that if there are intervening lands over which a right of way passes and the owners of those lands do not object to the right of way passing over their lands they need not be made parties to an action for declaration of a servitude brought by the owner of a dominant tenement, but, there must be satisfactory evidence that the intervening co-owners do not object to the right of way passing their lands, for the sole purpose in granting a servitude by judicial decree is to attain finality in respect thereof in so far as the lands over which that right of way passes. In the circumstances, before this right of way of necessity is granted by judicial decree the co-owners who are owners of land No. 1 depicted in plan P 2 and who have not been joined must either be joined as parties or there must be clear evidence before Court that they do not object to the right of way of necessity being granted. As this has not been done I set aside the order of the Commissioner of Requests granting a right of way of necessity and remit the case to the Court of first instance for further proceedings so as to enable the plaintiff-respondent to join the outstanding co-owners or to lead evidence satisfactory to Court that these co-owners have no objection to the right of way of necessity being granted over their land.

The 1st and 2nd defendants-appellants are entitled to the costs of appeal.

Set aside and sent back.

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Present : **Sansoni, J., and L. B. de Silva, J.**

RAMACHAND JIWATRAM DARYANANI *vs.* EASTERN SILK EMPORIUM, LIMITED

S.C. No. 41/61 (*Inty.*)—*D.C. Colombo, Case* 23565/*S.*

Argued on : 11th and 12th March, 1963.
Decided on : 4th April, 1963.

Civil Procedure Code, section 93—Amendment of Pleadings—Meaning of the words " at any time . . . before final judgment "—Can an amendment be applied for before hearing of a case—Alternative cause of action—Can it be pleaded by way of amendment—Discretion exercised by a judge—When it will be interfered with by Appeal Court.

The plaintiff instituted this action by summary procedure upon a cheque drawn in his favour. The defendant applied for and obtained leave to appear and defend unconditionally. The plaintiff thereafter moved to amend the plaint by pleading an alternative cause of action for goods sold and delivered, claiming the identical amount stated in the original plaint. The District Judge exercised his discretion and made order allowing the amendment and the defendant appealed therefrom.

Counsel for the appellant contended :—

(*a*) that the alternative cause of action was a new cause of action and therefore the amendment, as a matter of law, should not have been allowed ;

(*b*) that the amendment should not have been allowed because it was sought to be made before the hearing of the action.

For both these contentions he relied on the case of *Lebbe* v. *Sandanam*, reported in 64 N.L.R., page 461.

Held : (1) That there is no rule that a new or alternative cause of action can never be added. The cause of action sought to be added in this case, being one which is so germane to and so connected with the original cause of action, should be permitted. The real subject-matter being the indebtedness, no prejudice can arise from the amendment,

(2) That the words " at any time . . . before final judgment" in section 93 of the Civil Procedure Code should not be restricted to mean any time after the hearing. The clear words of the section "postponement of day for filing answer or replication " are sufficient to indicate that amendments can be applied for even before the pleadings are closed.

(3) That the observations of the learned Chief Justice in the case of *Lebbe* v *Sandanam*, 64 N.L.R. 461 relating to the meaning of the words " at any time . . . before final judgment " were made *obiter* as the amendment in that case was applied for at the trial.

Per SANSONI, J.—(*a*) " After referring to the rule that a Court cannot grant relief to a plaintiff on a case not put forward in his plaint the learned judge said : ' But when the alternative case, which the plaintiff could have made, was not only admitted by the defendant, in his written statement, but was expressly put forward as an answer to the claim which the plaintiff made in the suit, there would be nothing improper in giving the plaintiff a decree upon the case which the defendant himself makes . . . In such circumstances, where no injustice can possibly result to the defendant, it may not be proper to drive the plaintiff to a separate suit '."

(*b*) " Finally, on the question whether we ought to interfere with the order under appeal, there is the valuable dictum of Jenkins, L.J., in *G. L. Barker, Ltd.* v. *Medway Building and Supplies, Ltd.*, (1958) 1 W.L.R. 1216, ' There is no doubt whatever that the granting or refusal of an application (for leave to amend) is eminently a matter for the discretion of the judge with which this Court shall not in ordinary circumstances interfere, unless satisfied that the judge has applied a wrong principle or can be said to have reached a conclusion which would work a manifest injustice between the parties.' "

Per L. B. DE SILVA, J.—" Unless the Legislature has passed laws limiting the exercise of this power either directly or by rules or orders having the force of law, the Courts have no power to lay down rigid and inflexible rules for the exercise of a judicial discretion. The normally accepted rules or principles for the exercise of such a discretion enunciated by the Courts of the highest authority, are, therefore, only meant for the practical guidance of other Courts. They do not have the force of law. In that sense, I hold that the statement of the learned Chief Justice laying down what may appear to be rules for the exercise of the discretionary powers of the Courts under section 93, are not rules of law binding on our Courts. We are, therefore, free in this case to consider if there are good reasons to set aside the exercise of the discretion by the learned trial judge who allowed the amendment."

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Cases referred to : *Evans* v *Bartlam,* 1937 A.C. 473; (1937) 2 A.E.R. 646;53 T.L.R. 689; 106 L.J.K.B. 568.
L. J. Leech & Co. v. *Messrs. Jardine Skinner & Co.*, A.I.R. (1957) S.C. 357.
Australian Navigation Co. v. *Smith,* (1889) 14 A.C. 318.
G.L.Baker, Ltd. v. *Medway Building and Supplies, Ltd.*, (1958) 1W.L.R. 1216; (1958)3 A.E.R. 540.
Seneviratne v. *Candappa,* (1917) 20 N.L.R. 60.
Tildesley v. *Harper,* (1878) 10 Ch. D. 393; 39 L.T. 552; 48 L.J. Ch. 495.
Bank of Ceylon, Jaffna v. *Chelliah Pillai,* (1962) 64 N.L.R., 25.
Cropper v. *Smith,* (1884) 26 Ch. D. ·700; 51 L.T. 729; 53 L.J. Ch. 891
Weldon v. *Neal,* (1887) 19 Q.B.D. 394; 56 L.J.Q.B. 621.
Charan Das v. *Amir Khan,* A.I.R. (1921) P.C. 50.
Sarafalli Mahomedalli v. *Mahasukhbhai Jechandbhai,* A.I.R. (1933) Bombay 476.
Philipps v. *Philipps,* (1878) 4 Q.B.D. 127;39 L.T. 556; 48 L.J.Q.B. 135.
Ma Shwe Mya v. *Maung Mo Hnaung,* A.I.R. (1922) P.C. 249.
Lebbe v. *Sandanam,* (1963) 64 N.L.R. 461; LXIII C.L.W. 15.
Sriniwas Ram Kumar v. *Mahabir Prasad,* A.I.R. (1951) S.C. 177.
Haniffa v. *Cader,* (1941) 42 N.L.R. 403;XXI C.L.W. 44.
Sockalingam Chetty v. *Kathitha Bebe,* (1916) 2 C.W.R. 55.
Thomas v. *Alderton, Ltd.*, (1928) 1 K.B. 638; 97 L.J.K.B. 259; 138 L.T. 315.
Noorbhoy v. *Mohideen Pitche,* (1929) 31 N.L.R. 3.
Mamucha & Others v. *Ahmad Khan & Others,* A.I.R. 1963 P.C. 29.
Hipgrave v. *Chase,* (1885) 28 Ch. D. 361; 52 L.T. 242; 54 L.J. Ch. 399.
Wijewardana v. *Lenora,* 60 N.L.R. 463; LVI C.L.W. 1.

Nimal Senanayake, for the defendant-appellant.

C. Ranganathan, for the plaintiff-respondent.

SANSONI, J.

The plaintiff brought this action by summary procedure to recover a sum of Rs. 7,449.96 upon a cheque drawn in his favour by the defendant. The defendant applied for and obtained leave to appear and defend unconditionally. The plaintiff thereafter moved to amend his plaint, filing an amended plaint at the same time. This procedure was wrong, because the plaintiff should have first set out the amendments he wished to make and the defendant should have been given an opportunity to object to them. The correct procedure was later adopted and a motion to amend the plaint was filed. On the date given for objections, the defendant and his Proctor were absent. The amended plaint was then accepted by the Court, and the defendant has appealed from this order.

The amendment which was allowed was the pleading of an alternative cause of action for goods sold and delivered. The identical amount claimed in the original plaint was claimed on the new cause of action.

The question we have to decide is whether the District Judge was correct in allowing the alternative cause of action to be placed.

We have had the benefit of a full argument, and I wish first to touch upon some general aspects of the subject before I come to the particular question. The application for amendment is governed by section 93 of the Civil Procedure Code. It reads :—

> "At any hearing of the action, or at any time in the presence of, or after reasonable notice to, all the parties to the action before final judgment, the Court shall have full power of amending in its discretion, and upon such terms as to costs and postponement of day for filing answer or replication, or for hearing of cause, or otherwise, as it may think fit, all pleadings and processes in the action, by way of addition, or of alteration, or of omission. And the amendments or additions shall be clearly written on the face of the pleading or process affected by the order ; or if this cannot conveniently be done, a fair draft of the document as altered shall be appended to the document intended to be amended, and every such amendment or alteration shall be initialled by the Judge."

The section deals respectively with the time at which an amendment may be made, the power of the Court to make it, and the terms upon which it may be made. The principal point that arises in this appeal is the power of the Court, and I quote again the words of this section : " the Court shall have full power of amending in its discretion."

It seems to me that when a Statute confers a power on a Court to do something in its discretion, a higher Court cannot say more than that the Judge who has been given the power should or should not have exercised it in the particular case. And it can only say that after it has considered the facts and circumstances of that case. "A discretion necessarily involves a latitude of individual choice according to the particular circumstances, and differs from a case where the decision follows *ex debito justitiae* once the facts are ascertained" —*per* Lord Wright in *Evans* v. *Bartlam,* (1937) A.C., at 489. The circumstances are "a factor

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to be taken into account in exercise of the discretion as to whether amendment should be ordered, and does not affect the power of the Court to order it, if that is required in the interests of justice" : *see L. J. Leach & Co.* v. *Messrs. Jardine Skinner & Co.*, A.I.R. (1957) S.C. 357.

There has arisen a body of case law dealing with the matters which should be taken into consideration by the Judge when he comes to exercise this power. They are well-established rules of practice, and should not be treated as though they were statutory rules or provisions of positive law of a rigid and inflexible nature. The two main rules which have emerged from the decided cases are :—

(i) the amendment should be allowed if it is necessary for the purpose of raising the real question between the parties; and

(ii) an amendment which works an injustice to the other side should not be allowed.

These rules appear in the Privy Council judgment in *Australian Navigation Co.* v. *Smith*, (1889) 14 A.C. 318.

The first rule seems to be based on the principle that a multiplicity of actions should be avoided. Jenkins, L.J., in *G. L. Baker, Ltd.* v. *Medway Building and Supplies, Ltd.*, (1958) 1 W.L.R. 1216, has termed it "a guiding principle of cardinal importance on this question". It was pointed out in that case that the object of litigation is to adjudicate on the real matters at issue between the parties, and this object must be achieved even though it involves overcoming the well-known reluctance of a Court of Appeal to disturb the trial judge's exercise of a discretion. The second rule seems to follow from the principle that one of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any party ; and the Court should not generally exercise a power which will lead to such a result.

The first rule has been given statutory force both in England and in India. o.28 r. 1 of the Rules of the Supreme Court, and o.6 r. 17 of the Indian Civil Procedure Code, which are almost in identical terms say that "all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties". Our section 93 contains no such words, but such an omission, while it may enlarge the power and widen the discretion of the Court in this respect, cannot surely, restrict the amplitude of the power. It was pointed out in *Seneviratna* v. *Candappa*, (1917) 20 N.L.R. 60, that o.28, r. 1, corresponds to our section 93, and the case of *Tildesley* v. *Harper*, (1878) 10 Ch. D. 393, was cited there. Thesiger, L.J., in that case said that the object of the rules of the Court is to obtain a correct issue between the parties, and the Privy Council recently in *Bank of Ceylon, Jaffna* v. *Chelliahpillai*, (1962) 64 N.L.R., p. 25, said that the Civil Procedure Code gives in section 93 ample power to amend pleadings, and the case must be tried upon the issues on which the right decision of the case appears to the Court to depend, and the framing of such issues is not restricted by the pleadings. Again in *Cropper* v. *Smith*, (1884) 26 Ch. D. 700, Bowen, L.J., referring to o.28, r. 1, said : "It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of *the real matter in controversy*, it is as much a matter of right on his part to have it corrected, if it can be done *without injustice*, as anything else in the case is a matter of right".

Since the necessity of error or mistake as a condition precedent to amendment loomed large in the arguments before us, I shall quote what Bowen, L.J., said in that case on that matter :

> "The object of Courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. . . . I know of no kind of error or mistake, which, if not fraudulent or intended to over-reach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy and I do not regard such amendment as a matter of favour or of grace."

In another place in his judgment, he said :

> "It does not seem to me material to consider whether the mistake of judgment was accidental or not, if not intended to over-reach. There is no rule that only slips or accidental errors are to be corrected. . . . . I have found in my experience that there is one panacea which heals every sore in litigation, and that is costs. I have very seldom, if ever, been unfortunate enough to come across an instance, where a person has made a mistake in his pleadings which has put the other side to such a disadvantage as that it cannot be cured by the application of that healing medicine."

The avoidance of injustice to the other party, which is the second rule of practice I have referred to, requires that the Court should refuse, save in exceptional cases, to allow an amendment which would cause an injustice. Lord Esher, M.R., in *Weldon* v. *Neal*, (1887) 19 Q.B.D. 394, referred to the settled rule of practice that amendments are not admissible when they prejudice the rights

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of the opposite party as existing at the date of such amendments. To allow such an amendment would be to enable the plaintiff to take away an existing right from the defendant, a proceeding which, he thought would be improper and unjust. He added : " Under very peculiar circumstances the Court might perhaps have power to allow such an amendment, but certainly as a general rule it will not do so ". The Privy Council judgment in *Charan Das* v. *Amir Khan*, A.I.R. (1921) P.C. 50, decided that the power to make an amendment should not as a rule be exercised where its effect is to take away from a defendant a legal right which has accrued to him by lapse of time. Here again it was pointed out that " there are cases where such considerations are outweighed by the special circumstances of the case ". There are many decisions of this Court which have applied this rule in other situations also.

In the case before us, the District Judge has exercised his discretion and allowed the alternative cause of action to be pleaded. Mr. Senanayake's first objection was that, since it is a new cause of action, the amendment could not, as a matter of law, have been allowed. This raises the question whether a new cause of action can never be added by amendment. I think I can best answer that question by referring to the case of *Sarafalli Mahomedalli* v. *Mahasukhbhai Jechandbhai*, A.I.R. (1933) Bombay 476, where it was held that in an action on a promissory note, an amendment claiming in the alternative on the consideration may be allowed, even though the cause of action on the promissory note is distinct from the cause of action on the loan which gave rise in the promissory note. Beaumont, C.J., said :

> " Whether in any particular case the amendment is asked for at too late a stage, or in circumstances which make it unfair to grant the leave, is another matter, but as a mere proposition of law I see no reason why an amendment of this nature should not be allowed at the trial or even in appeal."

Rangnekar, J., who agreed, said :

> " There is clear authority for the proposition that the plaintiff may rely upon several different rights or claims alternatively although they may be inconsistent : *see Philipps* v. *Philipps*, (1878) 4 Q.B.D. 127, . . . If then, a plaintiff can set up inconsistent claims in the alternative in the plaint to start with, it is difficult to see why, on principle, he cannot be allowed to amend the plaint by pleading an inconsistent claim in the alternative at a later stage. Whether such an amendment should be allowed or not depends upon the circumstances of the case and various other considerations."

The learned judges distinguished an earlier Privy Council judgment in *Ma Shwe Mya* v. *Maung Mo Hnaung*, A.I.R. (1922) P.C. 249, where the action was brought on a contract made in 1912 ; the plaintiff failed to establish that contract, and then sought by amendment to base the cause of action on another contract altogether made in 1903. The Privy Council said that the plaintiff could not be allowed to substitute the latter cause of action for the former, or to change in this way the subject-matter of the action, for the real question in contest between the parties on the pleadings was the existence and the character of the agreement alleged to have been made in 1912. One can easily see that such an amendment should not be allowed, because it would offend against the first rule of practice by seeking to change, rather than clarify, the real question between the parties. An analogous rule of practice is that an amendment should not be allowed if it has the effect of converting an action of one character into an action of another and inconsistent character. See also section 46 of our Code. But an amendment seeking to add a cause of action which is so germane to and so connected with the original cause of action, should be permitted. The real subject-matter being the indebtedness, no prejudice can arise from an amendment which raises such an issue.

Another objection which Mr. Senanayake urged was that the amendment should not have been allowed because it was sought to be made before the hearing of the action and he relied, in support of both objections I have dealt with, on the case of *Lebbe* v. *Sandanam*, (1963) 64 N.L.R. 461. In that case Basnayake, C.J., said that the Court may not exercise the power under section 93 before the hearing, and he interpreted the words, " at any time ", to mean, " at any time after the hearing and not at any time before the hearing ". With great respect, I am unable to agree with that view of what the words, " at any time ", mean. The clear words of the section, " postponement of day for filing answer or replication ", are sufficient to show that amendments can be applied for even before the pleadings are closed. I have also always understood the rule to be that an amendment should be applied for as early as possible and as soon as it becomes apparent that it would be necessary. Only in this way can unnecessary delays be avoided. Applications for amendment at the trial have always been discouraged because the other party has been put to the expense and trouble of getting ready for trial. The Court would require to be satisfied as to the bona fides

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of an application made at a trial, where the party should have applied earlier to amend his pleading. I am not referring here to amendments that become necessary owing to some development that arises *ex improviso*. An amendment which is sought unduly late may be suspected also of being mala fide, and a Court would refuse an amendment so tainted. In *Tildesley* v. *Harper*, (1878) 10 Ch. D. 393, Bramwell, L.J., said : " My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that, by his blunder he had done some injury to his opponent which could not be compensated for by costs or otherwise ". Costs may in most cases be a sufficient compensation if the application is made as late as the trial stage, but the Judge may in a particular case doubt the efficacy of that medicine. Several authorities on this point are to be found in the notes to o.28, r.1, in *The Annual Practice*, and I do not wish to lengthen this judgment by making particular reference to them. On matters such as this I think considerable assistance can be found in English and Indian authorities, and judges of this Court have consistently looked in those directions for enlightenment. In the case of *Lebbe* v. *Sandanam*, the amendment in question was applied for at the trial, and I, therefore, think that the observations of the learned Chief Justice on this point were not necessary for the decision of that appeal.

How liberally the Courts have construed the power to amend pleadings also appears from cases where the plaintiff has failed to plead an alternative cause of action which could have been pleaded. In *Sriniwas Ram Kumar* v. *Mahabir Prasad*, A.I.R. (1951) S.C. 177, decided by the Supreme Court of India, the plaintiff alleging that the 2nd defendant had agreed to sell him a house which the 2nd defendant later sold to the 1st defendant sued to enforce specific performance of the contract. The plaintiff's case was that he had also paid Rs. 30,000/- as part of the purchase price. The 2nd defendant denied the agreement and pleaded that the sum of Rs. 30,000/- had been received by him as a loan. The trial Judge accepted the 2nd defendant's case and rejected that of the plaintiff. He dismissed the claim for specific performance but entered a money decree in plaintiff's favour for the sum of Rs. 30,000/- as the loan had been admitted. The High Court affirmed the findings of the trial Judge but held that no money decree should have been granted as no case of a loan was made by the plaintiff in his plaint and no relief was claimed on that basis. Accordingly, the plaintiff's action was dismissed in its entirety.

The Supreme Court accepted the concurrent findings of fact, but held that the High Court had taken " an undoubtedly rigid and technical view " in reversing the trial Judge's grant of a money decree. Mukherjee, J., said :

> " It is true that it was no part of the plaintiff's case as made in the plaint that the sum of Rs. 30,000/- was advanced by way of loan to the defendants second party. But it was certainly open to the plaintiff to make an alternative case to that effect and make a prayer in the alternative for a decree for money even if the allegations of the money being paid in pursuance of a contract of sale could not be established by evidence. The fact that such a prayer would have been inconsistent with the other prayer is not really material. A plaintiff may rely upon different rights alternatively and there is nothing in the Civil Procedure Code to prevent a party from making two or more inconsistent sets of allegations and claiming relief thereunder in the alternative."

After referring to the rule that the Court cannot grant relief to a plaintiff on a case not put forward in his plaint, the learned Judge said :

> " But when the alternative case, which the plaintiff could have made, was not only admitted by the defendant in his written statement but was expressly put forward as an answer to the claim which the plaintiff made in the suit there would be nothing improper in giving the plaintiff a decree upon the case which the defendant himself makes . . . In such circumstances where no injustice can possibly result to the defendant it may not be proper to drive the plaintiff to a separate suit."

A Privy Council decision, A.I.R. (1943) P.C. 29, was cited in support. It was a case where an action was brought on a mortgage which the defendant pleaded was void. That plea was upheld, but the Privy Council held that it was open to the plaintiff in such circumstances to repudiate the transaction and claim relief in the form of restitution. Although no such alternative claim was made in the plaint, the Privy Council allowed it to be advanced and gave a decree on the ground that the respondent could not be prejudiced by such a claim at all and the plaintiff should not be referred to a separate action.

These cases show, to my mind, that there is no rule that a new or alternative cause of action can never be added. A plaintiff who comes into Court alleging that he paid money as part consideration for a purchase is not precluded from also pleading that the money was given by way of loan ; and a plaintiff who sues to enforce a mortgage security in his favour is not precluded

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from also pleading that he should be granted restitution altogether outside the mortgage transaction. Such amendments are permissible in order that " the real question between the parties " may be brought out.

With regard to the addition of a new caus lof action, which is the amendment that was appeed for in *Lebbe* v. *Sandanam*, the ultimate finding was that the plaintiff's case as asserted in ihis evidence did not justify the amendment asked for, because the plaintiff had repeatedly repudiated the position which was sought to be covered by the amendment. In other words, the application to amend would appear to have been made *mala fide*, and its final refusal would appear to have proceeded on that ground. With very great respect, I am unable, for the reasons I have already given, to subscribe to an absolute and inflexible rule that in no circumstances may a new cause of action be added. As Beaumont, C.J., said in the case I have already referred to : " If the real subject-matter of the dispute between the parties can only be put in issue by an amendment even though it be by the addition of a cause of action, then I see no reason why the amendment should not be allowed ". In *Haniffa* v. *Cader*, (1941) 42 N.L.R. 403, it was held that an omission to make certain persons original plaintiffs was no reason for not adding them later, even if that involved the addition of new causes of action, because the amendment did not enlarge the claim originally made or cause any prejudice to the defendants.

Many years ago an appeal came up before De Sampayo, J., in the case of *Sockalingam Chetty* v. *Kathitha Bebe*, (1916) 2 C.W.R. 55. That was an action on a promissory note and an application was made to add an alternative cause of action for money lent. The application was disallowed in the lower Court and in appeal De Sampayo, J., said : " An amendment of this kind which is not intended to cure any defect in the original plaint but to add a further cause or causes of action is purely within the discretion of the Court. I think that while, if the Commissioner thought fit, the amendment might have been allowed, subject to terms,I do not think, now that the case as brought has entirely failed for the reason already stated, that this Court should interfere on appeal ". It should be noted that the learned Judge did not base his decision on the ground that the Court had no power to allow the amendment, but on the importance he attached to the manner in which the trial Judge had exercised his discretion.

In England also it has been held that in an action on a promissory note the Court has power to allow an amendment of a plaint by the addition of an alternative cause of action for goods sold and delivered, even where the action was filed by way of what corresponds to summary procedure under our Code—*see Thomas* v. *Alderton, Ltd.*, (1928) 1 K.B.D. 638, which was followed in *Noorbhoy* v. *Mohideen Pitche*, (1929) 31 N.L.R. 3.

Finally, on the question whether we ought to interfere with the order under appeal, there is the valuable dictum of Jenkins, L.J., in *G. L. Baker, Ltd.* v. *Medway Building & Supplies ,Ltd.*, (1958) 1 W.L.R. 1216, " There is no doubt whatever that the granting or refusal of an application (for leave to amend) is eminently a matter for the discretion of the judge with which this Court should not in ordinary circumstances interfere unless satisfied that the judge has applied a wrong principle or can be said to have reached a conclusion which would work a manifest injustice between the parties ". Neither alternative has been shown to appear in the order under appeal and I would dismiss the appeal with costs.

L. B. de Silva, J.

The plaintiff-respondent sued the defendant-appellant on a cheque or bill of exchange by way of Summary Procedure. The defendant obtained leave to defend the action. In view of certain legal defences raised, the plaintiff sought to amend his plaint by pleading an alternate cause of action for goods sold and delivered for the same amount.

The learned District Judge allowed the motion to amend the plaint. The defendant appealed from that order. Two main questions have arisen for decision in this appeal.

(*a*) Can the plaintiff move to amend his pleadings before the hearing of the case ?

(*b*) Can the plaintiff plead an alternate cause of action by way of amendment to his plaint ?

Counsel for the appellant relied on the decision of the Divisional Court in *Lebbe* v. *Sandanam*, 64 N.L.R. 461, in support of both objections. The judgment of the Bench was delivered by His Lordship the Chief Justice Basnayake. In that case, the question whether pleadings could be amended before the hearing of the case did not

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arise for decision, as the application to amend the plaint was made after the trial had commended.

His Lordship stated,

> "The Court may not exercise that power (of amendment) before the hearing or after final judgment. The words 'at any time' in the context mean at any time after the hearing and not at any time before the hearing. That power is conferred on the Court for the reason that it is only at the hearing or at any time thereafter that the Court would be in a position to decide whether having regard to the evidence there should be an amendment of the pleadings."

I agree with the reasons given in my brother's judgment which I had the privilege to read, that there is no justification for placing a restricted meaning on the words " at any time " in section 93 of the Civil Procedure Code, as stated by my Lord the Chief Justice in the case cited. The section reads,

> "At any hearing of the action, or any time in the presence of or after reasonable notice to, all the parties to the action before final judgment, the Court shall have full power of amending in its discretion, and upon such terms as to costs and postponement of day for filing answer or replication, or for hearing of cause, or otherwise, as it may think fit, all pleadings and processes in the action, by way of addition, or of alteration, or of omission."

The reference in the section to the postponement of the day for filing answer or replication, appear to clearly indicate that the amendment may be allowed on or before the day fixed for filing of the answer or replication. Apart from this reason, convenience and the interests of justice demand that an amendment of the pleadings should be made as early as possible. Immediately after a plaint is accepted, a plaintiff may realize that his plaint needs some amendment. Surely, it is not reasonable to think that this section deliberately forbids him from applying to Court to amend his plaint till after the defendant has filed his answer and the case comes up for trial. Such a procedure will entail unnecessary delay, expense to parties and inconvenience to witnesses, as the trial will almost invariably be postponed if the application to amend the pleadings were allowed at that stage.

The words used in the section " at any time . . . before final judgment " are of the widest import. There must be very strong and cogent reasons to give these words such a restricted meaning. If it becomes necessary in any case to hear some evidence before allowing the amendment, I see no reason why such evidence may not be led before the hearing of the case, for this particular purpose. It has been the normal practice of our Courts to allow such amendments before the hearing. It has been held in *Hipgrave* v. *Case*, 28 Ch. D. 361, that the Court will not readily allow at the trial an amendment, the necessity for which was abundantly apparent months ago and then not asked for.

With all respect to the learned Chief Justice, I beg to disagree with his dicta that the Court may not exercise its power under section 93 of the Civil Procedure Code to allow the amendment of pleadings before the hearing of a case.

On the second question, His Lordship the Chief Justice has stated in *Lebbe* v. *Sandanam*, 64 N.L.R. 461, after considering the meaning of the word " amend " in legal procedure,

> "The concept that an amendment is the correction of an error runs through all the definitions cited above and the definitions in the recognised English dictionaries, such as the Oxford English Dictionary, Standard Dictionary, and Webster's New International Dictionary. The Court's power is, therefore, limited to the correction of errors in pleadings. If there is no error, then the Court cannot act under section 93. The words 'by way of addition, or of alteration, or of omission' suggest that errors of both commission and omission are contemplated. As the power is limited to the correction of errors, it follows then that the Court has no power to make alterations—
>
> (*a*) which set up a new case,
> (*b*) which have the effect of converting an action of one character into an action of another character,
> (*c*) which have the effect of taking the action out of the provisions governing the limitation of actions in the Prescription Ordinance or any other enactment or law,
> (*d*) which have the effect of the addition of a new cause of action,
> (*e*) which have the effect of prejudicing the rights of the other side existing at the date of the proposed amendment, and
> (*f*) which have the effect of changing the substance or essence of the action."

Does the statement lay down a rigid rule of law or is it a statement for the practical guidance of the Courts in the exercise of the discretion given to them under section 93 of the Civil Procedure Code. This section gives our Courts the most ample power to allow the amendment of pleadings and this power is only limited by its discretion. There is no doubt that the Court must exercise this power judicially and it is not vested with an absolute or arbitrary power.

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Unless the Legislature has passed laws limiting the exercise of this power either directly or by Rules or Orders having the force of law, the Courts have no power to lay down rigid and inflexible rules for the exercise of a judicial discretion. The normally accepted rules or principles for the exercise of such a discretion, enunciated by the Courts of the highest authority, are, therefore, only meant for the practical guidance of other Courts. They do not have the force of law. In that sense, I hold that the statement of the learned Chief Justice laying down what may appear to be rules for the exercise of the discretionary powers of the Courts under section 93, are not rules of law binding on our Courts. We are, therefore, free in this case to consider if there are good reasons to set aside the exercise of the discretion by the learned trial judge who allowed the amendment.

In this connection, I wish to refer to the judgment of the learned Chief Justice in *Wijewardene* v. *Lenora*, 60 N.L.R., at 463, His Lordship stated in that case,

> " It (section 93) must be read subject to the limitation that an amendment which has the effect of converting an action of one character into an action of another or inconsistent character cannot be made thereunder. Apart from that limitation the discretion vested in the trial Judge by section 93 is unrestricted and should not be fettered by judicial interpretation. Unrestricted though it be, it must be exercised according to the rules of reason and justice, not according to private opinion ; according to law, and not humour. Its exercise must be uninfluenced by irrelevant considerations, must not be arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to discharge his office ought to confine himself, *Sharp* v. *Wakefield*, (1891) A.C. 173, at 179."

In *Evans* v. *Bartlam*, (1937) 2 A.E.R. 646, the House of Lords considered the exercise of a judicial discretion to set aside a judgment by default and the powers of a Court of Appeal to over-ride that discretion. Under the R.S.C. Orders, the discretion was in terms unconditional. Lord Atkin stated at p. 650, " The Courts, however, have laid down for themselves rules to guide them in the normal exercise of their discretion ". Having considered certain rules guiding such discretion, he said, " If there were a rigid rule that no one could have a default judgment set aside who knew at the time and intended that there should be a judgment signed, the two rules would be deprived of most of their efficacy. The principle obviously is that, unless and until the Court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has been obtained only by a failure to follow any of the rules of procedure ".

But, in any case, in my opinion, the Court does not, and I doubt whether it can, lay down rigid rules which deprive it of jurisdiction. Even the first rule as to affidavit of merits could, in no doubt rare but appropriate cases, be departed from. The supposed second rule does not, in my opinion, exist.

At page 651, Lord Russel of Killowen, stated,

> " It was argued by counsel for the respondent that, before the Court or a Judge could exercise the power conferred by this rule, the applicant was bound to prove—
>
> (*a*) that he had some serious defence to the action, and
> (*b*) that he had some satisfactory explanation for his failure to enter its appearance to the writ.
>
> *It was said that,* until these two matters had been proved, the door was closed to the judicial discretion, in other words, that *the proof of these two matters was a condition precedent to the existence* or (what amounts to the same thing) *to the exercise, of the judicial discretion.* For myself, *I can find no justification for this view in any of the authorities which were cited in the argument ; nor, if such authority existed, could it be easily justified in face of the wording of the rule. It would be adding a limitation which the rule does not impose.*"

Lord Wright, at p. 655, stated,

> " R.S.C. Order 27, r. 15, gives a discretion untrammelled in terms. He quoted with approval the words of Bowen, L.J., in *Gardner* v. *Jay*, (1885) 29 Ch. D., at 58 (137 L.T. 656), ' When a tribunal is invested by Act of Parliament or by rules with a discretion, without any indication in the Act or rules of the grounds upon which the discretion is to be exercised, it is a mistake to lay down any rules with a view of indicating the particular grooves in which the discretion should run, for if the Act or the rules did not fetter the discretion of the Judge why should the Court do so ? '. "

He further said,

> " Similarly, it has been held by the Court of Appeal in *Hope* v. *Great Western Railway Company*, (1937) 1 A.E.R. 625, that the discretion to grant or refuse a jury in King's Bench cases is in truth, as it is in terms, unfettered. It is, however, often convenient in practice to lay down, not rules of law, but some general indications, to help the Court in exercising the discretion, *though in matters of discretion no one case can be an authority for another.* As Kay, L.J., said in *Jenkins* v. *Bushby*, (1891) 1 Ch. 484, at p. 495, ' *the Court cannot be bound by a previous decision, to exercise its discretion in a particular way, because that would be in effect putting an end to the discretion* '."

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Sufficient has been said to show that the dictum in *Lebbe* v. *Sandanam,* 64 N.L.R. 461, is not a pronouncement on the Law which is binding on this Court. I may mention that in that case, His Lordship the Chief Justice considered the merits of the application and gave his decision.

There are numerous cases [*see* (*a*) 31 N.L.R. 3 ; (*b*) (1928) 1 K.B. 638 ; (*c*) A.I.R. (1923) Bombay 476 ; (*d*) I.L.R. (1898) 25 Calcutta 372] in which the plaintiff has been allowed to plead an alternate cause of action by way of amendment to his plaint.

I hold that there is no bar to the plaintiff pleading an alternate cause of action by way of an amendment to his plaint, so long as he does not thereby convert his action to another of an inconsistent character.

In this appeal no other reasons have been urged that the learned District Judge has improperly exercised his discretion in allowing the amendment to the plaint. I entirely agree with the reasons set out in his judgment by my brother, Sansoni, J. I dismiss the appeal with costs.

Appeal dismissed.

Present : **Weerasooriya, J.**

SOMAWATHIE *vs.* COORAY*

Application No. 406 (*In Revision*)—*C.R. Colombo,* 74842.

Argued on : September 20, 1961.
Decided on : 11-10-1961

Civil Procedure Code, sections 326, 327 *and* 327 A—*Resistance to Fiscal in executing writ of possession—Resistance held to be frivolous and vexatious—Order to issue writ under section* 327 A—*Application to revise said order—Later action filed under proviso to section* 327 A *to establish right to possession by person against whom order made—Does revision lie—Power of Court to impose terms on judgment-creditor when ordering to put him in possession.*

Held : That the provisions of section 327 A of the Civil Procedure Code do not in any way affect or limit the powers of the Supreme Court to revise an order under that section directing the judgment-creditor be put in possession of property described in the writ of possession.

Per Weerasooriya, J.—" The power given to the Court under that section to make an order that the judgment-creditor be put in possession includes, in my opinion, a power to impose such terms as the Court may think fit in regard to the giving of security by the judgment-creditor for the due performance of the decree entered in the action filed in terms of that section by the party against whom the order is passed."

Cases referred to : *Gunaratne* v. *de Silva,* 58 N.L.R. 542.
Appuhamy et al. v. *Siman,* 48 N.L.R. 298

T. Nadarajah, for the petitioner.

S. Sharvananda with *M. T. M. Sivardeen,* for the respondent.

Weerasooriya, J.

The respondent to this application filed C.R. Colombo, Case No. 74824, against one Mahadevan for the recovery of arrears of rent in respect of certain premises of which the latter was said to be the tenant, for his ejectment therefrom and damages. The petitioner was at the time married to Mahadevan and living in the same premises. Mahadevan and the petitioner fell out and Mahadevan left the premises. The petitioner then instituted proceedings against Mahadevan for a divorce on the ground of malicious desertion, and eventually obtained a decree in her favour.

On the 24th April, 1961, while the divorce proceedings were pending, Mahadevan consented to judgment being entered against him as prayed for in C.R. Case No. 74824. On the 8th May, 1961, writ for delivery of possession of the premises issued to the fiscal, but according to a petition subsequently filed by the respondent

*For Sinhala translation, see Sinhala section, Vol. 5, part 4, p. 13

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under section 325 of the Civil Procedure Code he complained that the writ could not be executed because of resistance offered to the fiscal's officer by the petitioner and three others, and he moved that they be dealt with under sections 326, 327 and 327A of the Code. The position taken up by the petitioner at the inquiry into the respondent's complaint was that from about October, 1959, she was accepted as the tenant of the premises by the respondent, that she had been paying rent to him on that basis thereafter and is entitled to remain in possession. This plea was rejected by the learned Commissioner of Requests. He held that the resistance offered by the petitioner and the three others was frivolous and vexatious and directed that writ should issue against all of them under section 327A. This order was made on the 25th August, 1961. On the same day the petitioner filed the present application to have that order revised and for stay of execution of the writ. On the 29th August, 1961, she also filed action No. 9610L in the District Court of Colombo, in terms of section 327A, to establish her right to the possession of the premises.

Section 327A, which was introduced by the Civil Procedure Code (Amendment) Act, No. 7 of 1949, provides as follows :—

> " If the resistance or obstruction was occasioned by a person other than the judgment-debtor and the Court finds that the claim of such person to be in possession of the property whether on his own account or on account of some person other than the judgment-debtor is frivolous or vexatious, the Court may by order direct the judgment-creditor to be put in possession of the property :
>
> The person against whom such order is passed may within one month institute an action to establish the right which he claims to the possession of the property but subject to the result of such action, if any, the order shall be final."

Mr. Sharvananda who appeared for the respondent, in taking objection to this application being entertained, submitted that the only remedy open to a person against whom an order under section 327A has been made is to file an action to establish the right which he claims to the possession of the property, as provided in the second paragraph of that section. If Mr. Sharvananda is right in his submission, even though the petitioner may have a *prima facie* valid claim as tenant to be in possession of the premises, and the case should have been dealt with as one falling under section 327 of the Civil Procedure Code, and not under section 327A, she has no right of appeal from the order of the Commissioner which, if given effect to, will result in her being forthwith ejected from the premises and the respondent being placed in possession.

Mr. Sharvananda relied on the judgment of my brother, H. N. G. Fernando in *Gunaratne* v. *de Silva*, 58 N.L.R. 542, where he held that no appeal lies against an order made under section 327A. In the case of *Arlis Appuhamy et al.* v. *Siman*, 48 N.L.R. 298, an order under section 330 (1) of the Civil Procedure Code was held by Dias, J., to be an appealable order. Section 330 (2) is in terms similar to the terms of the second paragraph of section 327A in that it enables a party against whom an order under section 330 (1) has been made to institute an action within one month to establish the right which he claims to the possession of the property, and, subject to the result of such action, the order is declared to be final. The decisions in these two cases do not appear to be reconcilable.

The question whether an appeal lies from an order under section 327A does not, however, arise for decision by me in the present application, in which the revisionary powers of the Supreme Court are being invoked with a view to obtaining relief from the order of the Commissioner. It may be that the petitioner was advised to make this application on the basis that she had no right of appeal from an order under section 327A, as decided in *Gunaratne* v. *de Silva* (*supra*). But even if that decision is correct, I do not think that the provisions of section 327A in any way affect or limit the powers of this Court to revise such an order. I would, therefore, hold that the present application is one that may be entertained. But as regards the merits, although the petitioner alleged that she was accepted as the tenant of the premises by the respondent from about October, 1959, she has no document which supports her on the point. Moreover, she admitted that all rent receipts issued thereafter continued to be in the name of Mahaedvan. It seems to me, therefore, that the learned Commissioner was justified in dealing with the case as one falling under section 327 A. The power given to the Court under that section to make an order that the judgment-creditor be put in possession includes, in my opinion, a power to impose such terms as the Court may think fit in regard to the giving of security by the judgment-creditor for the due performance of the decree entered in the action filed in terms of that section by the party against whom an order is passed. I accordingly direct that before the respondent is put in possession

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of the premises he should give security in such sum as may be determined by the Commissioner of Requests for the due performance of any decree (subject to appeal) which may be entered against him in D.C., Colombo, Case No. 9610L. Subject to this variation of the order passed by the Commissioner under section 327A, the application is dismissed.

I make no order as to costs.

Application dismissed.

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

DINGIRI BANDARA *vs.* D. G. KULATUNGE

S.C. 47/'61—*Court of Requests, Avissawella, Case No.* 1045.

Argued and decided on : November 22, 1962.

Civil Procedure Code, section 816—*Amendment of pleadings—Court of Requests—Proposed amendment inconsistent with evidence—Amendment disallowed—No injustice.*

It was sought to amend an amended plaint by inserting a paragraph averring the application of section 4 (1) of the Buddhist Temporalities Ordinance and thereby claiming certain rights for the plaintiff. In his evidence and at the hearing of the appeal, the plaintiff admitted that section 4 (1) was not applicable, as claimed in the proposed amendment. Section 816 of the Civil Procedure Code allows amendment of pleadings if substantial justice will be promoted thereby.

Held : That there had been no failure of justice in the present case and that the amendment should, therefore, not be allowed.

C. R. Gunaratne, for the plaintiff-appellant.

Ralph de Silva, for the defendant-respondent.

SRI SKANDA RAJAH, J.

In this case the amended plaint indicates that the plaintiff, though not named in the caption as Kapurale has averred in paragraph 2 of the plaint that he is the Kapurale. Therefore, he sued the defendant in his capacity as Kapurale. Later, he appears to have made an application to amend the caption by the insertion of the words " Kapurale of the Pattini Dewale " after his name and it was allowed. Whether that amendment was actually entered in the caption or not, is not of any materiality in this case. Then he sought to amend the amended plaint by the addition of paragraph 2 (*a*) as follows :—

" The plaintiff is the Kapurale of Pattini Dewale, Kabulumulla, which is registered under section 4 (1) of the Buddhist Temporalities Ordinance, Chapter 222 of the Legislative Enactments of Ceylon, and accordingly claims as Controlling Kapurale thereof the right to file the present action."

It is now admitted that this Dewale does not come under the provisions of section 4 (1) of the Buddhist Temporalities Ordinance. Therefore, it is difficult to reconcile that position with the position that the plaintiff sought to take by the amendment by adding paragraph 2 (*a*) to the amended plaint. In fact, he has, in his evidence, stated : " I did not claim to amend the plaint as controlling kapurale. In fact, there is no such office ". Therefore, there would have been no purpose in allowing that amendment to be made. Section 816 of the Civil Procedure Code reads as follows :—

" The Court shall, upon application, allow a pleading to be amended at any time before trial or during the trial, if substantial justice will be promoted thereby . . ."

This is a special provision which applies to amendment of pleadings in the Court of Requests and has no application to the amendment of pleadings in the District Court.

Though there was objection at the trial to the amending of the caption, issue No. 6, viz., " Is the plaintiff, the kapurale of the said Pattini Dewale ? " was accepted and was answered in the affirmative. That is to say, this action went on the footing that he was the Kapurale and he was held to be the Kapurale of this Dewale. So, the next question that was to be determined was issue 7 (*a*) : " If so, is he as such Kapurale entitled to see that the Paraveni Nilakarayas of the Vitharan Panguwa perform their due services ? " That has been answered in the negative by the learned Commissioner of Requests.

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P 1, an extract of a register under the Service Tenures Ordinance 4 of 1870, shows that the Vitharan Panguwa people, that is the defendant, has to raise flags for four festivals, and it is some other Panguwa people who are liable to appear before the Kapurale once a year with a pingo and forty betels. It is only the proprietor of this Dewale who can file an action under section 20 of the Service Tenures Ordinance. In P 1, the proprietor is given as Kabulumulla Pattini Dewale. It is argued that because this Dewale is not a juristic person the Kapurale will be entitled to sue. I am unable to accede to this proposition. Therefore, there has been no failure of justice in the Commissioner of Requests not allowing the amendment to be made to the plaint by the addition of paragraph 2 (*a*) which has already been referred to. I dismiss the appeal with costs·

Appeal dismissed.

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

A. D. APPUHAMY *vs.* T. E. PERERA HAMINE & ANOTHER

Application for Revision and/or " Restitutio in Integrum " in D.C. Colombo, 8291/*L.*
(*Application No.* 195).

Argued and decided on : August 31, 1962.

Civil Procedure Code, sections 188 *and* 408—*Consent decree—Matters outside the subject-matter of the action embodied in such decree—Validity of such decree.*

Where a decree entered in terms of a settlement arrived at by the parties to an action does not deal with matters which were the subject-matter of that action, but embodies matters extraneous to the action and dealing with the subject-matter of other actions between the parties—

Held : That such a decree is not one the Court had power to enter under section 188 of the Civil Procedure Code ; nor is it one that the Court had the power to pass under section 408 of the Code. Such a decree should not be allowed to remain on record.

Held further : That the petitioner's delay in making this application should not, in the circumstances this case, be a ground for refusing to set aside this decree.

H. W. Jayewardene, Q.C., with *N. E. Weerasooria (Jnr.)*, for the 1st defendant-petitioner.

N. E. Weerasooria (Jnr.), for the 2nd defendant-petitioner.

K. Shinya with *R. L. N. de Zoysa*, for the plaintiff-respondent.

BASNAYAKE, C.J.

The petitioner, A. D. Appuhamy, the 1st defendant, in D.C. Colombo, Case No. 8291/L, seeks to have the consent decree entered in that action set aside. That was one of three actions between the parties to this application. In the first of them, D.C. Colombo, Case No. 8289/L, the petitioner's wife, T. E. Perera Hamine, on 22nd August, 1957, sued the petitioner praying a decree—

(*a*) ordering the defendant and all those holding or claiming to hold under him to be ejected from the lands specified in the Schedule to the plaint and that the plaintiff be quieted in possession thereof,

(*b*) ordering the defendant to pay damages at the rate or Rs. 500/- per month from March, 1957, and

(*c*) for costs.

In the second action, D.C. Colombo, Case No. 8291/L, instituted on 23rd August, 1957, by the petitioner's wife against the petitioner and one S. D. Siriwardena she sought to obtain a decree—

(*a*) declaring her entitled to ten lands described in the Schedule to the plaint in that action,

(*b*) declaring deed No. 684 of 8th November, 1948, to be of no force or effect,

(*c*) ordering the defendants and all those holding or claiming to hold under them to be ejected therefrom and the plaintiff quieted in possession thereof,

(*d*) condemning the defendants jointly and severally in damages at the rate of Rs. 750/- per month from March, 1957, and

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(*e*) for costs.

The third action, D.C. Colombo, Case No. 4186/D, was instituted on 25th September, 1957, again by the petitioner's wife against the petitioner, in which she asked for a separation *a mensa et thoro*. In the course of the proceedings in action, No. 8289/L, learned Counsel stated to Court that a settlement had been effected. The relevant minute reads as follows :—

"At this stage the case is settled and Counsel notify the following terms of settlement :—

It is agreed that legal title to the lands described in the schedule to the plaint should remain with the plaintiff but that the defendant should continue to be in possession of the lands during his life-time. Plaintiff undertakes not to sell or alienate any lands standing in her name at present except to one or more of her children.

In view of the settlement, Mr. Edussuriya moves to withdraw the documents which he produced. The application is allowed."

Decree was entered accordingly. In the action, No. 4186/D in which the plaintiff sought a decree of separation *a mensa et thoro*, the trial of which was fixed for 6th May, 1959, a motion in the following terms was filed, dated 5th May, 1959 :

"In terms of the settlement arrived at by the parties in this action, in D.C. Colombo, No. 8291/Land, we move that plaintiff's action and defendant's claim be dismissed without costs."

On the date fixed for the trial the Judge made order :

"This matter is settled. *Vide* consent motion filed. Enter decree dismissing plaintiff's action and defendant's claim without costs."

Below this order the following decree is recorded :—

DECREE

"It is ordered and decreed by consent that the plaintiff's action and defendant's claim be and the same are hereby dismissed without costs."

On 9th October, 1958, Counsel notified to Court the following terms of settlement in case No. 8291/L :—

"(1) It is agreed that the defendants will convey within three months a life-interest to the plaintiff in the land called Kahatagahawatte, which is Item No. 1 in deed 684 of 6.11.1948, and on which the building used as the Co-operative Stores stands.

(3) It is also agreed that the defendants will convey within three months to the plaintiff a life-interest in the land opposite the land called Kahatagahawatte referred to in paragraph 1 in extent about 1/4 acre in which the bathing well stands.

(4) It is also agreed that the 2nd defendant is entitled to the rent of the ground floor of the building standing on Kahatagahawatte referred to in paragraph 1.

(5) The defendants undertake to give the plaintiff vacant possession of the lands referred to in paragraphs 1 and 2 exclusive of the ground floor of the building occupied by the Co-operative Stores.

(6) It is also agreed that the 1st defendant will pay the plaintiff a sum of Rs. 200/- per month commencing from this month, payments to be made before the end of each month. 1st defendant consents to writ being issued in this case against him for the amount due if he defaults in this payment.

(7) Plaintiff and 1st defendant agree that case No. 4186 D filed by the plaintiff against the 1st defendant should stand dismissed, and that 1st defendant's claim in that case should also be dismissed."

The following decree was thereupon entered :—

DECREE

"IN THE DISTRICT COURT OF COLOMBO.

T. E. PERERA HAMINE of 15/297, Baseline Road, Colombo, Dematagoda .... *Plaintiff.*

No. 8291/Land. *vs.*

1. A. D. APPUHAMY and
2. A. D. SIRIWARDENA, both of 93, Barnes Place, Colombo 7.............. *Defendants.*

This action coming on for final disposal on the 9th day of October, 1958, before A. L. S. Sirimanne, Esquire, Additional District Judge, Colombo, in the presence of Mr. K. Shinya, Advocate, instructed by Mr. H. V. M. Arulnayakan, Proctor, on the part of the plaintiff and of Mr. D. L. Edussuriya, Advocate, instructed by Messrs. Moonesinghe & Jayamaha, Proctors, on the part of the defendants.

It is ordered and decreed that the defendants do convey within three months a life-interest to the plaintiff in the land called Kahatagahawatte which is item No. 1 in Deed No. 684, of 6.11.48 and on which the building used as a co-operative stands and described in the schedule "A" hereto.

It is also ordered and decreed that the defendants do convey within three months to the plaintiff a life-interest in the land opposite the land called Kahatagahawatte referred to above in extent about 1/4th acre in which the bathing well stands described in the schedule "B" hereto.

It is also ordered and decreed that the 2nd defendant be and he is hereby declared entitled to the rent of the ground floor of the building standing on Kahatagaha-

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watte referred to above and described in the said schedule "A".

It is also ordered and decreed that the defendants do give the plaintiff vacant possession of the lands referred to above exclusive of the ground floor of the building occupied by the Co-operative Stores.

It is further ordered and decreed that the 1st defendant do pay to the plaintiff a sum of Rs. 200/- per month commencing from this month before the end of each month. In default of payment of the amount due writ to issue against him.

It is also further ordered and decreed that Case No. 4186/D filed by the plaintiff against the 1st defendant be dismissed and the 1st defendant's claim also be dismissed."

It is common ground that the above decree does not deal with matters which were the subject-matter of that action. It is for that reason that the petitioner seeks to have it set aside. The decree is not one the Court had power to enter under section 188 of the Civil Procedure Code. That section provides that as soon as may be after a judgment is pronounced a formal decree bearing the same date as the judgment should 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 judgment in regard to the relief granted or other determination of the action. Nor is the decree one that the Court had power to pass under section 408 of the Code. That section provides that where an action is adjusted wholly or in part by any lawful agreement or compromise, or if the defendant satisfy the plaintiff in respect to the whole or any part of the matter of the action, such agreement, compromise, or satisfaction be notified to the Court by motion made in the presence of, or on notice to, all the parties concerned and that the Court should pass a decree in accordance therewith, so far as it relates to the action.

The instant decree conforms with the requirements of neither section 188 nor 408 and cannot be allowed to remain on the record. We do not think that the petitioner's delay in coming to this Court should in the circumstances of this case be a ground for refusing to set aside the decree. We accordingly set aside the decree. As the petitioner has been an active party to the decree that has been passed in contravention of the provisions of the Code we do not award him the costs of this application.

ABEYESUNDERE, J.
I agree.

Decree set aside.

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

P. GEORGE SILVA *vs.* DR. L. E. SALGADO

S.C. 79/1963—*M.C. Panadura, No.* 74161.

Argued on : 19th March, 1963.
Decided on : 5th April, 1963.

Penal Code, section 434—*Criminal Trespass—Employee (accused) permitted to occupy room in dispensary premises free of rent—Continuing to remain after services terminated—Employer in occupation of entire premises except room occupied by accused—Accused not confined to room but enters other parts of the premises—Can conviction on a charge of criminal trespass be maintained.*

The accused was charged with criminal trespass under section 434 of the Penal Code for continuing to occupy a room forming part of a dispensary which he was permitted to occupy by his employer (a doctor) free of rent. After the services of the accused were terminated due to misconduct, the doctor requested him to quit the room, but he refused. The learned Magistrate held that the accused remained in the room with intent to cause annoyance to the doctor and convicted the accused.

In appeal it was contended on behalf of the accused that the conviction could not be sustained as on the authority of *R.* v. *Selvanayagam*, 51 N.L.R. 470, the accused as *de facto* occupier could not have remained in occupation to the annoyance of himself.

Held : That as the charge has not been restricted to the room itself, but it is that he remained in premises in the occupation of his employer, which fact is clearly supported by the evidence led, and as the accused could not be said to have any *bona fide* right to enter that part of the premises used for the purposes of the dispensary, the conviction should be upheld.

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Cases referred to : *Abraham* v. *Hume*, 52 N.L.R. 449.
R. v. *Selvanayagam*, 51 N.L.R. 470 ; XLIII C.L.W. 101.

D. R. P. Goonetilleke, for the accused-appellant.

G. P. J. Kurukulasuriya with *N. M. S. Jayawickrama*, for the complainant-respondent.

H. N. G. FERNANDO, J.

The accused in this case was employed as an assistant at a dispensary maintained by a doctor in Panadura. He was permitted by the doctor to occupy one room in the dispensary premises which is on the ground floor adjoining the kitchen. He was, of course, paid a salary by his employer, but the Magistrate has accepted the prosecution evidence that he paid no rent for the room and that no deduction was made from his salary on account of his occupation of the room, except a deduction of Rs. 10/- per month on account of lighting.

The accused's employment was terminated by his employer on 3rd August, 1962, on the ground of alleged misconduct and shortage of moneys in his charge. He was asked to vacate the room but continued to remain in occupation. The Magistrate is clearly right in holding that the accused has remained on the premises with the intention of causing annoyance to his employer. The only question upon which I had some doubt is whether there was a correct finding that the accused has remained upon premises in the occupation of the doctor. I am in agreement with an observation made by Dias, S.P.J., in *Abraham* v. *Hume*, 52 N.L.R. 449, when he said (with reference to the facts in *R.* v. *Selvanayagam*, 51 N.L.R. 470) that in the case of an estate line-room the person in occupation was the workman. Similarly it seems to me in the present case that if the charge against the accused had been only that he had remained in occupation of the room provided for his use by his employer, he could not be said to have remained there to the annoyance of the occupier of the room since he himself was the *de facto* occupier. Indeed, it seems to me that even if a trespasser is in actual occupation of a room, the offence of criminal trespass can be committed by some other person entering the room in order to annoy the trespassing occupant. But the charge in this case is not restricted to the room itself, but it is that the accused has remained *in premises* in the occupation of his employer.

According to the evidence the employer is clearly in occupation of the whole of the ground floor of the dispensary premises except the room occupied by the accused. He does not remain confined to the room but enters other parts of the premises and talks to the patients. Even if it might be said that he has a right to continue in occupation of the room, he cannot have any *bona fide* claim to enter that part of the premises which is used for the purpose of the dispensary. On this ground I think his conviction on the charge of criminal trespass was right. The appeal is dismissed.

Appeal dismissed.

(The following order was also delivered later :

H. N. G. FERNANDO, J.

I had overlooked the question of sentence in the judgment delivered this morning. It is altered to a fine of Rs. 100/-, in default one month's rigorous imprisonment).

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

R. G. S. DE SOYZA *vs.* THE COMMISSIONER OF AGRARIAN SERVICES & OTHERS

In the matter of an application for the issue of a Mandate in the nature of a Writ of Mandamus in terms of section 42 *of the Courts Ordinance.*

Application No. 436 *of* 1962.

Argued and decided on : 27th November, 1962.

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Mandamus—Application to Commissioner for certified copy of proceedings—Refusal—Right of appeal from Commissioner's order—Right to obtain certified copy of proceedings for purposes of appeal.

Where an application has been made to the Commissioner of Agrarian Services for a certified copy of the proceedings in order that an appeal from his order may be prosecuted properly,

Held : That the right of such appeal carries with it rights incidental thereto and the Commissioner must furnish the certified copy of proceedings upon request, although no specific provision has been made to that effect in the Paddy Lands Act, No. 1 of 1958.

Cases referred to : *Attorney-General* v. *K. Jeetin Singho*, 57 N.L.R. 289.
Buddhadasa v. *Mahendra*, 58 N.L.R. 8.

G. T. Samarawickrema for the petitioner.

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

SRI SKANDA RAJAH, J.

This is an application for the issue of a Writ of Mandamus on the 1st respondent, the Commissioner of Agrarian Services, by the landlord-petitioner.

It would appear that on a complaint made by one I. M. Abeyratne, the tenant of the landlord-petitioner, to the Commissioner of Agrarian Services, the landlord was called upon to show cause, if any, why the tenant should not be restored to possession. The landlord made representations to the Commissioner, in this case to the Assistant Commissioner who held an inquiry. Thereafter, by writing the Commissioner communicated his decision to the landlord.

The landlord is given the right of appeal to the Board of Review. This right has to be exercised within 30 days of the communication by the Commissioner.

The landlord exercised this right of appeal. But, when he made an application to the Commissioner to issue a certified copy of the proceedings, the Commissioner wrote back on the 31st of August, 1962, " regretting that the copy of the inquiry proceedings could not be provided. Thereafter, the landlord made an application to the 2nd, 3rd, and 4th respondents, who formed the Board of Review, to order the Commissioner to issue a certified copy of the proceedings. The Board of Review indicated that they had no authority to issue an order to the Commissioner to issue a certified copy. So the landlord has petitioned this Court praying for this Writ. Learned Crown Counsel has referred me to two authorities—57 N.L.R. 289, *Attorney-General* v. *K. Jeetin Singho* and 58 N.L.R. 8, *Buddhadasa* v. *Mahendra.* The former was an application for a certified copy of the first complaint to the police. It was ordered to be issued by this Court. The latter is one in which an application for a certified copy of a statement to the police was refused. It will be seen that the applications in those two cases were in respect of statements made to the police under the provisions of Chapter 16 of the Criminal Procedure Code. In my view, these decisions can be distinguished from the matter that is before me.

In this case there is a right of appeal granted to the landlord. In my view, such a right also confers on the appellant rights that are incidental thereto. One of the rights that would be incidental thereto would be to obtain a certified copy of the proceedings in order that the appeal may be prosecuted properly.

Therefore, the questions whether this is a " public document " and whether there is a " right of inspection of the public document " are not necessary to be considered in this application. I wish to make it quite clear that these matters are not decided in this application.

It has been pointed out that there are special provisions in the Criminal and Civil Procedure Codes to grant certified copy of proceedings in the event of appeal and that no specific provision has been made in this Act, namely, the Paddy Lands Act, No. 1 of 1958. But, as I said earlier the right of appeal carries with it the rights incidental thereto such as the right to obtain a certified copy of the proceedings from which an appeal is preferred. Therefore, I allow this application with costs fixed at Rs. 157.50.

Application allowed.

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Present : **Sansoni, J.**

MUTHUWEERA *vs.* CHANDRASOMA

S.C. No. 122/1960 *(R.E.)—C.R. Colombo, No.* 75155.

Argued on : 25th March, 1963.
Decided on : 1st April, 1963.

Rent Restriction Act (*Cap.* 274), *section* 13 (1), *proviso* (*c*)—*Action for ejectment on the ground that the premises are reasonably required for landlord's residence—Financial position of the parties—How far relevant.*

Burden of proof—What has plaintiff to prove—Genuine and present need—When will Appeal Court interfere with the trial judge's conclusions regarding balance of hardship.

Plaintiff, as landlord, sought to eject the defendant, her tenant, from rented premises on the ground that they were reasonably required by her for her occupation as a residence.

The defendant alleged that plaintiff's claim was not a *bona fide* one as the action was the result of his refusal to pay a second premium of Rs. 3,600/- for a period of three years from 1958 as was done when the tenancy agreement was first entered into in 1955.

It was in evidence—

(*a*) that the plaintiff was the owner of other houses in Colombo which brought her a monthly rental of Rs. 2,000/- ;

(*b*) that her husband was in receipt of a salary of Rs. 4,000/- per mensem ;

(*c*) that she had four children, three of whom were in England for whom a sum of Rs. 1,850/- had to be remitted monthly to England. The fourth child was attending a school in Colombo ;

(*d*) that she had borrowed Rs. 60,000/- from an Insurance Company for effecting improvements to her house and that her other liabilities totalled about Rs. 10,000/-.

The defendant was a Government servant drawing Rs. 702.35 a month. He was married and had no children of his own, but he was bringing up two children of a close relative. They were about seven years' old and were attending school in Colombo. He had no property of his own and stated that he could not afford to pay much more than he was doing as house rent.

When plaintiff filed this action she was living in a house temporarily lent to her and her husband, and pending the action they went into a flat at Jawatta paying Rs. 350/- a month. It was not suggested that they had to leave that flat The defendant, on the other hand, stated that he had tried to find suitable alternative accommodation but without success.

The learned Commissioner after holding that the plaintiff accepted a premium of Rs. 3,600/- in 1955 but that her request for a second premium in 1958 was not proved, gave judgment for the plaintiff stating that " unless the defendant satisfies Court that this requirement of plaintiff is *mala fide* and this action has been filed by plaintiff because of his refusal to accommodate her by giving her a further premium, I have no alternative but to hold that plaintiff requires the premises for her use and occupation as a residence ".

The defendant appealed.

Held : (1) That the passage in the judgment above referred to amounted to a grave misdirection which virtually vitiated the ultimate conclusion.

(2) That the defendant's failure to establish the charge that the plaintiff requested the second premium would have only affected the plaintiff's *bona fides,* not her reasonableness in requiring possession.

(3) That the burden of proving that premises were reasonably required for the plaintiff's occupation as a residence was on the plaintiff, who must show " a genuine present need" for the house and not be " moved by considerations of preference and convenience merely ".

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(4) That the financial position of the plaintiff was so much better when compared with that of the defendant, that any hardship caused to the plaintiff by the higher rent she had to pay for the flat was more than set off by the hardship which would be caused to the defendant if he had to leave those premises without a suitable alternative as a residence or had to pay key money for another house.

(5) That although it is the law that the question of weighing the balance of hardship is a matter for the trial judge, the Appeal Court will interfere, if on all the evidence there is only one reasonable conclusion to be come to, or alternatively, if the judge has misdirected himself on the facts or on the evidence.

Cases referred to : *Coplans* v. *The King*, (1947) 2 A.E.R. 393
Piper v. *Harvey* (1958) 1 Q.B. 439; (1958) 1 A.E.R. 454; (1954) 2 W.L.R. 408

G. P. J. Kurukulasooriya with *N. M. S. Jayawickrama*, for the defendant-appellant.

H. W. Jayewardene, Q.C., with *L. Kadirgamar* and *E. St. N. D. Tillekeratne*, for the plaintiff-respondent.

SANSONI, J.

This is an action for rent and ejectment brought by a landlord against her tenant on the ground that the rented premises are reasonably required by her for her occupation as a residence, within the meaning of section 13 (1) proviso (*c*) of the Rent Restriction Act, Cap. 274. The tenant disputed the landlord's claim, but he lost in the lower Court and he has appealed.

The tenancy was entered into in May, 1955. The rent agreed on was Rs. 99.50 a month and there can be no question that it was paid regularly.

One matter of dispute between the parties was whether a sum of Rs. 3,600/- was paid as a premium by the tenant to the landlord when the contract of tenency was entered it. The learned Commissioner has held that it was, and his finding was not challenged before me. The tenant alleged that a further such sum was demanded from him by the landlord at the end of February, 1958, payable at the expiry of three years from the commencement of the tenancy, his position being that he had paid the sum of Rs. 3,600/- as the equivalent of 36 months excess rent at the rate of Rs. 100/- a month. The learned Commissioner has rejected the defendant's evidence on this point. I have considered his Counsel's submissions, but I do not think I should interfere with this finding of fact either.

The only question left is whether the plaintiff has proved that the premises were reasonably required by her. I shall first set out the respective positions of the parties. The plaintiff owns, apart from the house in dispute, which bears assessment No. 95, 5th Lane, the adjoining house No. 97 which is occupied by a tenant who pays Rs. 600/- a month. She has two houses in Sea Avenue which bring in Rs. 500/- and Rs. 450/- a month, respectively. She also owns some semi-detached houses and tenements which between them bring in a monthly rent of Rs. 250/-. Her husband receives a monthly salary of Rs. 4,000/-. They have four children ; two of them are being educated in England, one is receiving medical treatment in England, and one child is in Ceylon where he attends a school in Colombo. The plaintiff has stated that a sum of Rs. 1,850/- a month has to be remitted to England for the three children who are there. She has also stated that she has borrowed Rs. 60,000/- from an Insurance Company for certain improvements to her house, and her other liabilities total about Rs. 10,000/-.

The defendant is a Government Servant drawing a salary of Rs. 702.35 a month. He is married and has no children of his own, but he is bringing up two children of his nieces : they are about seven years old and attend school in Colombo. He has no property of his own, and he has said that he cannot afford to pay much more than he is doing as house rent. So much for the financial position of the respective parties.

The plaintiff, when she filed this action, was living in a house which had been lent to her and her husband, but in accordance with an undertaking which they had given they left that house pending this action and went into a flat in Sulaiman Avenue, Jawatte Road, paying a rent of Rs. 350/- a month. Their landlord has given evidence for the plaintiff, and it is not suggested that they have to leave that flat. The defendant, on the other hand, has said that he has tried to

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find alternative accommodation anywhere within Colombo Municipality, but all his efforts have been fruitless. The main obstacle, according to him, is that he has to pay key money of about Rs. 3,000/-, which he cannot afford to do.

The plaintiff's objections to living in the flat are that it has no spare room, that her child has no garden to play in, and that there is no suitable room in which she can entertain guests. If her husband entertains guests at a hotel, presumably for business reasons, his employers meet the bill. According to her landlord, the flat consists of two bed rooms, 17 ft. x 10 ft. and 14 ft. 16 x ft., respectively, a hall and dining room combined, a kitchen, a garage, and a balcony 5 ft. wide and running the whole length of the building.

The defendant has given a detailed description of No. 95, 5th Lane. It has no garage. It has one bed room, 9 ft. x 15 ft. ; three small rooms which are about 8 ft. x 8 ft., a drawing room and dining room adjoining each other, no store room or servants' room, and a garden, 25 ft. x 30 ft., which he says is below the road level and goes under water in rainy weather. I very much doubt if such a house is suitable for occupation by a person employed as the plaintiff's husband is ; and I find it very difficult to accept the plaintiff's statement that, out of the houses she owns, it is the most suitable for her occupation.

The learned Commissioner, after considering the reasons which the plaintiff gave for filing this action, has stated this in his judgment : " Unless the defendant satisfies Court that this requirement of plaintiff is *mala fide* and this action has been filed by plaintiff because of his refusal to accommodate her by giving her a further premium, I have no alternative but to hold that plaintiff requires the premises for her use and occupation as a residence. " I consider this a grave misdirection which virtually vitiates the ultimate conclusion to which he has come.

The question whether the plaintiff reasonably requires the premises cannot possibly be answered by asking oneself whether she also asked for a further premium. It can only be answered after weighing the evidence led for either party, and seeing at the end whether the plaintiff has discharged the burden that lies on every plaintiff in a civil case. If the defendant's charge had been established, he would have succeeded in showing that the plaintiff was not acting *bona fide*, and nothing more ; but he is also entitled to show that the plaintiff is not acting reasonably in requiring possession. She must show " a genuine present need " for the house and not be " moved by considerations of preference and convenience merely. " The fact that the defendant failed to establish the charge he made against the plaintiff cannot possibly affect the question whether the plaintiff reasonably requires this house; and although it is unfortunate that the plaintiff may not be able to live in a house that belongs to her, that is a situation which is not uncommon in view of the protection which the Rent Restriction Act gives to a tenant by requiring the landlord to prove that the house she owns is " reasonably required " by her.

The plaintiff in this case has a flat for her occupation, and although she is only a tenant of it there is no suggestion that she holds it on a precarious tenure. I doubt if, apart from the garden, house No. 95, has any amenities that the flat cannot provide. The financial position of the plaintiff, when compared with that of the defendant, is so much better, that any hardship caused to the plaintiff by the higher rent she has to pay for the flat is more than set off by the hardship which would be caused to the defendant if he has to leave No. 95 without a suitable alternative as a residence, or if he has to pay key money for another residence.

Mr. Jayawardene asked me not to interfere with the learned Commissioner's order, and he cited the well-known case of *Coplans* v. *King*, (1947) 2 A.E.R. 393. It was there held that Parliament deliberately made the County Court Judge in England the conclusive judge on the question of hardship. But I cannot also ignore the later decision of the Court of Appeal in *Piper* v. *Harvey*, (1958) 1 Q.B.D. 439, where Lord Denning said : " It is undoubtedly the law that if it is just a matter of weighing the balance of hardship, that is a matter for the judge himself who hears the case, and is not a matter in which this Court can interfere. This Court can only interfere if on all the evidence there is only one reasonable conclusion to be come to, or, altenatively, if the judge has misdirected himself on the facts or on the evidence ". Hodson, L.J., agreed and made the following remarks : " The tenant has not been able to say anything more than the minimum which every tenant can say, namely, that he has, in fact, been in occupation of the bungalow, and that he has not at the moment any other place to go to. But he has not sought to prove anything additional to that

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by way of hardship in the way of unsuccessful attempts to find other accommodation, or, indeed, to raise the question of his relative financial incompetence as compared with the landlord ". This is just what the defendant in this case has done.

The Court of Appeal ultimately set aside the judgment of the County Court Judge in that case. I feel I should do the same thing here, chiefly because the learned Commissioner has been guilty of the serious misdirection to which I have already drawn attention by putting the onus on the wrong party. He has not rejected the defendant's evidence relating to his attempts to find alternative accommodation, and he has not considered what bearing the relative financial situations of the two parties should have on the main issue. If he had done so, I think he would have held that the plaintiff had failed to discharge the burden that lay on her.

I set aside the judgment under appeal and dismiss the plaintiff's action with costs in both Courts.

Appeal allowed.

Privy Council Appeal, No. 35 *of* 1961.

Present : **The Lord Chancellor, Lord Evershed, Lord Jenkins, Lord Guest, Sir Malcolm Hilbery.**

VIJAYA WICKRAMATUNGA VIDYASAGARA *vs.* THE QUEEN

From

THE SUPREME COURT OF CEYLON

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

Delivered on: 1st April, 1963

Contempt of Court—Industrial Disputes Act, 1950-1957, *section* 40*A—Statement to Court by Advocate on instructions from client—Statement containing words indicating that Court is prejudiced against his client and an impartial inquiry could not be had before it—Is the statement privileged—" Bona fides " of Advocate.*

The Supreme Court of Ceylon found the appellant guilty of contempt against or in disrespect of the authority of the Industrial Court under section 40A (1) of the Industrial Disputes Act, 1950-57 and ordered him to pay a fine of Rs. 500/-.

The alleged offence was that the appellant, while appearing before the Industrial Court as Advocate representing a Workers' Union, read out from a typewritten document in the following terms :—

> " In the circumstances, the Union, having felt that this Court by its order had indicated that an impartial inquiry could not be had before it, has appealed to the Minister to intervene in the matter. The Union is, therefore, compelled to withdraw from these proceedings and will not consider itself bound by an order made *ex parte* which, the Union submits, would be contrary to the letter and spirit of the Industrial Disputes Act."

Having read out the above, the appellant withdrew from the case.

The order referred to in the statement was one made by the Court on an application for postponement and was in the following terms :—

> " I am willing to allow another date provided the Union instructs the All-Ceylon Oil Companies Workers' Union to lift the boycott immediately. I put the case off for the 28th instant. If the boycott is lifted before then, the case shall proceed to inquiry, if not, *ex parte* trial shall stand."

The *ex parte* order referred to had been made earlier in default of the Union's appearance before the Court.

Under section 40A of the said Industrial Disputes Act the Court had to be satisfied on two questions : (*a*) whether the alleged statement by the appellant at the hearing before the Industrial Court brought the Court into disrepute, and (*b*) whether the statement was made without sufficient reason.

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Held : (1) That the words in the first sentence of the statement clearly suggested that the Court was prejudiced against the Union and could not be trusted to give impartial consideration to the inquiry and, therefore, the words used had the effect of bringing the Court into disrepute.

(2) That it cannot be said that the appellant acted in good faith and in accordance with what he believed to be his professional duty as the boycott had not been lifted and there was no necessity for any representation of the Union. The appellant was not entitled to any special privilege on the ground that he was acting on instructions. Therefore, the statement was not made with sufficient reason.

Per The Judicial Committee—" Counsel for the appellant argued that it could not be contempt for counsel to allege partiality of a Court as this would unduly restrict counsel's arguments on a hearing in *certiorari* proceedings. But different considerations apply when an attack is made in a Court of review on the impartiality of a lower Court."

E. F. N. Gratiaen, Q.C., with *Dick Taverne* and *Mrs. Q. A. Nonis* for the appellant.

Kenneth Potter with *T. O. Kellock* for the Crown.

Lord Guest

This is an appeal by special leave from a judgment and decree of the Supreme Court of Ceylon whereby the appellant was found guilty of contempt against or in disrespect of the authority of the Industrial Court under section 40A (1) of the Industrial Disputes (Amendment) Act, 1950-57 and whereby the appellant was ordered to pay a fine of 500 rupees and in default of payment to undergo six months' rigorous imprisonment.

The offence was alleged to have been committed by the appellant in making a statement to an Industrial Court before which he was appearing as Advocate representing the Petroleum Service Station Workers' Union.

It is necessary to refer briefly to the history of the case antecedent to the appellant receiving instructions to appear as counsel for the Union. On 2nd September, 1959, the Minister of Labour referred to the Industrial Court for settlement an industrial dispute between the Union and P. R. Perera. The matter in dispute related to the refusal by Perera to employ certain workmen who were members of the Union. Mr. H. S. Roberts was selected by the Minister of Labour from a panel to form the Industrial Court under the provisions of the Industrial Disputes Act, 1950. The Court fixed the hearing for the Industrial Disputes Act, 1950. The Court fixed the hearing for 30th October, 1959. At the hearing on that date the Union was not represented and no explanation was afforded for their non-appearance. The Court proceeded to hear the matter *ex parte* and fixed 10th November, 1959, as the date for the award. On 2nd November, 1959, the Union applied to the Court for permission to place its case before the Court. The Court granted the application and the Court fixed 21st November, 1959, for the hearing *inter partes*.

On 15th November, 1959, the Union applied to the Registrar of the Court for a postponement of the hearing to a date three weeks from 15th November, 1959, on the ground of the illness of their advocate. The Union was ordered to support the application for a postponement at the hearing on 21st November, 1959. At the hearing before the Court on 21st November the General Secretary renewed the Union's application for an adjournment on the ground of the continued illness of their counsel. This application was opposed by Perera's counsel. In the meantime there had occurred a sympathetic boycott of Perera by the All-Ceylon Oil Company Workers' Union. This boycott was alleged by Perera's counsel to have resulted in his being kept out of business for the last five months. He also stated that the Union had sufficient time to retain other counsel. The Court made an Order in the following terms :—

> " I am willing to allow another date provided the Union instructs the All-Ceylon Oil Companies Workers' Union to lift the boycott immediately. I put the case off for the 28th instant. If the boycott is lifted before then the case shall proceed to inquiry ; if not, the *ex parte* trial shall stand."

Subsequent to this Order the Secretary of the Union wrote a letter, dated 25th November, 1959, to the Minister of Labour in which he stated that the condition imposed on the Union of obtaining a release of the boycott could not be justified and that the Order reflected a positive degree of prejudice on the part of the Court against the two Unions. He further stated that the Union was of the view that an impartial inquiry could not be had into the matter at the hands of a tribunal which had made an order of this nature. He finally requested the Minister to have the Court reconstituted in order that the dispute

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might be heard *de novo* and determined by another member of the Panel.

A hearing took place before the Industrial Court on 28th November. At this date the sympathetic boycott by members of the All-Ceylon Oil Companies Workers' Union had not been lifted. Mr. S. J. Kadirgamar appeared for Perera and the appellant appeared on the instructions of the Union. He read out from a typewritten document in the following terms :—

> " . . . In the circumstances, the Union having felt that this Court by its order had indicated that an impartial inquiry could not be had before it, has appealed to the Minister to intervene in the matter. The Union is, therefore, compelled to withdraw from these proceedings and will not consider itself bound by any Order made *ex parte* which the Union submits would be contrary to the letter and spirit of the Industrial Disputes Act . . ."

He then withdrew from the case.

Following upon this hearing, Mr. Roberts submitted a complaint to the Chief Justice dated 3rd December, 1959, in which he submitted that the words used by the appellant at the hearing before the Court on 28th November, quoted above constituted a contempt of the Court being calculated to bring the Industrial Court into disrepute. The Chief Justice acting under the provisions of section 40A (4) of the Act issued a rule *nisi* on the appellant to show cause why he should not be punished for contempt in respect of the remarks above quoted. The case was heard before the Supreme Court and on 20th May, 1960, the Court found the appellant guilty of contempt. They made the rule absolute and imposed a fine of Rs. 500/- and in default of payment six months rigorous imprisonment.

Section 40A (1) of the Act provides :—

> " Where any person—
>
> (*a*) without sufficient reason publishes any statement or does any other act that brings any arbitrator, Industrial Court or Labour Tribunal or any member of such Court into disrepute during the progress or after the conclusion of any inquiry conducted by such arbitrator, Court or Tribunal ; or
>
> (*b*) interferes with the lawful process of such arbitrator, Court or Tribunal,
>
> such person shall be deemed to commit the offence of contempt against or in disrespect of the authority of such Arbitrator, Court or Tribunal."

The questions, therefore, which were before the Supreme Court were : (1) whether the statement made by the appellant at the hearing before the Industrial Court on 28th November, 1959, brought the Court into disrepute, and (2) if so, whether the statement was made without sufficient reason. The Supreme Court held that the statement was an act calculated to bring the Industrial Court into disrepute. Counsel for the appellant had difficulty in resisting the conclusion that such a finding was warranted. The words in the first sentence of the statement that the Union felt that the Court by its Order indicated that an impartial inquiry could not be had before it clearly suggested that the Court was prejudiced against the Union and could not be trusted to give impartial consideration to the inquiry. Their Lordships agree with the conclusion reached by the Supreme Court upon this matter. In regard to the second question whether the statement was made without sufficient reason, counsel for the appellant argued that as the appellant acted in good faith and in accordance with what he believed to be his professional duty in bringing to the notice of the Court that his client had applied to the Minister of Labour to have the Court reconstituted, the statement was made with sufficient reason. It was not and could not be contended that because the appellant was acting on instructions he was entitled to any special privilege. In reading from the typewritten document he accepted responsibility for its contents. While there might have been justification for informing the Court of the fact of the Union's application to the Minister and the fact of their withdrawal from the proceedings, there was really no call for any statement at all on behalf of the Union. The matter had been submitted by the Union to the Minister of Labour on 25th November. The Court Order of 21st November made it clear that if the boycott was not lifted before 28th November, the hearing would be *ex parte*. It was only if the boycott was lifted before that date that the inquiry would be *inter partes*. As the boycott had not been lifted, there was no necessity for any representation on behalf of the Union. But whether the appellant's appearance for the Union was in order or not, Their Lordships consider that there was no justification at all for his statement that an impartial inquiry could not be expected before the Industrial Court. This was the sting in the con-

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tempt and it was deliberate and quite unnecessary in the circumstances. Counsel for the appellant argued that it could not be contempt for counsel to allege partiality of a Court as this would unduly restrict counsel's arguments on a hearing in *certiorari* proceedings. But different considerations apply when an attack is made in a Court of review on the impartiality of a lower Court. It may be necessary in certain cases for counsel in compliance with his duty to his client to allege partiality of the lower Court. But where the allegation of partiality is made in the circumstances under which the appellant's statement was made Their Lordships consider that no adequate justification exists.

In Their Lordships' opinion the Supreme Court were entitled to find the appellant guilty of contempt and they will humbly advise Her Majesty that the appeal be dismissed.

The respondent did not ask for costs. There will, therefore, be no order for costs.

Appeal dismissed.

Present : **H. N. G. Fernando, J. and L. B. de Silva, J.**

THE CEYLON MOTOR TRANSIT COMPANY, LTD. *vs.* S. M. DAVID

S.C. 140/1961 (*F*)—*D.C. Colombo*, 43014/*M*

Argued on : 27th October, 1961
Decided on : 15th January, 1962

Workmen's Compensation Ordinance, section 60—*Acceptance of compensation in respect of injury in accordance with the provisions of the Ordinance—No action for damages maintainable thereafter in respect of that injury—Explanation in Sinhalese of agreement written in English to the effect that sum paid in settlement of claims under the Workmen's Compensation Ordinance—Ignorance that such agreement brought section* 60 *into operation*—" *Ignorantia juris haud neminem excusat* ".

The plaintiff, an employee of the 1st defendant Company, sued the 1st defendant Company in damages for a sum of Rs. 10,000/- in respect of an injury caused to him by a fellow-employee of the 1st defendant Company. The defence set up was that the plaintiff could not maintain this action by reason of section 60 of the Workmen's Compensation Ordinance (Cap. 139), inasmuch as he had agreed with his employer to accept compensation in respect of the injury in accordance with the provisions of the Ordinance. It was proved that the plaintiff had signed two memoranda of agreement, D 3 and D 1, written in English, by which he agreed to accept the sums of Rs. 2,520/- and Rs. 840/-, respectively, in full settlement of his claims under the Workmen's Compensation Ordinance. The evidence on behalf of the 1st defendant Company was that the contents of both memoranda were explained in Sinhalese to the plaintiff. The plaintiff denied that the contents of the memoranda were explained to him ; or that he had knowledge on the first occasion that the payment was made to him as compensation by reason of the accident. He also said that he was unaware that a workman can claim compensation under the Workmen's Compensation Ordinance. According to him he was only told that the document relates to the accident and that it was being paid to him for treatment. The trial judge held that the plaintiff " was not aware when he received the first sum paid as compensation that it was a payment made in terms of the Ordinance. "

Held : (1) That on the facts it was in the highest degree unlikely that the memoranda of agreement were not explained in Sinhalese to the plaintiff. To hold otherwise would carry with it the implication that a deliberate deceit had been practised on the plaintiff.

(2) That even conceding that the plaintiff probably did not, in fact, know that his agreement to accept the sums in full settlement of his claim under the Oridnance, would bring section 60 into operation, yet according to the principle *ignorantia juris haud neminem excusat* the plaintiff was presumed to know this.

C. Ranganathan with *S. J. P. Kadirgamar* and *K. N. Choksy*, for the 1st defendant-appellant.

No appearance for the respondent.

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H. N. G. FERNANDO, J.

The plaintiff in this action who had been employed by the 1st defendant Company as a lorry cleaner sued the 1st defendant for damages in a sum of Rs. 10,000/- in respect of injuries sustained by the plaintiff in the course of his employment when a lorry driven by another employee of the defendant Company collided with a tree.

The defendant's Answer did not challenge the facts as stated in the plaint but relied only on a point of law, namely, that the plaintiff having accepted a sum of Rs. 3,560/- as compensation in accordance with the Workmen's Compensation Ordinance in respect of the injury suffered by him, he was not in law entitled to maintain an action in the Courts for damages in respect of that injury. The relevant part of section 60 of the Ordinance is that " no action for damages shall be maintainable by any workman in any Court of law in respect of any injury . . . if he has agreed with his employer to accept compensation in respect of the injury in accordance with the provisions of this Ordinance. "

The Accountant of the defendant Company gave evidence on its behalf to the effect that the Company was insured with Royal Exchange Assurance Company in respect of its liability under the Workmen's Compensation Ordinance and that in the normal way the Insurance Company was informed of this accident and the plaintiff examined by a doctor. In accordance with the medical report a sum of Rs. 2,520/- was paid to the plaintiff on 30th July, 1956. On that occasion, in accordance with the provisions in that behalf contained in the Workmen's Compensation Ordinance, the memorandum of agreement, *D*3, was signed by the Accountant on behalf of the Company and by the plaintiff to the effect that the parties had agreed to pay and accept respectively the sum of Rs. 2,520/- in full settlement of the workman's claim under the Workmen's Compensation Ordinance.

The Accountant said in his evidence that the contents of forms such as *D*3, which are in English, are always explained to the workmen because they have difficulty in understanding the contents. This presumably is because the forms used by the Company were in English. According to this witness the contents of the form, *D*3, was explained to the plaintiff by the clerk who attended to payments to the minor employees. He said that the clerk explained it in Sinhalese and that he himself understood Sinhalese well enough to know that the contents were correctly explained.

Subsequently there was another medical report in respect of the plaintiff and on 30th September, 1957, a further sum of Rs. 840/- was paid to the plaintiff. On this occasion another memorandum of agreement D1 was signed by the Secretary of the Company and by the plaintiff. While it is not clear that on the first occasion the signature of the plaintiff was witnessed by some friend of his, on the second occasion it is admitted by the plaintiff that he brought one Miranda with him, and *D*1 shows that Miranda signed as a witness. Despite this evidence of the Accountant that the contents of the document were explained on both occasions to the plaintiff the learned District Judge had held that the plaintiff " was not aware when he received the first sum paid as compensation that it was a payment made in terms of the Ordinance ".

The plaintiff in his evidence denied outright that the contents of the two documents were ever explained to him or that he had knowledge that on the first occasion the payment was made to him as compensation by reason of the accident. He said also that at the time he was unaware that a workman can claim compensation under the Workmen's Compensation Ordinance. According to him he was only told that the document relates to the accident and that it was being paid to him for treatment.

It is apparent that the plaintiff after receiving the first payment in 1956 had consulted a Proctor whose advice was available to him before the second payment was made. On 17th September, 1957, the Proctor wrote to the defendant Company with reference to the sum of Rs. 840/- which was the further compensation payable to the plaintiff. In this letter the Proctor requested the defendant Company to allow the plaintiff to draw the sum of Rs. 840/- without prejudice however to his rights to bring an action against the Insurance Company. One of the points made by the learned Judge against the defendant Company is that in view of this letter the plaintiff when he received the second payment was entitled to assume that his rights to recover damages under the common law were not prejudiced. This consideration, in my opinion, was not relevant for the reason that if the acceptance of the first payment did, in fact, bring section 60 of the Ordinance

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into operation then the circumstances in which the second payment was made could not halt the operation of the section. To put the matter in another way the state of mind of the plaintiff on the second occasion affords no clue to what his state of mind was when he accepted the first payment.

In regard to the necessity for an explanation of the contents of the memorandum of agreement, D3, it seems to me that what had to be said to the plaintiff was very simple. All that was necessary was to ask him whether he agreed to accept the sum of Rs. 2,520/- in full settlement of his claim under the Workmen's Compensation Ordinance. What has to be clearly borne in mind, however, is that according to the principle *ignorantia juris haud neminem excusat* the plaintiff was presumed to know (although I must concede that he probably did not, in fact, know) that his agreement to accept this sum would bring section 60 into operation. If that matter, too, had needed explanation to the plaintiff there might have been some reason to think that no explanation of it was given.

In my opinion it was in the highest degree likely that the necessary explanation was, in fact, given ; it was something that one would expect to have been done in the ordinary course of business. Surely, it was unlikely that so large a sum as Rs. 2,520/- would be paid out without ordinary care. The learned Judge failed to refer to the plaintiff's evidence that he was told that the money was given to him for treatment. If this evidence was true then the Company's officers would have been deliberately deceiving the plaintiff and inducing him to sign the document D3 on the faith of a false statement. If the plaintiff's evidence on this point was false, it follows that an explanation had, in fact, been given to him and that some two years later he chose to give to the Court an incorrect version of that explanation. Had the learned Judge directed his mind to this aspect of the matter I doubt whether he would have reached the conclusion which carries with it the implication that a deliberate deceit was practised on the plaintiff.

For these reasons I would set aside the decree appealed against and dismiss the action with costs in both Courts.

L. B. de Silva, J.

I agree.

Appeal allowed.

Privy Council Appeal, No. 48 *of* 1961.

Present : **The Lord Chancellor, Lord Evershed, Lord Jenkins, Lord Guest, Sir Malcolm Hilbery.**

ABDUL WAHAB MOHAMED SAMEEN
vs.
PALLIYAGURUGE VITHANAGE SUMANAWATHIE ABEYEWICKREMA & OTHERS

From
THE SUPREME COURT OF CEYLON

JUDGEMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Delivered on : 3rd April, 1963.

Civil Procedure Code, sections 356, 756 (1), 756 (3)—*Notice of tender of security for costs of appeal —Requirement of section* 756 (1) *that it must be given* "*forthwith*"—*Meaning of* "*forthwith*" *in that section—Failure to comply with section* 756—*Power of the Supreme Court to grant relief under section* 756 (3).

The appellant's Proctor filed a petition of Appeal in the District Court on 16th February, 1957. He took the notice tendering security for costs of appeal to the respondent's Proctor on 18th February. It was accepted by the respondent's Proctor subject to his right to object to the validity of the notice. The appellant then took the notice to the District Court which stamped it with its seal on 18th February. On 8th March the respondent objected that the notice was bad as it had not been filed "forthwith" upon receipt of the petition of Appeal by the Court. The appeal was forwarded to the Supreme Court which upheld the preliminary objection of the respondent that the notice was not given "forth-

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with ", and treated the notice lodged with the District Court on 18th February as filed too late. The Supreme Court did not give their mind to the question of relief under section 756 (3) because they considered themselves precluded from granting relief by the decision of the Divisional Bench of the Supreme Court in *De Silva* v. *Seenathumma*, 41 N.L.R. 241.

Held : (1) That when the appellant filed notice of security on 18th February, he had not followed the procedure prescribed by section 756 (1), as the notice was given to the respondent's proctor and not to the respondent himself.

(2) That in the circumstances of this case the respondent was not materially prejudiced by the failure of the appellant to give notice of security to the Court for service by the Fiscal on the respondent, and therefore relief should be granted to the appellant and his appeal entertained.

(3) That there was no limit to the power of the Supreme Court to grant relief under section 756 (3), except that the power should not be exercised to the material prejudice of the respondent. Section 756(3) is expressed not only in relation to all the provisions of section 756, but also in relation to any mistake, omission or defect.

(4) That in exercising its discretion to grant relief under section 756 (3), the Court will take into account as a material circumstance whether or not there was an excuse for non-compliance with a requirement of the section, but that the section cannot be interpreted as denying relief where there is no excuse for non-compliance.

Per THE JUDICIAL COMMITTEE : " It does not follow that the relief should be given even if the respondent has not been materially prejudiced, but relief should not be lightly withheld, for the effect of refusing relief may be to deprive a litigant of access to the Supreme Court and, if the original judgment is wrong, amount to a denial of justice. "

Held further : (5) That the word " forthwith " in section 756 (1) could not be construed as meaning " on the same day ". The word " forthwith " clearly meant that the notice must be filed as soon as practicable, but what is practicable must depend on the circumstances of each case.

Disapproved : (*a*) the opinion of Soertz, J., in *De Silva* v. *Seenathumma*, 41 N.L.R. 241, that the notice of security must be filed on the same day as the receipt of the petition of appeal ;

(*b*) the distinction drawn by Soertz, J., in *De Silva* v. *Seenathumma* between " a failure to comply with ", and " a mistake, omission, or defect in complying with " the provisions of section 756 ;

(*c*) the view expressed by Fisher, C.J., in *de Silva* v. *Gunasekera*, 31 N.L.R. 184, that the application of section 756 (3) is limited to trivial omissions as distinguished from a substantial non-compliance with the section.

Cases referred to : *Fernando* v. *Nikulan Appu*, 22 N.L.R. 1.
Thenuwara v. *Thenuwara*, 61 N.L.R. 49.
De Silva v. *Seenathumma*, 41 N.L.R. 241; XVI C.L.W. 105
Silva v. *Gunasekera*, 31 N.L.R. 184.
Zahira Umma v. *Abeyasinghe*, 39 N.L.R. 84 ; VIII C.L.W. 26

The judgment of the Supreme Court is reported in 61 N.L.R. 443.

(**Editorial Note :** The perils which beset the appellant who fails to comply with section 756 of the Civil Procedure Code have now been removed by the Legislature. The Supreme Court Appeals (Special Provisions) Act No. 4 of 1960 became law on October 14th, 1960. It enacts that the Supreme Court shall not reject an appeal for error, omission, or default on the part of the appellant in complying with the provisions of any law relating to such appeal, unless material prejudice has been caused thereby to the respondent, and that the Court shall give the appellant an opportunity on terms for rectifying any error, omission, or default).

Kenneth Potter, for the defendant-appellant.

E.F.N. Gratiaen, Q.C., with *R.K. Handoo and Mrs. Q.A. Nonis*, for the plaintiff-respondent.

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THE LORD CHANCELLOR

On the 15th February, 1957, in the District Court of Colombo, judgment was entered for the first named respondent as substituted plaintiff against the appellant in the sum of Rs. 10,828/- and costs.

The next day, Saturday, the 16th February, at about 11.00 a.m., the appellant's proctor filed a Petition of Appeal in the District Court.

Section 756 (1) of the Civil Procedure Code of Ceylon prescribes the further steps that the would-be appellant has to take. It begins as follows :—

> "(1) When a petition of appeal has been received by the Court of first instance under section 754, the petitioner shall forthwith give notice to the respondent that he will on a day to be specified in such notice . . ., tender security as hereinafter directed for the respondent's costs of appeal, and will deposit a sufficient sum of money to cover the expenses of serving notice of the appeal on the respondent."

This provision requires to be read with section 356 of the Code.

That *inter alia* provides that—

> "all notices and orders required by this Ordinance to be given to or served upon any person, shall, unless the Court otherwise directs, be issued for service to the Fiscal of the province or district in which the Court issuing such . . . notices, or orders is situate, under a precept of that Court . . ."

It follows that unless compliance with the requirements of section 756 is waived, the appellant when his Petition of Appeal is received by the Court of first instance is required " forthwith " to lodge the notice of security with that Court for the necessary steps to be taken for service of the notice by the Fiscal on the respondent.

In this case the appellant's proctor made no attempt until the 28th February to follow this procedure.

Having lodged the Petition of Appeal with the District Court at about 11 o'clock on Saturday, the 16th February, he telephoned to the respondent's proctors at about 11.15 a.m. He spoke to a Mr. Cooray who told him that the member of the firm dealing with the case was not available but agreed on behalf of his firm to receive the notice of security. The appellant's proctor then prepared the notice and took it to the respondent's proctor's premises at about 1.15 p.m. on the same day, only to find that Mr. Cooray had left and that there was no one there to receive it.

On the following Monday, the 18th February, the notice was again taken to the respondent's proctor's office. They then endorsed it " Received notice subject to objections ". The notice was then taken to the District Court and stamped with the seal of the Court. The entry for the 18th February in the journal of the action kept by the Court states the contents of the notice and records " Proctors for plaintiff-respondent received notice ". A later entry in the journal shows that it should have been recorded as received " subject to objections ".

On the 28th February the appellant's proctor in an endeavour to comply with section 756 filed a fresh Petition of Appeal and lodged a fresh notice of security with the District Court.

The notice received by the respondent's proctors on the 18th February was in the following terms :—

> " TAKE NOTICE that the Petition of Appeal of the Appellant presented by me in the above-named action on the 16th day of February, 1957, against the Judgment of the District Court of Colombo, dated 15th day of February, 1957, in the said action, having been received by the said Court, Counsel on my behalf will, on the day of March, 1957, at 10.45 o'clock on the forenoon, or so soon thereafter move to tender Security in a sum of Rs. 250/-, for any costs which may be incurred by you in appeal in the premises, and will on the said day deposit in Court a sufficient sum of money to cover the expenses of serving notice of appeal on you.
>
> (Sgd.)......................
> *Appellant.*
>
> The 16th day of February, 1957.
>
> (Sgd.) K. RASANATHAN,
> *Proctor for Appellant.*"

The notice filed with the District Court on the 28th February also specified the 8th March as the day on which security would be tendered.

Before Their Lordships the appellant did not seek to contend that the notice lodged with the Court on the 28th February complied with section 756 or that the giving of it was any ground for relief from the requirement of that section.

Section 756 (1) also provides that on the day specified in the notice (which has to be within a stipulated time from the date of the judgment) :

> " the respondent shall be heard to show cause if any against such security being accepted. And in the event of such security being accepted and also the deposit made within such period, then the Court shall immediately issue notice of the appeal together with a copy of the petition of appeal, to be furnished to the Court for that purpose by the appellant, to the Fiscal for service

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on the respondent who is named by the appellant in his petition of appeal, or on his proctor if he was represented by a proctor in the Court of first instance."

It is to be noted that while the section makes provision for the service of the notice of appeal on the respondent's proctor by the Fiscal, it does not provide for service of the notice of security on the respondent's proctor either directly or by the Fiscal. That can only be done if the Court gives a direction to that effect under section 356.

On the 8th March, 1957, the respondents appeared before the District Court. Notwithstanding their appearance, the respondents took the point that the appellant's notice of security was bad in that it had not been filed with the Court " forthwith " upon the Petition of Appeal being received by the Court. It was contended on their behalf that this objection was fatal to the appeal. Counsel for the appellant asked that that appeal should not be abated by the District Court but that the matter should be left to the Supreme Court.

The District Judge was of the opinion that the appeal should be forwarded to the Supreme Court and that it should be open to the respondents to take their objection there. He stated that he had been in Chambers from 10.30 a.m. to 12.30 p.m., on the Saturday, the 16th February and while he could not say that he had initialled the Petition that morning, he thought that it was most probable that he had done so.

He also recorded that the security tendered was accepted and that there was a perfect bond and he issued notice of appeal for the 23rd March, 1957.

On the 9th, 10th and 11th November, 1959, the matter was heard by the Supreme Court (Sinnetamby and Fernando, JJ.). The preliminary objection was taken that the notice was not given " forthwith " as section 756 requires. Judgment was given on the 1st February, 1960. Sinnetamby, J., held that the notice was not given " forthwith ". He treated the notice lodged with the Court on the 18th February as filed too late. He did not in the course of his judgment deal with the question of relief. It may, Their Lordships think, be assumed that he did not do so because in the light of the decision of the Supreme Court in *De Silva* v. *Seenathumma*, (1940) 41 N.L.R. 241, he had no power to grant relief on account of failure to give the notice of security " forthwith ".

From this decision the appellant now appeals.

Their Lordships' attention was drawn to the conflicting views of Bertram, C.J., in *Fernando* v. *Nikulan Appu*, (1920) 22 N.L.R. 1, and Basnayake, C.J., in *Thenuwara* v. *Thenuwara*, (1959) 61 N.L.R. 49, as to the meaning to be attached to the phrase at the commencement of section 756 (1) " when a petition of appeal has been received by the Court of first instance under section 754 ". Section 754 requires the Petition to be " presented " to the Court of first instance and states " the Court to which the petition is so presented shall receive it and deal with it as hereinafter provided. If those conditions are not fulfilled it shall refuse to receive it ".

Sections 755 and 758 state how the Petition is to be drawn and its language and form. Section 759 gives the Court power to reject the Petition if it is not properly drawn up or to return it for amendment or to amend it then and there.

Bertram, C.J., expressed the view (at page 3 of the Report) that the notice of security " must follow forthwith, not upon the presentation of the petition, but upon its receipt. The receipt ", he said, " is the act of the Court, and before receiving the petition the Court must verify the fact that the petition is in time ". Basnayake, C.J., took the contrary view, namely, that the Petition was " received " for the purposes of section 756 when it was handed to the appropriate officer of the Court.

As in this case it was common ground that the Petition was " received " in both senses in the morning of the Saturday, the 16th February, it is not necessary for Their Lordships to decide which view is right.

The importance which has been attached to the meaning of " received " in section 756 would appear to be due to the narrow interpretation which has been given to the word " forthwith ".

In *Fernando* v. *Nikulan Appu* (*supra*) Bertram, C.J., held that in the circumstances of that case a notice of security was given forthwith despite the fact that two days elapsed between the presentation of the Petition and the giving of the notice. He pointed out that the Judge might have " received " the Petition at the end of one day at the conclusion of the Court and that on that supposition the petitioner could have ascertained that fact and filed the notice the next

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day. On that basis there was a delay of one day. He held and Shaw, J., agreed with him that a delay of one day did not prevent the Court from holding that the notice was given forthwith.

Bertram, C.J., added (at page 4) :

> "I think, however, that, as a general rule, it is the intention of the section that the notice should be filed on the same day as the receipt is verified or can reasonably be verified. It is important that this principle should be observed, all the more so as delays may interpose themselves between the filing of the notice in Court and its actual delivery by the Fiscal's officer."

In *De Silva* v. *Seenathumma* (*supra*) the question was whether relief should be given under section 756 (3) on account of the fact that the plaintiff-respondent was not served with the notice of security until after the date specified in the notice. This case was heard by a Branch of five Judges who held that the Court had no power to grant the relief asked for.

In the course of his judgement with which the other four Judges agreed, Soertsz, J., said (at page 247):

> "The next question is what are the requirements of section 756 that *must* be complied with unless they have been *expressly* waived. Section 756 (1) sets forth explicitly. They are : (1) that the appellant, once the petition of appeal has been received, shall give notice *forthwith* that he will *on* a date within 20 days from the date of the decree or order appealed against (*a*) tender and perfect his security, (*b*) that he will deposit a sum of money sufficient to cover the expenses of serving the notice of appeal . . ."

At the conclusion of his judgment (at page 249), he said :

> "To sum up, the conclusions reached are that . . . notice of security, unless waived, must be given forthwith, that is to say, must be tendered or filed on the day on which the petition of appeal is received by the Court (*Fernando* v. *Nikulan Appu supra*)."

In the present case Sinnetamby, J., following this decision, stated that the notice was eventually filed in Court on the 18th February and held that it should have been filed on the same day as the Petition, that is to say, the 16th February. Fernando, J.'s judgment was to the same effect.

In Their Lordships' opinion it is not right to construe the word "forthwith" as meaning "on the same day". If it had been intended that the notice must be filed on the same day as the Petition of Appeal, that could have been expressed in section 756 by the use of the words "on the same day". It is to be observed that the decision in *Fernando* v. *Nikulan Appu* (*supra*) does not support the interpretation placed on "forthwith" by Soertsz, J., at the end of his judgment. The decision in that case was that the delay of one day did not prevent the Court from holding that the notice was given "forthwith".

Bertram, C.J., in expressing his opinion that as a general rule it was the intention of the section that the notice should be filed on the same day as the receipt was verified or could reasonably be verified, did not hold that as a matter of law the notice must be filed the same day as the Petition of Appeal was received. If he had held that, it would have been in conflict with the decision in that case.

In Their Lordships' opinion Soertsz, J., in *De Silva* v. *Seenathumma* (*supra*) was wrong in saying that the notice must be filed the same day as the Petition was received. In many cases it may well be that unless the notice is filed the same day it cannot be said to be filed "forthwith" but it may be filed forthwith even though not filed the same day. Their Lordships do not propose to attempt to define "forthwith". The use of that word clearly connotes that the notice must be filed as soon as practicable, but what is practicable must depend upon the circumstances of each case.

Sinnetamby, J., in this case said that the notice was eventually filed on the 18th February. If it had been filed for the purpose of complying with the requirements of section 756, namely, to secure the service by the Fiscal of the notice on the respondent, it may well be that, having regard to the circumstances of this case and in particular to the fact that the Court did not sit on the Saturday afternoon, it should be treated as having been filed forthwith.

Before Their Lordships it was submitted by counsel for the respondent that the notice filed on the 18th February was not filed for that purpose and this was agreed by counsel for the appellant. It would seem that the purpose of filing it was to inform the Court of the contents of the notice and of the fact that the respondent's proctors had received it. In these circumstances Their Lordships do not think it would be right to hold that the filing of the notice on the 18th February complied with section 756. It follows that the prescribed procedure was not followed

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by the appellant, with the consequence that unless he is granted relief his appeal is abated.

Section 756 (3) of the Civil Procedure Code, which was added in 1921 after the decision in *Fernando* v. *Nikulan Appu* (*supra*), reads as follows :

"In the case of any mistake, omission, or defect on the part of any appellant in complying with the provisions of this section, the Supreme Court, if it should be of opinion that the respondent has not been materially prejudiced, may grant relief on such terms as it may deem just."

This provision has been the subject of judicial consideration on a number of occasions. In *Silva* v. *Goonesekere*, (1929) 31 N.L.R. 184, it was admitted that notice of appeal had not been given to any of the parties and that the security bond had not been signed by any of the parties. The Court refused to grant relief under 756 (3) and Fisher, C.J., in the course of his judgment, said (at page 185) :

"I do not think that this additional paragraph [756 (3)] can be held to apply to cases where there has been a substantial non-compliance with the provisions of the section. In my opinion it applies to more or less trivial omissions where it may be said that although the strict letter of the law has not been complied with the party seeking relief has been reasonably prompt and exact in taking the necessary steps."

Their Lordships do not consider that the limitation placed by Fisher, C.J., on the scope of section 756 (3) is justified. The sub-section begins :

"In the case of *any* mistake, omission, or defect on the part of any appellant in complying with *the provisions* of this section."

It does not attempt to distinguish between substantial or more or less trivial mistakes, omissions or defects, and the sub-section, in Their Lordships' view, applies in relation not just to some, but to all, the provisions of section 756.

Their Lordships do not wish to suggest that relief was not rightly refused, but in their view Fisher, C.J., was wrong in thinking that there was any such limitation on the power to grant relief.

In *Zahira Umma* v. *Abeysinghe*, (1937) 39 N.L.R. 84, Abrahams, C.J., in the course of his judgment (at page 85) said :

"It seems to me that there are two forms of a breach of section 756 in respect of which this Court ought not to give relief. One is when, whether a material prejudice has been caused or not, non-compliance with one of the terms of section 756 has been made without an excuse, and the other is when though non-compliance with an essential term may be trivial, a material prejudice has been occasioned."

Abrahams, C.J., does not appear to have been intending to say that the powers of the Court under section 756 were in any way restricted, but only to have been expressing his opinion as to the circumstances in which the Court should not, in the exercise of its discretion, grant relief. Whether or not there was an excuse for non-compliance with a requirement of the section is a material circumstance to be taken into account in deciding whether or not, the Court should in the exercise of its discretion, grant relief. But the sub-section itself does not provide that relief shall not be granted if there is no excuse for non-compliance and to interpret it in this way is, in Their Lordships' opinion, wrong.

In *De Silva* v. *Seenathumma supra* Soertsz, J., cited this passage from the judgment of Abrahams, C.J., and said (at page 245) :

"This is an authoritative decision of this Court and, if we may say so, contains a correct statement of the meaning of section 756 read as a whole, but in view of the fact that that decision does not appear to have been duly appreciated, in the succinct form in which it has been expressed, it seems desirable to elucidate its meaning. The first part of that statement is intended to lay down that where there has been a *total failure* to comply with one of the terms of section 756, relief will not be given even if it should be apparent that no material prejudice has been occasioned to the respondent by such a failure, for peremptory requirements of the law must be given full effect."

Their Lordships are unable to agree with these observations made by the learned judge. As has been said, Abrahams, C.J., was not, so it would seem, intending to state the meaning of section 756, read as a whole but merely expressing an opinion as to the exercise of their discretion by the Court. Their Lordships cannot agree that the first part of Abrahams, C.J.'s statement was intended to lay down that where there has been a total failure to comply with one of the terms of section 756, relief will not be given even if it should be apparent that no material prejudice has been occasioned to the respondent.

Later in his judgment (at page 247) Soertsz, J., said :

"The result thus reached is that this Court is not empowered by sub-section (3) to grant relief where there has been a failure to comply with an essential

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requirement of section 756 regardless of the question of prejudice, but may do so in cases in which there has been 'mistake, omission, or defect *in complying* with the provision of section 756' provided the respondent has not been materially prejudiced.

I cannot read sub-section (3) in the manner proposed by the appellant's Counsel as covering 'all failures', for to read it in that way, that sub-section will have to be recast, for instance, as follows : *in the case of a failure to comply with, or* of any mistake, omission, or defect *in complying with.*"

The distinction sought to be drawn by the learned judge between "a failure to comply with" and "a mistake, omission or defect in complying with" is not, in Their Lordships' opinion, a valid one. The failure to comply with a requirement may be due to a mistake or omission. An omission in complying with a requirement must, so it seems to Their Lordships, involve a failure to comply with the requirement.

Their Lordships are accordingly unable to accept the learned judge's view as a correct interpretation of section 756 (3). As Their Lordships have said, that sub-section is expressed to apply in relation to the provisions of section 756 and there is no justification for saying that it applies to some and not to all the provisions of that section. It is also expressed to apply in relation to *any* mistake, omission or defect.

In Their Lordships' view the Supreme Court is given by this sub-section the power to grant relief on such terms as it may deem just where there has been a failure to comply with an essential requirement of the section. The only limitation imposed by the sub-section is that the Court has not power to do so unless it is of the opinion that the respondent has not been materially prejudiced.

This decision was followed in a number of cases cited by Basnayake, C.J., in his judgment in *Thenuwara* v. *Thenuwara* (*supra*), and by the learned Chief Justice in that case. It was followed by the Supreme Court in this case with the result that that Court did not consider whether it would have granted relief if it had thought it had power to do so.

Can it be said that there are any grounds for an opinion that the respondents were materially prejudiced by the appellant's failure to comply with the requirements of section 756 ? The obvious intention of the provision that they should be given notice of security forthwith is that they should have due notice of the day fixed for them to show cause, if they wished, against the security tendered being accepted. On Monday, 18th February, they had notice that the date for that would be the 8th March and on the 8th March the respondents were represented at hearing before the District Court. In fact, they may well have had notice of that date of an earlier time than they would have had if the procedure laid down by the Civil Code had been carried out. If the appellants had filed notice of security in the District Court on Saturday, 16th February, or on the morning of the 18th February, the Court would have then had to issue a precept to the Fiscal and then some delay might have occurred before the Fiscal served the notice.

In the circumstances, in Their Lordships' opinion, the respondents cannot have been materially prejudiced by the failure to file the notice of security with the Court for service by the Fiscal.

It does not follow that relief should be given even if the respondents have not been materially prejudiced but relief should not be lightly withheld, for the effect of refusing relief may be to deprive a litigant of access to the Supreme Court and, if the original judgment is wrong, amount to a denial of justice.

In this case importance is to be attached to the fact that on the Saturday, 16th February, Mr. Cooray, a member of the respondent's proctors' firm agreed to accept notice of security. That may well have led the appellant's proctor to suppose that the respondent's proctors were prepared to waive compliance with the requirements of section 756 and so have led him not to have filed the notice at the Court that morning.

While the respondents were entitled to object on the Monday on the ground that section 756 had not been complied with, it may well be regarded as somewhat surprising that they should have done so in view of the statement made by Mr. Cooray on the Saturday.

Their Lordships were invited to remit the case to the Supreme Court to consider whether relief should be granted, it being urged that as the Supreme Court had held, regarding themselves bound by authority that they did not have power to grant relief in respect of this non-compliance, this course should be taken.

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Their Lordships, bearing in mind the technicality of the respondent's objection and the fact that the respondent cannot have been materially prejudiced, have come to the conclusion that it would not be right to take this course, and so prolong litigation which started so long ago as 1957. In Their Lordships' view there can be no doubt that in the circumstances of this case relief should be granted and the appeal not abated and accordingly Their Lordships will humbly advise Her Majesty that the appeal should be allowed with costs and with the costs incurred in the Supreme Court.

Appeal allowed.

Present : **Basnayake, C.J., Abeyesundere, J., and G. P. A. Silva, J.**

M. A. A. HUSSAIN *vs.* THE TRIBUNAL OF APPEAL UNDER LICENSING OF TRADERS ACT.

S.C. No. 1/1962—*Tribunal of Appeal, No. C.* 4 (*Licensing of Traders Act*).

Argued on : February 1 and 14, 1963.
Decided on : February 14, 1963.

Licensing of Traders Act, No. 62 *of* 1961, *sections* 2, 3, 4, 6, 7 (1)—*Licensing of Traders* (*No.* 1), *Regulations,* 1961—*Regulation* 12 *empowering Licensing Authority to delegate its powers—Whether such regulation* " *ultra vires* "—*Scope of section* 3 (*b*)—*Invalidity of such delegation.*

Held : (1) That Regulation 12 of the regulations made under the Licensing of Traders Act, was *ultra vires*. Although section 3 (*b*) of the said Act empowered the regulation making functionary to declare by regulation the licensing authority or authorities, it did not empower him to make a regulation authorising such authority or authorities to delegate this power.

(2) That inasmuch as the said Regulation was *ultra vires*, the powers vested in the licensing authority could not have been delegated to the Government Agent, Moneragala, as was purported to be done in the present case. The Government Agent of Moneragala had, therefore, no authority in law to punish the appellant or exercise any of the powers of a licensing authority.

H. Rodrigo with *D. A. E. Thevarapperuma* and *M. D. K. Kulatunga*, for the appellant.

V. C. Gunatilleke, Crown Counsel (on 1.2.63), and *R. S. Wanasundere, Crown Counsel* (on 14.2.63), as *amicus curiae*.

BASNAYAKE, C.J.

This is an appeal from a decision of the Tribunal of Appeal under section 6 of the Licensing of Traders Act, No. 62 of 1961.

Section 7 (1) of that Act provides that an appeal shall lie on any question of law against an order of a Tribunal to the Supreme Court and shall be preferred before the expiry of a period of one month next succeeding the date of the order of the Tribunal.

This appeal came up for hearing before my brother Tambiah in the first instance who, under section 48 of the Courts Ordinance, reserved the question of law arising thereon for the decision of more than one Judge of this Court. An order under section 48A of that Ordinance was made by me and the appeal comes up for hearing before us in pursuance of that order.

The following grounds are urged in the petition of appeal :—

" I. The said order is contrary to the weight of evidence.

II. Charge I does not disclose the contravention of any regulation.

III. It is incompetent and illegal for the Licensing Authority in terms of section 5 (1) (*d*) of the Act to impose a penalty in the nature of a fine without at the same time suspending or cancelling the licence given to a trader.

VI. It is unconstitutional for the Licensing Authority not being a judicial officer appointed by the Judicial Service Commission to have punished the appellant by punitive orders.

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(V) The appellant had not been asked to show cause in terms of section 5 (2) of the Act, the Notice that was served on him not being a notice meeting the requirements of the section."

Briefly, the relevant facts are as follows :—The appellant is the proprietor of the stores known as Pathuma Stores in Wellawaya. On 6th September, 1961, the Divisional Revenue Officer, Wellawaya, inspected his shop and made the following report :—

"(1) He does not possess a dealer's licence. I was told that he has applied for a licence and that he has not received it so far from the Kachcheri.

(2) A notice board showing the price list was not available. Instead there was a list on a paper written in pencil. This was not displayed conspicuously. This is against Regulation No. 8.

(3) It was mentioned on this list that gram and dhal were available for sale. But when questioned as to where these items were I was told that they were sold out. This is a contravention of Regulation No. 8 (3).

(4) It was stated on this notice board that onions (B. onions) were available for sale. But, in fact, they were not available for sale. The dealer told me that this item was sold off. This is a contravention of Regulation No. 8 (3).

(5) Biscuits were available for sale, but their availability or their prices were not indicated on the notice board. This is a contravention of Regulation No. 8.

(6) There were two varieties of chillies for sale. The dealer stated that the price of one variety was Rs. 1.15 per lb. and the other Re. 1.00 per lb. But only the variety sold at Rs. 1.15 per lb. was indicated on the notice board. This is a contravention of Regulation No. 8."

Thereupon the Government Agent of Moneragala, on the 8th September, 1961, addressed the following communication to Pathuma Stores, Wellawaya :—

"The D.R.O., Wellawaya, has reported that he inspected your shop on 6th September, 1961, and that you have resorted to the following malpractices :—

(i) A proper notice board showing the prices of goods was not displayed conspicuously. Instead you produced a list of goods on a paper written in pencil.

(ii) It was indicated on the list of goods that gram, dhal and onions (B. onions) were available for sale. But these items were not, in fact, available for sale.

(iii) Biscuits were available for sale. But it was not stated in the list of goods that they were available for sale nor were the prices of these items given in the list.

(iv) There were two varieties of chillies for sale. The price of one variety was only given in the list of goods. The price of the other variety did not appear at all.

2. You have thereby contravened Regulations No. 7, 8 (3) and 8 (4) of Regulations under the Licensing of Traders, Act No. 62 of '61, published in the Ceylon Government *Gazette*, No. 12575A, dated 10.8.1961, as amended in the Ceylon Government *Gazette*, No. 12610, dated 18.8.1961

3. As such, you are hereby requested to make a submission, if any, within three days, of the receipt of this letter, explaining as to why a punitive order should not be imposed on you by me by virtue of the powers vested in me under the Licensing of Traders Act, No. 62 of 1961."

The appellant made his submission as required by the Government Agent by his letter dated 9th September, 1961, which reads—

"Reference to your order No. FC/195, dated 8.9.61, I had prepared a Board but the paint of this had not dried. I had, therefore, prepared a cardboard notice which had also got washed away for rain on 5.9.61, therefore, had to write it in pencil to make it easily readable. Now the proper notice board showing the list of goods has been prepared.

2. It is true that I had marked the prices of gram, dhal and Bombay onions on the

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notice board. But these items were not available at that moment for sale. I instructed my assistant to remove from the Notice Board any article which was not available for sale. But it is true that at the time of inspection the names of these items were on the Board. This was due to an oversight. I wish to inform you humbly that this was not an act of disobedience.

3. It is true that biscuits were available for sale. I did not mention it on the Notice Board as I was not aware of the controlled price. At present the prices of this item are also marked on the Notice Board.

4. There were two varieties of chillies for sale. Their price lists were also available. But the label on which the price of one variety was marked had been blown out by the wind and dropped by the side of the trough in which chillies was packed. I pointed this out to the D.R.O. at the time of inspection. Here, too, I have the honour to inform you that it was not due to my negligence. Furthermore, I have the honour to inform you that in future I will not act carelessly and to request you most humbly to pardon me for these offences."

Thereafter, on 15th September, 1961, the Government Agent, Moneragala, sent the following communication to the appellant :—

" With reference to your letter dated 9.9.61.

2. Your explanations given to the charges in my letter No. FC/195, dated 8.9.61, are unsatisfactory. You are, therefore, found guilty of all these four charges. As such, by virtue of the powers vested in me under the Licensing of Traders' Act, No. 62 of 1961, and the Regulations made thereunder, I impose on you the following fines for each charge and order you to credit a sum of Rs. 900/- to the general revenue. You shall pay the money on or before 30.9.61 :—

Charge No.	*Fines*
(1)	Rs. 200/-
(2)	,, 200/-
(3)	,, 200/-
(4)	,, 300/-."

The appellant appealed against that order to the Tribunal of Appeal constituted under section 6 of the Licensing of Traders Act, No. 62 of 1961. The Tribunal of Appeal heard his appeal and made order to the effect that it saw no reason to interfere with the findings of the Licensing Authority and confirmed its order and dismissed the appeal.

It is sufficient for the purpose of this appeal for us to confine ourselves to the ground of appeal that the authority that purported to impose the penalty on the appellant was not competent and that its findings are, therefore, illegal.

Under section 3 of the Licensing of Traders Act, No. 62 of 1961, regulations may be made under that Act for or in respect of all or any of the matters specified therein relating to any area to which or class of traders to whom, an order under section 2 is applicable. An order under section 2 had been made and published in *Gazette*, No. 12575A of 10th August, 1961. That order reads—

" By virtue of the powers vested in me by section 2 of the Licensing of Traders Act, No. 62 of 1961, I, Tikiri Bandara Ilangaratne, Minister of Commerce, Trade, Food and Shipping, do by this Order declare that—

(1) with effect from eleventh day of August, 1961, no person other than a person exempted from the application of the aforesaid section by regulation made under the Act, shall carry on business as a trader in any class of any article unless he is the holder of a licence authorising him to carry on such business or otherwise than in accordance with the terms and conditions of such licence ; and

(2) paragraph (1) of this Order shall be applicable—

(*a*) to the whole of Ceylon ; and
(*b*) to all classes of traders other than itinerant vendors who do not have a fixed place of business."

The Minister of Commerce, Trade, Food and Shipping has also made regulations under sections 3 and 4 of the Licensing of Traders Act, No. 62 of 1961, entitled the Licensing of Traders (No. 1) Regulations, 1961. Regulation 2 of those regulations reads—

" The Director of Commerce shall be the Licensing Authority for the purpose of these regulations."

Regulation 12 provides—

" The Director of Commerce may by notification published in the *Gazette* appoint the Government Agent of any Administrative District to exercise the powers of the Director of Commerce as a Licensing authority under these regulations within the Administrative District of such Government Agent."

Acting under the above regulation the Director of Commerce published the following notification

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in the *Gazette*, No. 13292 of 5th September 1962 :—

" By virtue of the powers vested in me by regulation 12 of the Licensing of Traders (No. 1) Regulations, 1961, published in *Gazette Extraordinary*, No. 12575A of August 10, 1961, I, Ginige Richard Walter de Silva, Director of Commerce, do by this notification—

(1) appoint the Government Agent, the Additional Government Agent and the Assistant Government Agents of each Administrative District specified in the Schedule hereto, to exercise within their respective Administrative Districts the powers vested in me as a licensing authority under the Licensing of Traders (No. 1) Regulations, 1961 ; and

(2) cancel the notification under regulation 12 of the Licensing of Traders (No. 1) Regulations, 1961, published in *Gazette*, No. 12,577 of August 11, 1961."

Regulation 2 which declares that the Director of Commerce shall be the licensing authority is not questioned by the appellant, but regulation 12 is. He submits that section 3 (*b*) empowers the regulation making functionary to declare by regulation the authority or authorities by whom licences may be granted, but that it does not empower him to make a regulation authorising the Director of Commerce or any other authority to appoint others who may grant licences. The submission of the appellant is sound and is entitled to succeed.

Regulation 12 being *ultra vires* the Government Agent of Moneragala had no authority in law to punish the appellant or exercise any of the powers of a licensing authority. The proceedings taken by him are illegal.

We accordingly reverse the order of the Tribunal and quash the order of the Government Agent of Moneragala.

ABEYESUNDERE, J.
I agree.

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

Appeal allowed.

Present : **Sansoni, J., and L. B. de Silva, J.**

K. M. PUNCHI BANDA *vs.* W. D. NAGASENA

S.C. No. 42 (*F*)/1961—*D.C. Kurunegala, No.* 415/*L.*

Argued on : 5th March, 1963.
Decided on : 11th March, 1963.

Kandyan Law—Deed of gift—Described as " a gift or donation ' inter vivos ' absolute and irrevocable "—Revocability of such deed of gift—Kandyan Law Declaration and Amendment Ordinance (*Cap.* 59), *sections* 4 (1) *and* 5 (1).

Where a Kandyan deed of gift executed in 1948 contained a declaration that it was " a gift or donation *inter vivos* absolute and irrevocable " —

Held : That the use of the word " irrevocable " is sufficient to indicate that the donor has expressly renounced his right of revocation. Therefore, section 5 (1) of Kandyan Law Declaration and Amendment Ordinance would make it unlawful for the donor to revoke such a gift.

N. E. Weerasooria, Q.C., with *W. D. Gunasekera*, for the defendant-appellant.

C. R. Gunaratne, for the plaintiff-respondent.

SANSONI, J.

There is only one question for determination in this appeal, and it is whether the deeds of gift P 1 and P 2 are revocable or not. The relevant provisions, which are common to both deeds, read as follows :—

" Know all men by these presents that I, Manapaye Kulatunga Mudiyanselage Kiri Banda of Bogomuwa in Hewawisse Korale in consideration of the natural love and affection which I have and bear unto . . . and for divers other causes and considerations . . . me hereunto moving do hereby give, grant, convey, make over and confirm unto . . . as a gift or donation *inter vivos* absolute and irrevocable the premises in the schedule hereto . . . subject, however, to my life-interest.

*For Sinhala translation, see Sinhala section, Vol. 5, part 5, p. 17.

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". . . To have and to hold the said premises hereby donated unto . . . and his heirs, executors, administrators and assigns absolutely for ever."

The deeds were executed on 8th July, 1948, and the Kandyan Law Declaration and Amendment Ordinance (Cap. 59) therefore, applies to this case, since the parties are subject to the Kandyan Law. Sections 4 (1) and 5 (1) of that Ordinance require consideration in this connection, and they are as follows :—

4 (1) Subject to the provisions and exceptions hereinafter contained, a donor may, during his lifetime and without the consent of the donee or of any other person, cancel or revoke in whole or in part any gift, whether made before or after the commencement of this Ordinance, and such gift and any instrument effecting the same shall thereupon become void and of no effect to the extent set forth in the instrument of cancellation or revocation :

Provided that the right, title, or interest of any person in any immovable property shall not, if such right, title, or interest has accrued before the commencement of this Ordinance, be affected or prejudiced by reason of the cancellation or revocation of the gift to any greater extent than it might have been if this Ordinance had not been enacted.

5 (1) Notwithstanding the provisions of section 4 (1), it shall not be lawful for a donor to cancel or revoke any of the following gifts where any such gift is made after the commencement of this Ordinance :—

. . . .

(*d*) any gift, the right to cancel or revoke which shall have been expressly renounced by the donor, either in the instrument effecting that gift or in any subsequent instrument, by a declaration containing the words "I renounce the right to revoke" or words of substantially the same meaning or, if the language of the instrument be not English, the equivalent of those words in the language of the instrument.

I omit those portions which have no applications to this case.

The District Judge held that the deeds are revocable and the defendant-appellant has challenged that finding before us.

The question of the revocability of the deeds depends solely on whether the first clause of the deeds, already reproduced, satisfies the requirements of section 5 (1) (*d*) of the Ordinance. Those requirements are :—

(1) A renunciation of the right to revoke;
(2) which is express;
(3) made by the donor in a declaration;
(4) containing the words "I renounce the right to revoke" or words of substantially the same meaning.

The fourth requirement seems to be merely illustrative of the other three.

Now the clause under consideration is nothing less than a declaration by the donor, expressed in the first person, for he declares that he gives the property as a gift. He describes the gift as "irrevocable ", and the question that remains for consideration is whether, by the use of that single word, he has expressly renounced the right to revoke. I can see no need for a separate clause containing such a renunciation. The Notary could have drafted the deed in that way, but he has chosen a more abbreviated form which is just as effective. The donor has, by describing his gift as " irrevocable " declared that he has renounced the right to revoke, for it is only a donor who has the right to revoke a gift. When he declares that the gift is irrevocable, he is expressly renouncing that right.

We were referred to the report of the Kandyan Law Commission (Sessional Paper 24 of 1935). I do not think this report is of assistance in interpreting the words used in the Ordinance. It usefully summarises the case law relating to Kandyan deeds of gift, and para 58 contains a recommendation that there should be a clause renouncing the right to revoke, made in explicit terms and according to a prescribed form, to render a deed otherwise revocable absolute and irrevocable. Parliament has not accepted the recommendation so far as it relates to a clause or to a prescribed form, and we thus come back to the actual words of the Ordinance.

I do not think it is helpful to refer to the earlier cases which deal with the revocability of Kandyan deeds of gift, but there are two decisions which throw light on the questions arising here. In *Kumarasamy* v. *Banda*, (1959) 61 N.L.R. 68, where a deed in the same terms as these deeds was considered, it was held that there was a declaration by the donor. In *Ukku Banda* v. *Paulis Singho*, (1926) 27 N.L.R. 449, it was held that the words " absolute and irrevocable " are an express and unmistakable renunciation of the right to revoke.

For these reasons I would allow the appeal and dismiss the plaintiff's action with costs in both Courts.

L. B. de Silva, J.

I agree.

Appeal allowed.

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Present : **Abeyesundere, J.**

DE SILVA *vs.* S.I. POLICE, KANDY

S.C. Application, No. 106 *of* 1963—*M.C. Kandy*, 26794.

In the matter of an application in revision under Section 356 *of the Criminal Procedure Code.*

Argued and decided on : April 8, 1963.

Criminal Procedure Code, section 411—*Failure to comply with—Surety—Forfeiture of Bond—Validity of order of forfeiture.*

In forfeiting a bond given by a surety for the production of an accused person in Court whenever requested to do so, a Magistrate made order in the following terms :—

"Surety is asked to show cause why her bond should not be forfeited. She has no cause to show, I forfeit the surety's bond. In default six weeks' simple imprisonment. Time till 20th March, 1963. Remand 1st accused . . ."

Held : That the order of forfeiture should be set aside as the learned Magistrate had failed to comply with the provisions of section 411 (1) and (4) of the Criminal Procedure Code. He should have recorded the grounds of proof that the bond had been forfeited and it is only if the penalty cannot be recovered by attachment and sale that he could have imposed the sentence of imprisonment.

C. D. S. Siriwardane, for the petitioner.

G. P. S. de Silva, Crown Counsel, for the Attorney-General.

ABEYESUNDERE, J.

The first accused in Case No. 26794, of the Magistrate's Court of Kandy, was enlarged on bail in a sum of Rs. 500/- with one surety and the petitioner, Mirisse Galappathige Millie de Silva, hypothecated immovable property to the value of Rs. 500/-, and entered into a bond as surety for the production of the first accused in Court whenever requested to do so. The trial of the case was fixed for the 7th January, 1963, and on that date the first accused failed to appear in Court and sent a medical certificate stating that he was unwell and unable to attend Court. The medical certificate was accepted by Court and the trial of the case was postponed for the 30th January, 1963. The record of the case does not disclose that notice of the date to which the trial was postponed had been notified either to the first accused or to the surety. The petitioner subsequently received a notice requiring her to produce the first accused in Court on the 6th March, 1963, and in compliance with that notice she produced the first accused on that date. Thereupon the learned Magistrate had called upon the petitioner to show cause why her bond should not be forfeited and the following order of the learned Magistrate appears in the record :—

"Surety is asked to show cause why her bond should not be forfeited. She has no cause to show. I forfeit the surety's bond. In default six weeks' simple imprisonment. Time till 20.3.63. Remand first accused . . ."

The petitoner prays that this order of the learned Magistrate be set aside by this Court in the exercise of its revisionary powers.

In making the aforesaid order the learned Magistrate has failed to comply with the provisions of section 411 of the Criminal Procedure Code. Under sub-section (1) of that section he should have recorded the grounds of proof that the bond had been forfeited. According to sub-section (4) of that section, it is only if the penalty is not paid and cannot be recovered by attachment and sale that the surety is liable to be sentenced to simple imprisonment for a term which may extend to six months.

I hold that the said order of the learned Magistrate is invalid. I, therefore, set aside that order.

Set aside

*For Sihala translation, see Sinhala section, Vol. 5, part 4, p. 16

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Present : **Abeyesundere, J.**

CAROLIS *et al vs.* ASST. COMMISSIONER OF AGRARIAN SERVICES, HAMBANTOTA

S.C. Application, No. 96 *of* 1963.

In the matter of an application for revision in M.C. Hambantota, Case No. 40353.

Argued and decided on : April 9, 1963.

Paddy Lands Act, No. 1 *of* 1958—*Sections* 21 (2) *and* (3)—*Summons issued not in accordance with section* 21 (2)—*Order of eviction under section* 21 (3)—*Validity of such order.*

Where a summons issued under 21 (2) (*a*) of the Paddy Lands Act, No. 1 of 1958, stated that the person summoned had failed to deliver possession of a paddy field called *K.* to a person named therein, and that he has thereby " committed an offence punishable under section 21 of the P.L.A." and required him to appear with his witnesses on 1st February, 1963 at 9 o'clock, in the forenoon at the Magistrate's Court, Hambantota, to answer to the said complaint and to be further dealt with according to law:-

Held : (i) That the summons was bad in law as it was not issued in accordance with section 21 (2) (*a*) of the Paddy Lands Act, No. 1 of 1958.

(ii) That consequently an order of eviction made under section 21 (3) of the Act should be set aside.

E. A. G. de Silva, for the respondents-petitioners.

A. A. de Silva, Crown Counsel, for the petitioner-respondent.

ABEYESUNDERE, J.

The petitioners pray that this Court, by way of revision, be pleased to set aside the order made by the learned Magistrate of Hambantota, under sub-section (3) of section 21 of the Paddy Lands Act, No. 1 of 1958, directing them to be evicted from a paddy land called " KATUKUMBURA " situated in the Hambantota District.

The order under that sub-section has been made on the basis that summons under sub-section (2) of the said section 21 had been served on the petitioners and that they had failed to appear on the date specified in the summons. The petitioners averred in their affidavit that the summons had been served not on them but on some other persons residing in their house on the 29th and 30th January, 1963. The Process Server has averred in his affidavit that the summons was served on the petitioners. I have no reason to disbelieve the statement of the Process Server that summons had been served on the petitioners. The summons in this case is, however, not in accordance with paragraph (*a*) of sub-section (2) of the said section 21. According to that paragraph the summons should require the person named therein to appear and show cause, on a date specified in the summons, why he should not be evicted from the paddy land specified therein. The summons in this case stated that the person summoned had failed to deliver possession of the paddy land called " Katukumbura " to K. D. Karolis of Mirijjawala, and that he has thereby " committed an offence punishable under section 21 of the P.L.A. ", and required him to appear in person with his witnesses on 1st February, 1963, at 9 o'clock in the forenoon, at the Magistrate's Court of Hambantota to answer to the said complaint, and to be further dealt with according to law. The petitioners were, therefore, not summoned to appear and show cause why they should not be evicted from the paddy land called "Katukumbura ".

I, therefore, hold that the summons in this case is not according to law. I set aside the order of eviction made by the learned Magistrate under sub-section (3) of the said section 21 and order that the application of the Assistant Commissioner of Agrarian Services, Hambantota, made on the 17th December, 1962, under sub-section (1) of the said section 21 be dealt with *de novo* in accordance with the provisions of that section.

Set aside.

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

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Present : **Herat, J.**

ROBERT THALIS *vs.* DE SILVA, REVENUE INSPECTOR, KURUNEGALA*

S.C., No. 51—*M.C. Kurunegala, No.* 14133.

Argued and decided on : 13th February, 1963.

Municipal Councils Ordinance, No. 29 of 1947, *section* 313—*Prosecution under section* 148 (3)—*Conviction of accused—Appeal from conviction—Neither counsel nor appellant present at hearing of appeal—Should costs be awarded against accused—Criminal Procedure Code, section* 352.

Held : That where an accused charged with a statutory offence under the Municipal Councils Ordinance, is found guilty and files an appeal, but does not take the trouble to be represented or even present at the hearing of the appeal, he should be mulcted in costs as the Municipal Council is put to the unnecessary expense in retaining Counsel to represent it.

No appearance, for the accused-appellant.

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

HERAT, J.

In this case the accused-appellant was charged with having committed an offence punishable under section 148 (3) of the Municipal Councils Ordinance, No. 29 of 1947, in that he had the source of mechanical power on his premises without the necessary licence. He was convicted and he has appealed.

The accused-appellant is unrepresented and absent, but Mr. E. A. G. de Silva for the complainant-respondent has dealt with all the facts and explained the matter to me. I see no reason to interfere with the conviction and, therefore, dismiss the appeal.

Mr. E. A. G. de Silva for the complainant-respondent asks that the accused-appellant be ordered to pay the costs of this appeal to the complainant. He points out that section 313 of the Municipal Councils Ordinance makes provision that prosecutions under that Ordinance be governed by the provisions of the Criminal Procedure Code, and he also cites section 352 of the Criminal Procedure Code which provides for the Court making an appropriate order for costs in proceedings under the Criminal Procedure Code.

I think in cases of this sort, where an accused is charged with a statutory offence and found guilty and files an appeal and does not take the trouble to be represented or even present at the hearing of the appeal, he should be mulcted in costs as the Municipal Council is put to the unnecessary expense in retaining Counsel to represent it at the hearing of the appeal. I, therefore, order that the accused-appellant do pay a sum of Rs. 52.50 as costs of the complainant-respondent in this appeal.

Appeal dismissed.

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

LORENSZ *vs.* ABDUL CADER

Application for Revision and/or " Restitutio in Integrum " in C.R. Colombo, 77793.

S.C. Application, No. 394/1961.

Argued on : 20th October, 1961
Decided on : 15th January, 1962

* For Sinhala translation, see Sinhala section, vol. 5, part 4, p. 15

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Rent Restriction (Amendment) Act, No. 10 *of* 1961, *section* 13—*Action for ejectment filed on ground that premises reasonably required by landlord for his own use and occupation—Action filed on* 24*th October*, 1960—*Such action to be null and void if pending on March* 6*th*, 1961, *by virtue of section* 13 (3)—*Can consent of parties give Court jurisdiction to enter decree for ejectment.*

Held : (1) That the effect of sub-section 3 of section 13 of the Rent Restriction (Amendment) Act, No. 10 of 1961, was that where an action of the kind referred to in that sub-section was pending on March 6th, 1961, the Court would have no jurisdiction thereafter to enter a decree for ejectment.

(2) That this want of jurisdiction could not be supplied even by consent of parties, so that a minute of consent filed by the parties consenting to judgment as prayed for being entered, did not confer on the court jurisdiction to order ejectment. The only order which could lawfully have been made after March 6th, 1961, was an order dismissing the plaintiff's action.

M. M. Kumarakulasingham, for the defendant-petitioner.

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

H. N. G. Fernando, J.

This action for the ejectment of the defendant from premises subject to rent control was instituted on 24th October, 1960. The ground for ejectment was that the premises were reasonably required by the plaintiff for his own use and occupation. After Answer had been filed the parties reached agreement as to the conditions of ejectment and a Minute of Consent, dated 24th May, 1961, was filed in Court whereby the parties consented to judgment as prayed for writ not to issue until 31st August, 1961. In consideration of the defendant's agreement to give vacant possession of the premises, the plaintiff agreed to pay the defendant a sum of Rs. 3,000/- and, in fact, that sum was paid and receipt thereof acknowledged by the defendant in the Minute of Consent. Thereafter the Judge made order for entry of decree accordingly.

Counsel appearing for the defendant in the application for revision made against this order of the Commissioner relies on section 13 of the Rent Restriction (Amendment) Act, No. 10 of 1961. Sub-section 1 of that section provides that an action for ejectment shall not be instituted except upon one of the three grounds specified in that sub-section. The ground of requirement for occupation by the landlord is not one of the three grounds specified in that sub-section 1. Sub-section 3 then provides that where any action for ejectment instituted after 20th July, 1960, on any ground other than one of those specified in sub-section 1 is pending in a Court at the time of the enactment of the Amending Act, such action " shall be deemed at all times to have been and to be null and void ".

The effect of sub-section 3 of section 13 of the Amending Act is that where an action of the kind referred to in this sub-section is pending on March 6th, 1961, the Court would have no jurisdiction thereafter to enter a decree for ejectment. This want of jurisdiction cannot be supplied even by the consent of parties. That being so, the Minute of Consent in pursuance of which the learned Commissioner ordered decree to be entered did not confer jurisdiction to order ejectment. The only order which the Commissioner could lawfully have made after March 6th, 1961, was to dismiss the plaintiff's action.

Subsequent to my reserving judgment counsel have informed me that the sum of Rs. 3,000/- paid to the defendant was repaid to the plaintiff.

Acting in revision I set aside the order of the learned Commissioner. Decree will now be entered dismissing the plaintiff's action. I make no order as to costs.

Application allowed.

END OF VOLUME LXIII

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අධිකරණ ආඥා පණත

අධිකරණ ආඥා පණත—20 වන ඡේදය—ඉන්ජන්ෂන් තහනම—කලින් මසක් කල් නොදී සුලු නගර සභාවකට විරුඬව පෙත්සම් කරුට නඩුවක් පැවරීමට නුපුළුවන් බව—නඩුව සැනෙකින් නොදැමුව හොත් පෙත්සම් කරුට පිරිමැසිය නොහැකි පාඩු සිදුවන බවට ඇති භීතිය—සුළු නගර සභා පණතේ 218 වන ඡේදය (පරිච්ඡේදය).

වෂ් 1960 ජුනි මාසයේදී සුළු නගර සභාවක එවකට සිටි සභාපති මහතා කඩවීදියේ කඩයක් පෙත්සම් කරුට කුලියට දුන්නේ ය. මින්පසු කිසිම නීත්‍යානුකූල අවසරයක් නොමැතිව "කේ" නමැත්තෙක් එම ගොඩනැගිල්ලෙන් කොටසක පදිංචි වූ නිසා ඔහු ඉන් බැහැර කිරීමට සුළු නගර සභාව විසින් නඩු පවරණ ලදී. මෙම නඩුව විභාගව නිමවීමට පෙර සුළු නගර සභාවට අළුත් සභාපති වරයකු තේරී පත්විය. යම් කිසි ආරංචියක් ලැබු පෙත්සම්කරු අලුත් සභාපති වරයා "කේ" නමැත්තා එහි නියම කුලී ගෙවන පදිංචි කරුවකු ලෙස සලකාය යන බියෙන් එම සභාපතිවරයා "කේ" නමැත්තාට එහි පදිංචිවීමේ අයිතිවාසිකම දීමෙන් වැළැක්වීම පිණිස.

(ඒ) තමා සභාපතිවරයාට විරුඬව නඩුවක් දැමීමට අදහස් කර ඇතත් සුළු නගර සභා ආඥා පණතේ 218 (1) දරණ ඡේදයට අනුව මසකට කලින් මේ බව ලියවිල්ලකින් දැනුම් දිය යුතු නිසා එම කටයුත්ත වැළකීමේ හේතුවෙනුත්,

(බී) මෙසේ මසක් ගතවන තුරු නඩු දැමීම පමා කළොත් ඔහුට පිරිමැසිය නොහැකි පාඩුවක් සිදුවීමේ හේතු වෙනුත්,

සභාපතිවරයාට විරුඬව තහනම් නියෝගයක් ශ්‍රෙෂ්ඨාධිකරණයෙන් ඉල්ලා සිටියේය.

තීන්දුව : මෙම කරුණු අනුව අධිකරණ ආඥා පණතේ 20 වන ඡේදය යටතේ අතුරු තහනම් ආඥාවක් ලැබීමට පෙත්සම්කරු සුදුසු තත්ත්වයක සිටී. එම ආඥාවේ බලපැවැත්වීම සති හයකට සීමාවේ.

මීරා මොහිදීන් එ. කල්මුනේ සුලු නගර සභාව සහ තවත් කෙනෙක් 9

අපරාධ නඩු විධාන සංග්‍රහය

අපරාධ නඩුවිධාන සංග්‍රහයේ 411 වෙනි ඡේදය—ඊට අනුකූලව නොකළ නියෝගය—ඇපකරයක් රාජසන්තක කිරීම—එම නියෝගය නිෂ්ප්‍රභා කළ යුතු ද?

විත්තිකරුවෙක් උසාවිය කී අවස්ථාවක එම උසාවියට ඔහුව ඉදිරිපත් කරන්ට පොරොන්දුවී ඇපකාරියෙකු විසින් දුන් ඇප රාජසන්තක කරමින් මහේස්ත්‍රාත්තුමා මෙහි පහත පෙනෙන නියෝගය කෙළේය:—

"ඇපකාරියට තමාගේ ඇපකරය රාජසන්තක නොකිරීමට හේතු ඇත්නම් දක්වීමට යයි කියන ලදී. මේ සඳහා දක්විය හැකි කිසිම හේතුවක් නොමැත. එම ඇපකාරිගේ ඇපකරය රාජසන්තක කරමි. කාලය දෙමි. පළමු වෙනි විත්තිකරු භිරබාරයේ තබනු . . ."

තීන්දුව : මෙම නියෝගය අපරාධ නඩුවිධාන සංග්‍රහයේ 411 වෙනි ඡේදයේ 1 වෙනි, 4 වෙනි උපඡේද වලට අනුකූල නොමැති නිසා අවලංගු කළ යුතුයි.

මේ නියෝගය කරන්ට පෙර ඇපකරය රාජසන්තක කිරීමට ඔප්පුවූ කරුණු සඳහන් කළ යුතුවා පමණක් නොව භිරඅඩස්සියට නියම කළ යුත්තේ දඩුවම් නිසා නියම කළ මුදල නොගෙවීම නිසා හෝ එය දේපල විකුණා අයකර ගන්ට බැරිවුවොත් පමණකි.

ද සිල්වා එ. උප ඉන්ස්පැක්ටර්, නුවර පොලිසිය... 16

ඉඩම් හිමි සහ බදුකරු

ඉඩම් හිමි සහ බදුකරු—මාසයේ අන්තිම දිනයේ දී ගෙයින් පිටවීමට දැනුම් දීමක්—මෙය ලිත් මාසයක දැනුම් දීමක් ද—එවැනි දැනුම් දීමක වලංගුභාවය.

මේ නඩුවේ බදු ගිවිසුම අනුව 1953 මැයි 1 වෙනිද බද්ද ආරම්භවී ඇත. ඉඩම් හිමියා (පැමිණිලිකරු) සවකීය බදුකරුට (විත්තිකරු) 1959 නොවැම්බර් 30 වනද ගෙයින් පිට වන ලෙස 1959 ඔක්තෝබර් 13 වනද දැනුම් දී තිබේ. ඉන් පසුව බදුකරු නෙරපීම සඳහා ඔහු නඩු පැවරුවේ ය.

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තීන්දුව : ඉඩම් හිමිට ගෙයි භුක්තිය හිමිවිය යුතුව තිබුනේ දෙසැම්බර් 1 වනද පමණක් මිස නොවැම්බර් 30 වනද නොවන බැවින් ගෙයින් පිටවීමට දැනුම්දීම වලංගු නැත. එම නිසා නඩුව නිෂ්ප්‍රභා කළ යුතුය.

අබේවික්‍රම එ. කරුණාරත්න 4

උඩරට නීතිය

උඩරට නීති—ත්‍යාගි ඔප්පුවක්—"වෙනස් කළ නොහැකි ජීවතුන් අතර සම්පූර්ණ දීමනාවක් හෝ තෑග්ගක්" යනුවෙන් සටහන්වී තිබීම—මෙවැනි ත්‍යාගි ඔප්පුවක් අවලංගු කරන්ට පුලුවන් ද?—උඩරට නීති හා සංශෝධන ආඥා පණත 59 වන පරිච්ඡෙදය, 4 (1) සහ 5 (1) යන කොට්ඨාස.

1948 වේ ලියා අත්සන් කරන ලද උඩරට තෑගි ඔප්පුවක, "වෙනස් කළ නොහැකි ජීවතුන් අතර සම්පූර්ණ දීමනාවක් නොහොත් තෑග්ගක්" යනුවෙන් සටහන් කර තිබේ නම්:

තීන්දුව : "වෙනස් කළ නොහැකි" යන වචන වලින් ත්‍යාග දයකයා එම තෑගි ආපසු ගැනීමේ බලය විශේෂයෙන් අත්හළ බව සලකාගත හැකිය. එම නිසා උඩරට නීති ප්‍රකාශ හා සංශෝධන ආඥා පණතෙහි, 5 (1) කොට්ඨාසය යටතේ, ත්‍යාග දයකයාට එම තෑගි ආපසු ගැනීම නීතිවිරෝධිය.

පුංචිබණ්ඩා එ. නාගසේන 17

උත්පත්ති සහ මරණ ලියා පදිංචි කිරීමේ ආඥා පණත

උත්පත්ති සහ මරණ ලියා පදිංචි කිරීමේ පණත, වර්‍ෂ 1951, නො. 17—ලියා පදිංචි කිරීමේදී නම සහ ස්ත්‍රී-පුරුෂ භාවය ගැන ඇතිවූ වරදක්—නිවැරදිසේ සටහන් කිරීමට නියෝගයක් දිස්ත්‍රික් උසාවියෙන් ඉල්ලීම—පණතේ අංක 28 දරණ ඡෙදය යටතේ රෙජිස්ට්‍රාර් ජනරාල්තුමාට කළ නියෝගයක්—එම නියෝගය ආඥා බලය ඇතුව කරණ ලද්දක් ද යන වග.

තම ස්වාමිපුරුෂයා වන 1 වන වගඋත්තරකරුට දාව වර්‍ෂ 1954 අප්‍රියෙල් මස 2 වන දින වගඋත්තරකාරියට 3 වන වගඋත්තරකාරිය වන ළමයා බිහිවිය. ළමයාගේ නම "සුනිල්" හැටියටත් ස්ත්‍රී පුරුෂ භාවය "පිරිමියා" හැටියටත් සටහන්වී මෙමෙ උත්පත්තිය වර්‍ෂ 1954 අප්‍රියෙල් මස 14 වන දින ලියා පදිංචි විය. ළමයාගේ නම "සුනිලා" යයි ද ස්ත්‍රී-පුරුෂ භාවය "ගැහැණිය" යයි ද පිළිවෙලින් වෙනස් කරණ ලෙස රෙජිස්ට්‍රාර්-ජනරාල්තුමාට නියෝගයක් දෙන ලෙස වර්‍ෂ 1960 ජූනි මස 3 වන වගඋත්තරකාරී කොළඹ දිස්ත්‍රික් උසාවියෙන් ඉල්ලීමක් කළාය. කලින් කර තිබෙන මෙම සටහන් යම්කිසි වැරදීමකින් කෙරී තිබේ යයි තෘප්තියට පත් දිස්ත්‍රික් උසාවිය ඉල්වන ලද එම වෙනස් කිරීම සටහන් කිරීමටයි වර්‍ෂ 1951 අංක 17 දරණ උත්පත්ති සහ මරණ ලියා පදිංචි කිරීමේ පණතේ 28 වන ඡෙදය අනුව යයි සලකා ගෙන රෙජිස්ට්‍රාර්-ජනරාල්තුමාට නියෝගයක් කෙළේය. මෙහි දැනට ඉදිරිපත්වී ඇති ඉල්ලීමෙන් රෙජිස්ට්‍රාර් ජනරාල්තුමා එම නියෝගය පරිශෝධනය කරණ මෙන් ඉල්වා සිටියේ ය.

තීන්දුව :—(1) මෙම නියෝගය ආඥා බලය නොමැතිව කරණ ලද්දකි. මීට හේතුව—(එ): 28 (1) ඡෙදයේ (1) දරණ කොටසින් උත්පත්තිය ලියා පදිංචි වී ඇති යම් කෙනෙකුගේ නම වෙනස් කිරීමට උසාවියට බලයදී ඇතත් මෙය කළ හැක්කේ ඒ තැනැත්තාගේ වයස සම්පූර්ණ වූ පසුවයි : (බී) : උප්පැන්න සහතිකයක කෙනෙකුගේ ස්ත්‍රී-පුරුෂ භාවය ගැන කෙරී ඇති සඳහන වෙනස් කිරීමට 18 වන ඡෙදයෙන් කිසි ලෙසකින් වත් විධිවිධානයක් යෙදී නැත.

(2) මෙම පණතේ 52 (1) (h) ඡෙදය අනුව රෙජිස්ට්‍රාර්-ජනරාල් තුමාටම යම්කිසි කරුණක හෝ අත්පියක වරදක් නිවැරදි කළ හැකි බව පෙනීගියත් මෙම බලය දී තිබෙන වාක්‍ය පාඨ සම්බන්ධය ගැන සලකා බැලීමේදී එය කළ හැක්කේ එම උත්පත්තිය ලියා පදිංචි කිරීමට කලින් තමා වෙත ඉදිරිපත් කොට ඇති "නිවේදන කරුණු" අනුව එම ලියා පදිංචි කිරීම කර නැති බව පැහැදිලිව වැටහුණු අවස්ථාවක පමණකි.

රෙජිස්ට්‍රාර්-ජනරාල් එ. කේ. ඒ. ටිකිරි බණ්ඩා සහ තවත් අය 6

කුඹුරු පණත

කුඹුරු පණත, 1958, අංක 1, 21 වෙනි ඡෙදය, (2) වෙනි, (3) වෙනි උපඡෙදය—(2) වෙනි උපඡෙදය යටතේ විත්තිකරුට නිකුත් කල සිතාසියක්—එය එම උපඡෙදයට අනුකූල නොමැති බව—විත්තිකරු කුඹුරකින් පිටමං කිරීමට කරන ලද නියෝගය—එය නීත්‍යානුකූල ද?

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කුඹුරු පණතේ 21 වෙනි ඡෙදයේ (2) වෙනි උප-ඡෙදය යටතේ නිකුත් කළ යුතු සිතාසියක සඳහන් කර තිබුනේ සිතාසි ලද තැනැත්තා ''කටුකුඹුර'' කියන කුඹුරක බුත්තිය මිරිජ්ජවල කේ. ඩී. කරෝලිස් නමැත්තකුට බාරදීම පැහැරහැර ඇති බවත් ඒ නිසා ඔහු කුඹුරු පණතේ 21 වෙනි ඡෙදය අනුව දඬුවම් කළ යුතු වරදක් කර ඇති බවත්, මේ නිසා ඔහු 1963.2.1 වෙනි දින පු. භා. 9|ට තමාගේ සාක්ෂිකරුවනුත් සමග හම්බන්තොට මහේස්ත්‍රාත් උසාවියට පැමිණ මෙම පැමිණිල්ලට උත්තර කියවන බවත්, ඒ අනුව ඔහුට නීතියට අනු-කූලව ක්‍රියා කිරීමට ඉදිරිපත් වන ලෙසත් ය.

තීන්දුව : මේ සිතාසිය කුඹුරු පණතේ 21 වෙනි ඡෙදයේ 2 (ඒ) වෙනි උපඡෙදයට එකඟව නිකුත් කර නොවුවක් නිසා එම ඡෙදයේ 3 වන උපඡෙදය යටතේ සිතාසිය ලද අය එහි සඳහන් කළ කුඹු-රෙන් පිටමං කළ යුතු යයි කළ නියෝගය නීති-විරෝධී නිසා එය අවලංගු කළ යුතු ය.

කරෝලිස් එ. හම්බන්තොට සහකාර ගොවිජන සේවා කොමසාරිස් 19

නඩත්තු ආඥා පණත

නඩත්තු ආඥා පණත, 2 වෙනි ඡෙදය—නඩත්තු මුදලක් ගෙවීමේ නියෝගයක් ඉල්ලීම—එම ඉල්ලීම පිළිගෙන ක්‍රියාකිරීමට අධිකරණ බල-සීමාව ඇති මහේස්ත්‍රාත් උසාවිය—ඉල්ලුම් කාරී පදිංචි ප්‍රදේශය යටත් අධිකරණ බලසීමාව තිබෙන මහේස්ත්‍රාත් උසාවිය ද, විත්තිකරු පදිංචි ප්‍රදේශ යේ පිහිටි එවැනි උසාවිය ද.

තීන්දුව : (සින්නතම්බි විනිශ්චයකාරතුමා විපක්-ෂව) නඩත්තු ආඥා පණතේ දෙවෙනි ඡෙදයෙන් අදහස් කරන්නේ නඩත්තු මුදල් ඉල්ලා ඉදිරිපත් කරන ආයාචනයක් පිළිගෙන ක්‍රියා කිරීමට බලය ඇත්තේ ඉල්ලුම්කාරි පදිංචි ප්‍රදේශය යටත් අධි-කරණ බලසීමාව තිබෙන මහේස්ත්‍රාත් උසාවියකට මිස විත්තිකරු පදිංචි ප්‍රදේශය යටත් එවැනි උසාවි-යකට එකඟ වෙන බවයි.

තෙන්නේ එ. ඒකනායක 1

පරිවාස ආඥා පණත

පරිවාස ආඥා පණත, 3 (1) වන ඡෙදය—එම ඡෙදය යටතේ වරදකරුවෙකු නොකර කළ නියෝගයක්—එම නියෝගය නීත්‍යානුකූල ද?

තීන්දුව : යමෙකුට විරුඬව නගන ලද චෝද-නාවක් සම්බන්ධව ඔහු වරදකරුවෙකු යයි තීන්දු නොකර පරිවාස ආඥා පණත යටතේ නියෝග-යක් කිරීමට බලයක් නැත.

සේබමලේ එ. මාරියම්පිල්ලේ 8

පිත කොමිසම

පිත කොමිසම—තෑගි ඔප්පුවක්—''ඔවුන්ගේ මරණයෙන් පසුව එකී ඉඩම සමාන කොටස් වලින් ඔවුන්ගේ නීතානුකූල දරුවන් වෙත පැව-රිය යුතුය'' යන වචනවල තේරුම.

ඉංග්‍රීසි බසට පරිවර්තනය කළවිට පහත සඳහන් පරිදි කියවෙන මෙම ඡෙදය එක්තරා පියෙකු විසින් තම පුතුන් පසදෙනාගේ යහපත පිණිස ලියන ලද තෑගි ඔප්පුවක ගැබ්වී තිබිනි:—

> ''කෙසේ වුවද ඉහත සඳහන් ත්‍යාගලාභින් එකී ඉඩම භුක්ති විඳිනවා හැර එය ඔවුන් විසින් විකිණීම, උකස් කිරීම, ප්‍රදානය කිරීම, හුවමාරු කිරීම හෝ අන්කිසි විධියකින් අන්සතු කිරීම නොකළ යුතුය. ඔවුන්ගේ මරණයෙන් පසුව එකී ඉඩම සමාන කොටස් වලින් ඔවුන්ගේ නීත්‍යානුකූල දරුවන් වෙත පැවරී යායුතු අතර එම දරුවන්ට එම ඉඩම භුක්ති විඳීමට හෝ ඔවුන්ගේ කැමැත්ත පරිදි එම ඉඩමට යම්කිසි දෙයක් කිරීමට හෝ පුළුවන.''

මෙම ඡෙදය පිත කොමිසමක් ඇති කිරීමට පොහොසත්ය යන්න ගැන තර්කයක් මතුවී නැත.

තීන්දුව : මෙම වාක්‍ය කොටසෙහි ප්‍රකාශිත ව ඇති අන්දමට මෙම ඉඩම තෑගි දුන් අයගේ අදහස වූයේ ඔහු විසින් නම් කරණ ලද ඔහුගේ පුතුන්ට එය භුක්ති විඳීමට අවසර දීම සහ ඒ සියලු දෙනාම මැරුණු පසුව එකී නම් කරණ ලද පුතුන්ගේ දරුවන් දරුවන් සහ සමව එම ඉඩම සම්පූර්ණයෙන් ම ලබාගත යුතුය යන්නය.

කරෝලිස් සිඤ්ඤෝ එ. හෙන්ද්‍රික් සිඤ්ඤෝ සහ අනෙක් අය 10

මහ නගර සභා පණත

මහ නගර සභා පණත, 1947 නේ නො: 29, 148 (3) ඡෙදය යටතේ චෝදනාවක්—විත්තිකරු වරදකරු වීම—ඇපැලක් ගැනීම—ඇපැල විභාග

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කරන දිනයෙහි ඇපැල්කරු හෝ ඔහු වෙනුවෙන් නීතිවේදියෙක් නොපෙනී සිටීම—විත්තිකරුට විරුඬව ඇපැල් ගාස්තු නියම කළ යුතු ද?

තීන්දුව : මහ නගර සභා ආඥා පණත යටතේ විත්තිකරුවෙකු වරදකරුවෙකු කරනු ලැබූ කල්හි ඔහු විසින් ඇපැල් පෙත්සමක් ඉදිරිපත් කොට තමා වෙනුවෙන් පෙනී සිටීමට නීතිවේදියෙකු ඉදිරිපත් නොකර එමෙන්අමඇපැල් පෙත්සම විභාග කරන අවස්ථාවේදී උසාවියට ද නොපැමිණ සිටී නම් නාගරික සභාව මගින් ඒ වෙනුවෙන් පෙනී සිටීමට නීතිඥයින් ඉදිරිපත් කිරීමෙන් ඔවුන් දූරූ අනවශ්‍ය වියදම නිසා විත්තිකරු ගාස්තුවට යටපත් කල යුතුයි.

රොබට් තේලිස් එ. ද සිල්වා, ආදයම් පරීක්ෂක, නාගරික සභාව, කුරුණෑගල 15

සිවිල් නඩු විධාන සංග්‍රහය

සිවිල් නඩු සංවිධාන සංග්‍රහයේ 326, 327 සහ 327 (ඒ) යන ඡේදයන්—බුත්තිය භාරදීමේ ආඥාව ගෙනගිය පිස්කල් නිලධාරියාට බාධා කිරීම—එම බාධා කිරීම අවිචාරිවූ බවත්, පීඩාකාරිවූ බවත් පිළිගැනීම—327 (ඒ) යන ඡේදය යටතේ ආඥාවක් නියෝග කිරීම—එම නියෝගය සංශෝධනය කිරීමට සුප්‍රිම් උසාවියෙන් ඉල්ලුම් කිරීම—පසුව 327 (ඒ) ඡේදයේ උපවගන්තිය යටතේ බුත්තිය ඔප්පු කිරීමට නඩුවක්—ඉල්ලන ලද සංශෝධනය-යට ඉඩ තිබේ ද?—විනිශ්චිත නය හිමියාට බුත්ති භාරදීමට නියෝග කරණ විට කොන්දේසි පිට භාරදිය යුතු ද?

තීන්දුව : සිවිල් නඩු සංවිධාන සංග්‍රහයේ 327 (ඒ) යන ඡේදය යටතේ විනිශ්චිත නය හිමියා වෙත භාරදීමට යයි කරණ ලද ආඥාවේ විස්තර කරණ ලද ඉඩම එසේ භාරදීමට, භාරදීමේ නියෝ-ගය සංශෝධනය කිරීමට යයි සුප්‍රිම් උසාවියෙන් කරණ ලද ඉල්ලීමක් විභාග කිරීමට එම උසාවියට බාධාවක් හෝ බල සීමිත බවක් හෝ සඳහන් නැත.

ගරු විරසූරිය විනිශ්චයකාරතුමා විසින් :— "විනිශ්චිත නය හිමියා ඉඩමේ භුත්තිය ලබනසේ නියෝගයක් කිරීමට මෙම ඡේදය යටතේ උසාවි-යට දී ඇති බලයට, විනිශ්චිත නය හිමියා විසින් මෙම ඡේදය යටතේ දමා ඇති නඩුවක තීන්දු ප්‍රකා-ශයෙන් කියැවෙන යම් යම් කටයුතු ඒ අයුරු ඉටුවන හැටියට ඇප දිය යුතු යයි කීමට බලය ද ඇතුලු වේය යනු මගේ හැඟීමයි".

සෝමාවති එ. කුරේ 13

ළමයින් සහ තරුණයන් පිළිබඳ ආඥා පණත

ළමයින් සහ තරුණයන් පිළිබඳ ආඥා පණත (23 වෙනි පරිච්ඡේදය) 28 සහ 35 දරණ ඡේද—මහේස්ත්‍රාත් වරයකු විසින් සුරාබද්ද ආඥා පණත අනුව වරදක් පිළිබඳව දඩුවම් කිරීම—තරුණයකු පරිවාසක නිලධාරියෙකුගේ පරිපාලනය යටතේ තැබීමට දුන් නියෝගයක්—මෙවැනි නියෝගයක් දිය හැක්කේ කවරෙකු විසින් ද?—එවැනි නියෝ-ගයක් දීමට තිබිය යුතු කරුණු.

තීන්දුව : (1) ළමයින් සහ තරුණයන් පිළිබඳ ආඥා පණතේ 35 (1) (ඩී) ඡේදය යටතේ නියෝ-ගයක් දිය හැක්කේ මහේස්ත්‍රාත් වරයෙකුගේ උසාවිය ළමා උසාවියක් වශයෙන් කටයුතු කරණ අවස්ථාවක පමණකි.

(2) මෙවැනි නියෝගයක් දිය හැක්කේ ප්‍රදේශීය පාලන මණ්ඩලයක නිලධාරියෙකු හෝ පොලිස් නිලධාරියෙකු හෝ අන්කිසි බලයලත් පුද්ගලයකු විසින් ළමයෙකු හෝ තරුණයකු උසාවියට ඉදිරි-පත් කරණ ලද කල්හි පමණකි.

පුපාලසිංහම් එ. ස්වාන් (ඇක්සයිස් ඉන්ස්පැක්ටර්) 5

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ගරු බස්නායක, අ. වි., එච්. ඇන්. ජී. ප්‍රනාන්දු, සහ සින්නතම්බි වි. තුමන් ඉදිරිපිටදී

තෙන්නේ එ. ඒකනායක*

ශ්‍රේෂ්ඨාධිකරණයේ අංකය : 442/60 මාතලේ මහේස්ත්‍රාත් උසාවියේ අංකය: 6823

විවාද කළ දිනය : ජූනි 6 සහ 7, 1961.
තීන්දු කළ දිනය : මාර්තු 30, 1962.

නඩත්තු ආඥපනත, 2 වෙනි ඡේදය—නඩත්තු මුදලක් ගෙවීමේ නියෝගයක් ඉල්ලීම—එම ඉල්ලීම පිළිගෙන ක්‍රියා-කිරීමට අධිකරණ බලසීමාව ඇති මහේස්ත්‍රාත් උසාවිය—ඉල්ලුම් කාරී පදිංචි ප්‍රදේශය යටත් අධිකරණ බලසීමාව තිබෙන මහේස්ත්‍රාත් උසාවිය ද, නැතිනම්, විත්තිකරු පදිංචි ප්‍රදේශයේ පිහිටි එවැනි උසාවිය ද.

තීන්දුව :—(සින්නතම්බි වි. තුමා විපක්ෂව) නඩත්තු ආඥපනතේ දෙවෙනි ඡේදයෙන් අදහස් කරන්නේ නඩත්තු මුදල් ඉල්ලා ඉදිරිපත් කරන ආයාචනයක් පිළිගෙන ක්‍රියා කිරීමට බලය ඇත්තේ ඉල්ලුම්කාරී පදිංචි ප්‍රදේශය යටත් අධිකරණ බලසීමාව තිබෙන මහේස්ත්‍රාත් උසාවියකට මිස විත්තිකරු පදිංචි ප්‍රදේශය යටත් එවැනි උසාවියකට එකඟවෙන බවයි.

නීතිඥවරු : කේ. සී. කමලනාදන් සහ ඇම්. ෂන්මුගලිංගම්, පැමිණිලිකරු වෙනුවෙන්.
වයි. ඇල්. ඇම්. මන්සූර්, වග-උත්තරකරු වෙනුවෙන්.

ගරු බස්නායක අග්‍ර විනිශ්චයකාරතුමා

මෙම ඇපැල මගේ සහෝදර සින්නතම්බි මහතා ඉදිරිපිටදී පළමුවෙන්ම විනිශ්චයට භාජනවී ඔහුට හැඟී ගිය පරිදි සැකසහිතවූත් අමාරුවූත් ප්‍රශ්නයක් එහිදී පැනනැගුණු නිසා නඩු අධිකරණ ආඥපණතේ 48 වන ඡේදය යටතේ එම ප්‍රශ්නය මෙම උසාවියේ එක්කෙනෙකුට වැඩිගණනකින් යුත් විනිශ්චය මණ්ඩලයකින් තීරණය කළ යුතුයයි ඉදිරිපත් කළ නිසා එම ආඥපණතේ 48 ඒ දරණ ඡේදය අනුව එම ප්‍රශ්නය විසඳීමට විනිශ්චයකාරවරුන් තිදෙනෙකුගෙන් යුත් මණ්ඩලයක් පත්කළ යුතුයයි මම නියෝග කෙළෙමි. විනිශ්චයට භාජනය කිරීමට වෙන් කොට තිබූ ප්‍රශ්නය නම් යම්කිසි විත්තිකරුවෙකු ආඥබලය පවත්නා ප්‍රදේශ සීමාවේ පදිංචි නොවූවිට එවැනි අයෙකුට විරුඬව කරන ලද නඩත්තුව පිළිබඳ ඉල්ලීමක් එම උසාවියට විනිශ්චය සඳහා පිළි-ගැනීමට හැකි ද නැද්ද යන්නයි.

එහිවූ වැදගත් කරුණු සැකෙවින් මෙසේය. වෂී 1959 නොවැම්බර මස 10 වන දින ආර්. බී. තෙන්නෙ නැමැති ඉල්ලුම්කරු තමාගේ දියණිය වන විරා ඒකනායක මහත්-මියගේ සවාමිපුරුෂයාවූ කුණ්ඩසාලයේ ඉඩම් වගාකිරීමේ කායඹාලයට අයත් කොකෝවා ගවේෂණ අංශයේ රැකියාවෙහි නියුතු වී. බි. ඒකනායක මහතා තම දියණිය හෝ කීර්ති ඒකනායක නැමති තුන්හැවිරිදි පිරිමි දරුවා නඩත්තු කිරීමට නොහැකියයි පැහැර හරින බව උසාවියට පැමිණිලි කෙළේය. ඔහුගේ සාක්ෂියේදී ඔහු කීයේ වෂී 1959 ජූනි මාසයේ සිට තම දියණිය අංගොඩ මානසිකාරෝග්‍යශාලාවේ ප්‍රතිකාර ලබන නේවාසික රෝගියකු බවත් කීර්ති නැමති දරුවා තමා ළඟ සිටින බවත්ය.

විත්තිකරු සිතාසි ලබා පැමිණි විට නඩුපොතේ ඇති සටහනකින් ඔහු ඉල්ලුම්කරුගේ දියණියගේ සවාමි-පුරුෂයා බවත් කීර්ති නැමති දරුවාගේ පියා බවත් පිළිගෙන ඇති බව පෙනී යේ. එම සටහන මෙසේය:

"විත්තිකරු විවාහය හා පිතෘත්වය පිළිගන්නා නමුත් ඔහුට කියාසිටීමට කරුණු තිබේ."

නඩුව විභාග වන දිනයේදී විත්තිකරුත් කිසිම සාක්-ෂියක් ඉදිරිපත් නොකළ නමුත් තමා මාතලේ මහෙස්-ත්‍රාත්-උසාවියේ ආඥ බලය පවත්නා සීමාවෙන් පිටත ඇති දුම්බර ප්‍රදේශයේ නිවාසි වූ අයකු නිසා එම උසා-වියට මෙම නඩුව විසඳීමට ආඥ බලය නැතැයි කියා

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 63 වෙනි කා., 10 වෙනි පිට බලනු.

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සිටියේය. විත්ති කරු මාතලේ මහෙස්ත්‍රාත් උසාවියේ ප්‍රාදේශීය සීමාවෙන් පිටත ඇති ස්ථානයක වසන කෙනෙකු බව දෙපක්ෂයම පිළිගෙන තිබේ. විත්ති කරුගේ ආයාචකයා විසින් ඉදිරිපත් කළ **ජේන් නෝනා එ. වැන් ට්වෙස්ට්** (30 න. නී. වා. 449 පිට) යන නඩුව ද **සරස්වතී එ. කන්දය්යා** (50 න. නී. වා. 22 පිට) යන නඩුව ද සලකා බලා එම විරෝධය පිළිගෙන තිබේ.

ජේන් නෝනාගේ නඩුවෙහි තීරණය වී ඇත්තේ නඩත්තු ආඥපණත යටතේ කෙරෙන ඉල්ලීමක් පිළිගැනීමට ආඥ බලය ඇති උසාවිය එම නඩු නිමිත්ත උද්ගතවුණු ප්‍රදේශයේ ආඥ බලය පතුරු වන මහෙස්ත්‍රාත් උසාවිය බවය. වැඩිදුරටත් කරුණු දක්වන මෙම නඩු තීන්දුවේ කියවෙන්නේ නඩත්තු ආඥ පණතේ ප්‍රාදේශීය ආඥ බලය ගැන ප්‍රශ්නය පිළිබඳව නිශ්ශබ්දතාවයක් පෙනී යන බැවින් මේ සඳහා සිවිල් නඩු විධාන සංග්‍රහයෙන් මාර්ගෝපදේශකත්ත්වය ලබා ගැනීමට අවසර තිබේය යන බවකි. ඒ බැඳී යයි මට හැඟී ගිය **ජේන් නෝනා එ. වැන් ට්වෙස්ට්** නැමති (ඉහත සඳහන් කළ) නඩුව අනුගමනය කරමින් ම විසින් **සරස්වතී එ. කන්දයියා** නැමති (ඉහත සඳහන් කළ) නඩුවේ දී පලකළ මතය නම් නඩත්තු ආඥපණතේ දෙවන ඡේදය යටතේ ඉදිරිපත් කරන ඉල්ලීමක් පාර්ශවකරුවන්ගේ නිවාස භූමිය ගැන හෝ නඩු නිමිත්ත උද්ගත වුණු ස්ථානය ගැන හෝ නොසලකා මහේස්ත්‍රාත්වරයෙකුට පිළිගැනීමට නීත්‍යානුකූල බලයක් තිබේය යන්නයි. **ඩිංගිරි මැණිකා එ. කිරිඅප්පු** (52 න. නී. වා. 362 පිට) යනුවෙන් කියවුණු නඩුවෙහි නඩත්තු ආඥපණතේ 11 වන ඡේදය යටතේ නියෝගයක් ක්‍රියාවේ යෙදීමේ ප්‍රශ්නය ගැන සලකා බැලූ නාගලිංගම් විනිශ්චයකාරතුමා තීන්ද කෙළේ 11 වන ඡේදය යටතේ නියෝගයක් ක්‍රියාවේ යෙදීමට උසාවියට ඇති ආඥ බලය විත්තිකරු එම උසාවියේ ප්‍රාදේශීය සීමාවෙන් පිටත පදිංචිව සිටීමේ හේතුව නිසා උසාවියෙන් බැහැර නොවන බවය. අමතර ප්‍රකාශයකින් ඔහු වැඩිදුරටත් මෙසේ කීය.

> "ඇත්ත වශයෙන්ම කිනම් මහේස්ත්‍රාත් උසාවියකට වුවද ඉල්ලුම්කරුවා හා වග-උත්තරකාරිය පදිංචිව සිටින ස්ථානය ගැන නොසලකා එබඳු ඉල්ලීමක් පිළිගැනීමට බලය තිබේ."

දැනට සළකා බැලීමට ඇති පළමු වන ප්‍රශ්නය ජේන් නෝනාගේ නඩුව නිවැරැදි ලෙස විසඳී තිබේ ද යන්නය. සිවිල් නඩු විධාන සංග්‍රහයේ 9 වන ඡේදය මෙයට යෙදීමට අවසර තිබේ ද? මා සිතන්නේ එසේ අවසර නැති බවයි. එයට හේතුව සිවිල් නඩු විධාන සංග්‍රහය බල පවත්වන්නේ එම සංග්‍රහයේ සීමාව තුලට වැටෙන නඩුවලට පමණක් වීමයි. නඩත්තු ආඥපනතින් පැනවී ඇත්තේ එම ආඥපනතට කලින් සිවිල් අයිතිවාසිකමක් ක්‍රියාවේ යෙදීමට සාමාන්‍ය සම්ප්‍රදය අනුව තිබූ ක්‍රියා පිළිවෙලක් වෙනුවෙන් විශේෂ පිළියරණක් සහ විශේෂ ක්‍රියා පිළිවෙලක් සැපයීමයි. නමුත් නඩත්තු ආඥ පණත පැනවීමට පසු ගැහැණියකට තමාවෙනුවෙන් සහ ඇයගේ දරුවන් වෙනුවෙන් තමාට හා ඔවුන්ට ලැබිය යුතු ණයක් හැටියට සිවිල් නඩුවක් දමා නඩත්තුව ඉල්ලීමට නොහැකියයි තීන්දු කොට තිබේ. (**මැණික්හාමි එ. ලොකුඅප්පු**, (1898) 1 බාලසිංහම් වාර්තා 161 පිට) මෙම නඩත්තු ආඥ පණත පැනවීමෙන් ව්‍යවහාර නීතිය අනුව ලැබුනු එම අයිතිය ව්‍යවස්ථාපිත අයිතියක්වී එය එම ව්‍යවස්ථාවේ සනිටුහන්වී ඇති ක්‍රම සම්ප්‍රදය අනුව ක්‍රියාවෙහි යෙදිය යුතු වූවක් හැටියට පෙනේ. එහෙත් අපරාධ නඩුවිධාන සංග්‍රහයේ ඇතැම් විධිවිධාන (V, VII, පරිච්ඡේදයේ 338 සිට 352 වන ඡේද) සහ සිවිල්නඩු විධාන සංග්‍රහයේ යම් යම් විධිවිධාන ද එනම් නඩු ගාස්තු පිළිබඳ විධිවිධාන ක්‍රියාවේ යෙදිය හැකි පමණට මේ නඩත්තු ඉල්ලීමේ සම්ප්‍රදයට අදල වන පරිදි පනවා තිබේ. (ඡේද: 9 සිට 15 දක්වා, 17) අපරාධ නඩු විධාන සංග්‍රහයෙහි ඇතුළත් අනිකුත් ප්‍රතිපාදන මීට අදල නොවේයයි ද තීන්දු කොට තිබේ. (**ඇනා පෙරේරා එ. එමලියානෝ** නෝනිස්, 12 න. නී. වා. 236 වන පිට) සමතාවයක් උඩ තර්ක කළ විට ඒ නියායෙන්ම සිවිල් නඩු විධාන සංග්‍රහයේ විශේෂයෙන් අදලයයි ආඥපනතේ පැනවී ඇති විධිවිධාන හැර සෙසු විධිවිධාන ඇතුළත් නොකළ යුතු ලෙස නිරායාසයෙන්ම හැඟීයේ.

නඩත්තු නීතිය අනුව කෙනෙකුට ලැබෙන අයිතිවාසිකම එම ආඥපනතෙන් ඇති කොට ඇති සීමාවන්ට පමණක් සීමිතව එම අයිතිවාසිකම ලැබීමට සුදුස්සා කෙරෙහි අඛන්ඩව පැවතීගෙන යන අයිතිවාසි කමකි. ඈ නොනන සිටියත් මේ අයිතිවාසිකම තමා පිට පැවරී ඇති නිසා තමා එවකට නිවාසීව සිටින ප්‍රදේශයේ ඇති උසාවියක සහාය ඇයට ආයාචනා කළ හැක. එබැවින් සිවිල් නඩු සම්ප්‍රදයෙහි පැනෙන "නඩු නිමිත්තක් මේ සඳහා අමුතා ගැනීම අවශ්‍ය නොවේ. පහත පලවෙන පරිදි කියවෙන නඩත්තු ආඥපනතේ 2 වන ඡේදයෙන් ද මේ මතයට ප්‍රතිෂ්ඨාව ලැබෙන බව මෙහිලා කිව යුතුය: —

> "සෑහෙන ප්‍රමාණයක වත්කමක් ඇති යම් කිසි පුද්ගලයකු විසින් තමාගේ භාර්‍යාව හෝ නීත්‍යානුකූලවූ හෝ නීත්‍යානුකූල නොවූ තමාගේ දරුවා නඩත්තු කිරීම පැහැර හරින ලද්දේ නම් එබඳු පැහැර හැරීමක් හෝ නොසලකා හැරීමක් පිළිබඳව ඔප්පුකළවිට මහේස්ත්‍රාත්

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වරයෙකු විසින් එම පුද්ගලයාට ඔහුගේ භාර්‍යාවගේ හෝ එවැනි දරුවකුගේ නඩත්තුව පිණිස මාස්පතා රුපියල් 100 කට වැඩි නොවන යම්කිසි මුදලක් මහේස්ත්‍රාත්වරයාට සුදුසු යයි සිතෙන පරිදි ගෙවන හැටියට නියෝග කළ හැක. මෙම මුදල ඒ ඒ වකවානුවලදී මහේස්ත්‍රාත්තුමා උපදෙස් දෙන හැටියට යම්කිසි තැනැත්තෙකුට ගෙවිය යුතුවාක්මෙන්ම එම ගෙවීම නියෝගය දුන් දින සිට ක්‍රියාත්මක කළ යුතුය.''

මෙයින් පෙනී යන්නේ මෙහි සඳහන් කෙරෙන නඩුව එම ඉල්ලීම කිරීමට අයිතියක් ඇති අද්ගලයා වාසය කරන ස්ථානයෙහි ආඥාබලය පවත්නා උසාවියෙන් මෙම ඉල්ලීම කළයුතු බව විනා එය විත්තිකරු වාසය කරන ප්‍රදේශයේ උසාවියෙන් ඉල්ලිය යුතු බව නොවේ.

ඉහත සඳහන් කළ මතය කලින් පැවැති නීතිය අනුව මීගමුවේ පොලිස් උසාවියේ අංක 29055 දරණ නඩු අධිකරණයකින් දෙන ලද තීන්දුව සමග ගැලපේ— ගුනියල් වාර්තා (1873) පොලිස් උසාවිය 112 එම නඩුවෙහිදී මෙම උසාවිය තීන්දුකළේ නඩත්තු නඩුවලදී යම් කිසි භාර්‍යාවක් හෝ ළමයෙක් අනාථව සිටින ස්ථානයේ ආඥා බලය පතුරුවන උසාවියකට (එම ආඥා බල ප්‍රදේශයෙන් පිටත සිටින) ඒ අයට ආධාර කිරීමට බැඳී සිටින විත්තිකරුවකුට විරුද්ධව නඩු විභාග කිරීමට බලය තිබෙන බවය. ඉන් පසුව ඇතිවූ **සෙලෙස්තිනා ප්‍රනාන්දු එ. මොහමඩ් කාසිම්** (1908) 11 න. නී. වා. 329 වන පිට) නඩුවේදී මෙම නිගමනය අනුගමනය කරමින් වෙන්ඩ්ට් විනිශ්චයකාර තුමා කියේ යම්කිසි නීත්‍යානුකූල නොවන දරුවෙකු වාසය කරන සීමාවට අයත් උසාවියකට ඒ දරුවාගේ පියායයි සිතන කෙනෙකුට විරුද්ධව ඇති නඩත්තු ඉල්ලීමක් ගැන එම පියා එනී උසාවියේ ආඥා බලය පැවැත්වෙන සීමාවෙන් පිටත සිටියත් විභාග කළ හැකි ය යන්නයි. මගේ අදහසේ හැටියට ජේන් නෝනාගේ නඩුවේ නඩු නිමිත්තක් පිළිබඳව සඳහන් කරමින් සිවිල් නඩුවිධාන සංග්‍රහයේ ඇති සංකල්පයක් සාවද්‍ය (concept) ඇතුලත් කොට ඇතිසේ පෙනේ. එබැවින් ඉහතින් ලෙස සවිස්තර ලෙස දක්වූ සරස්වතීගේ නඩුවේ මා විසින් පලකරන ලද මතයෙහිම මම එල්බ ගනිමි.

කල්පනාවට භාජනව ඇති මෙම නඩුවේ ඉල්ලුම්කරු නඩත්තුව ලැබීමට සුදුසු පුද්ගලයකු නොවේ. නමුත් එය ලැබීමට සුදුසු කම් ඇති පුද්ගලයකු එනම් එහි සඳහන් දරුවා මාතලේ මහේස්ත්‍රාත් උසාවියේ ආඥා බලය පවත්නා ප්‍රදේශයක ඕනෑලභ සිටී. මේ නිසා එම උසාවියෙහි ළමයාගේ ඉල්ලීමක් සම්බන්ධයෙන් පැවරෙන නඩුවක් කියා ගෙන යා හැක. එහෙත් මට වෙනුවෙන් කෙරෙන ඉල්ලීම ඉල්ලුම්කරු නඩත්තුව තමාව ලබා ගැනීමට පරිශ්‍රම දරන්නෙකු නොවන නිසා එම උසාවියට ආඥා බලය ලැබීමට කිසිදු හේතුවක් නොපෙනෙන බැවින් කොළඹ මහේස්ත්‍රාත් උසාවියට ඉදිරිපත් කළ යුතුයි.

ගරු එච්. ඇන්. ජී. ප්‍රනාන්දු විනිශ්චයකාරතුමා

මම එකඟවෙමි.

ගරු සින්නතම්බි විනිශ්චයකාරතුමා:

තමාගේ දියණිය වෙනුවෙන් වග-උත්තරකාරයා වන තමාගේ ස්වාමිපුරුෂයා නඩත්තුව දීම ඉටුනොකිරීම හා නොසලකා හැරීම පිළිබඳ භාර්‍යාව විසින් කරන ලද ඉල්ලීමක් කවර උසාවියකට සම්බන්ධව කළ යුතු ද යන්න මෙම නඩුවෙහි නිගමනය සඳහා ඉදිරිපත්වී ඇති ප්‍රශ්නයයි. මෙම ඉල්ලීම ඉදිරිපත් කරනු ලැබූ මහේස්ත්‍රාත්වරයා පිළිගත්තේ වග-උත්තරකරු තමාගේ උසාවියේ ආඥා බලය පවතින සීමාවෙන් පිටත වාසය කළ නිසා එම ඉල්ලීම සලකා බැලීමට තමාට බලයක් නොමැති බවය. තමාට නඩුව විසඳීමට ආඥා බලයක් ඇද්ද යන ප්‍රශ්නය විසඳීමේදී මහේස්ත්‍රාත්වරයා විත්තිකරුගේ වාසය පිළිබඳ ප්‍රශ්නය පරීක්ෂණයට භාජනය කරමින් මෙම උසාවියේ කලින් දෙන ලද තීන්දු දෙකක් අනුගමනය කෙළේය. ඉන් පළමු වැන්න **ජේන් නෝනා එ. වැන් ටිවෙස්ට්** 30 න.නී.වා. 449 පිට නැමති නඩුවයි. දෙවැන්න **සරස්වතී එ. කන්දයියා** 50 න.නී.වා. 22 පිට නැමති නඩුවයි. මෙහි පෙනී යන හැටියට **ඩිංගිරිමැණිකා එ. කිරිඅප්පු** 52 න. නී. වා. 378 පිට නමැති නඩුව උගත් මහේස්ත්‍රාත්වරයා ඉදිරියේ උපුටා දක්වා නැත.

මෙම ඇපෑල පළමුවන වරට මා ඉදිරියේ විභාගයට පැමිණිවිට එය සැලකිය යුතු තරම් වැදගත් කරුණක් වූ නිසාත් එහිදී බැරෑරුම් ප්‍රශ්න උද්ගත වුණු නිසාත් මම එම නඩුව එක විනිශ්චයකාරවරයෙකුට වැඩි-ගණනකින් යුතු මණ්ඩලයකින් විසඳෙන ලෙස කරුණු සැලසීමට යයි අග්‍රවිනිශ්චයකාරතුමාට ඉදිරිපත් කෙළෙමි. එහෙත් මෙහිලා මාගේ අභිරුචියවූයේ **ඩිංගිරිමැණිකා එ· කිරිඅප්පු** (ඉහත සඳහන් කළ) නඩුවේදී අමතර ප්‍රකාශයක් ලෙස වූවත් නාගලිංගම් විනිශ්චයකාර මහතා එහි පළකල මතය අනුගමනය කිරීමටය. එතුමාගේ මතයට බස්නායක විනිශ්චයකාරතුමා, එවකට ඔහු බස්නායක විනිශ්චයකාරතුමාව සිටියදී පළකල මතයෙන් ද පිටුවහලක් ලැබේ. බස්නායක විනිශ්චයකාරතුමා කලින් දී තිබුණ තීන්දුවලට එකඟවීමට රිසිබවක්

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නොදක්වූ නමුත් **ජේන් නෝනා එ. වැන් ට්වෙස්ට්** (ඉහත සඳහන් කළ) නඩුවේදී දුන් විනිශ්චයකාරවරු දෙදෙනෙකුගේ තීන්දුව අනුගමනයකිරීමට බැඳී සිටියේය එතුමාගේ තීන්දුවේදී එතුමාවිසින් පහත සඳහන් පරිදි ප්‍රකාශ කරන ලදී.

''මගේ පුද්ගලික මතය නම් දෙවන ඡේදය යටතේ පාර්ශවකරුවන්ගේ වාසභූමිය හෝ නඩු නිමිත්ත පැන නැගුණු ස්ථානය හෝ නොසලකා මෙබඳු ඉල්ලීමක් පිළිගැනීමට මහේස්ත්‍රාත් වරයෙකුට බලය ආඥා තිබේය'' යනුයි.

මෙම වාක්‍ය ඛණ්ඩයෙන් මා තේරුම් ගන්නේ පාර්ශවකරුවන්ගේ වාසභූමිය ගැන නොසලකා ඕනෑම මහේස්ත්‍රාත් උසාවියකට මෙබඳු නඩත්තු පිළිබඳ ඉල්ලීමක් පිළිගැනීමට බලය තිබෙන බවයි. ඉල්ලීම ඉදිරිපත් කරනු ලබන්නේ නඩත්තුව තමාම ලැබීමට සුදුසු පුද්ගලයා විසින් නොවන බව පමණක් මෙම ප්‍රශ්නය කෙලෙසිය යුතු නොවේ.

එම නිසා මාගේ කල්පනාවේ හැටියට නඩත්තුව පිළිබඳ ඉල්ලීමක් තමා වෙනුවෙන් හෝ වෙන කෙනෙකු වෙනුවෙන් හෝ යම්කිසි පුද්ගලයෙකුට ඕනෑම මහේස්ත්‍රාත් උසාවියක ඉල්ලුම් කළ හැක. මෙය විත්තිකරුගේ වාස භූමිය පිළිබඳ ප්‍රශ්නයෙන් හෝ ඉල්ලුම්කරුගේ හෝ මෙම ඉල්ලීම යමෙකු වෙනුවෙන් කෙරේ නම් ඒ පුද්ගලයාගේ හෝ වාස භූමිය පිළිබඳ ප්‍රශ්නයෙන් ඉල්ලීම නොකෙළෙසේ.

කරුණු මෙසේ නිසා ඉල්ලුම්කරු විසින් තමාගේ දියණිය පිළිබඳව කරන ලද නඩත්තු ඉල්ලීම පිළිගැනීමට මාතලේ මහේස්ත්‍රාත් උසාවියට බලය තිබෙන බව මම පිළිගනිමි. ඒ අනුව මම උගත් මහේස්ත්‍රාත්වරයාගේ නියෝගය නිෂ්ප්‍රභා කොට නැවතත් මෙම නඩුව නීතිය අනුව ගත යුතු වැඩිමනත් පියවරක් ඇත්නම් එය ගැනීම සඳහා ඔහු වෙත යවමි. මෙම ඇපෑල් පෙත්සම සඳහා ගිය වියදම් ලැබීමට ඉල්ලුම්කරුට සුදුසුකම තිබේ.

ඇපෑලට ඉඩ දෙන ලදී

ගරු ශ්‍රී ස්කන්ධරාජා විනිශ්චයකාරතුමා ඉදිරිපිට

අබේවික්‍රම එ. කරුණාරත්න*

ශ්‍රෙ. අ. නො: 72/61—කොළඹ රික්වැස්ට් උසාවියේ, නො: 75160

විවාද කළ සහ තීන්දු කළ දිනය : 1962 නොවැම්බර් 8 වෙනි ද.

ඉඩම් හිමි සහ බදුකරු—මාසයේ අන්තිම දිනයේ දී ගෙයින් පිටවීමට දැනුම් දීම—මෙය ලිත්-මාසයක දැනුම් දීමක් ද—එවැනි දැනුම් දීමක වලංගුභාවය.

මේ නඩුවේ බදු ගිවිසුම අනුව 1953 මැයි 1 වෙනිද බද්ද ආරම්භවී ඇත. ඉඩම් හිමියා (පැමිණිලිකරු) සවකීය බදුකරුට (විත්තිකරු) 1959 නොවැම්බර් 30 වනද ගෙයින් පිට වන ලෙස 1959 ඔක්තෝබර් 13 වනද දැනුම් දී තිබේ. ඉන් පසුව බදුකරු නෙරපීම සඳහා ඔහු නඩු පැවරුවේය.

තීන්දුව : ඉඩම් හිමිට ගෙයි භුක්තිය හිමිවිය යුතුව තිබුනේ දෙසැම්බර් 1 වනද පමණක් මිස නොවැම්බර් 30 වනද නොවන බැවින් ගෙයින් පිටවීමට දැනුම්දීම වලංගු නැත. එම නිසා නඩුව නිෂ්ප්‍රභා කළ යුතුය.

නීතිඥවරු : එන්. එස්. ඒ. ගුණතිලක, විත්තිකාර-ඇපැල්කරු වෙනුවෙන්.
එම්. එම්. කුමාරකුලසිංහම්, පැමිණිලිකාර-වගඋත්තරකරු වෙනුවෙන්.

ගරු ශ්‍රී ස්කන්ධරාජා විනිශ්චයකාරතුමා

මේ නඩුවේ දී කරුණු දෙකක් මතු කරන ලදී. ඉන් එකක් නම් පිටවීමට දැනුම් දීම ප්‍රමාණවත් ද යන ප්‍රශ්නයයි. කුලී ලැබිය යුතු කාලයට මාස කිහිපයකට පසුව කුලී පිළිගැනීම පුරුද්දක් කර ගත් පසු නඩුවක් පැවරීමට පැමිණිලිකරුට පුළුවන් ද යනු අනිත් ප්‍රශ්නය යි. පළමු වැනි ප්‍රශ්නය සම්බන්ධයෙන් මා කර ඇති නිගමණය හේතු කොට ගෙන දෙවැන්න ගැන තීන්දුවක් අවශ්‍ය නැත. පිටවීමට දැනුම් දුන් ලියවිල්ල නඩුවේ දී ඉදිරිපත් නොකරන ලදී. ඒ සම්බන්ධයෙන් දැනගන්ට තිබෙන්නේ පැමිණිල්ලේ 3 වැනි ඡේදයේ සඳහන් කරුණු පමණකි. එනම් ''1959 නොවැම්බර් 30 වන ද ගෙයින් පිටවී එය සාමකාමී ලෙස බාරදෙන ලෙස 1959 ඔක්තෝබර් 13 වනද ඉහත සඳහන් පැමිණිලිකරු විසින් විත්තිකරුට දැනුම් දෙන ලදී '' යනුයි. පි 1 දරණ බදු ගිවිසුම 1953 මැයි 1 වනද බද්ද ආරම්භවූ බව පෙනේ. එම නිසා ඉඩම් හිමිට ගෙයි භුක්තිය හිමිවීමට තිබුනේ 1959 දෙසැම්බර් 1 වනද පමණයි. නමුත් ඔහු 1959 නොවැම්බර් 30 වනද භුක්තිය ඉල්ලා සිටි හෙයින් එය ලිත්-මාසයක් දැනුම් දීමක් නොවේ.

මම, එමනිසා, ඇපැලට ඉඩ දෙන අතර පහළ උසාවියේ නඩු තීන්දුව පසෙක තබමින් පැමිණිලිකරුගේ නඩුව ගාස්තු සහිතව නිෂ්ප්‍රභා කරමි. මෙම ඇපැල් ගාස්තු විත්තිකරුට හිමි විය යුතුය.

ඇපැලට ඉඩ නෙද ලදී

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* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයේ 63 වෙනි කා., 23 වෙනි පිට බලනු.

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ගරු අබේසුන්දර විනිශ්චයකාරතුමා ඉදිරිපිටදී.

පූපාලසිංහම් එ. ස්වාන් (ඇක්සයිස් ඉන්ස්පැක්ටර්, මන්නාරම)*

ශ්‍රේෂ්ඨාධිකරණය අංකය 636/62—මන්නාරමේ මහේස්ත්‍රාත් උසාවිය, අංකය 19232.
(චිත්තිකරු සිරගෙදරය)

විවාද කොට තීන්දු කළ දිනය : 1962 අගෝස්තු 13.

ළමයින් සහ තරුණයන් පිළිබඳ ආඥාපණත (23 වෙනි පරිච්ඡේදය) 28 සහ 35 දරණ ඡේද—මහේස්ත්‍රාත් වරයකු විසින් සුරාබද්ද ආඥාපණත අනුව වරදක් පිළිබඳව දඬුවම් කිරීම—තරුණයකු පරිවාසක නිලධාරියෙකුගේ පරිපාලනය යටතේ තැබීමට දුන් නියෝගයක්—මෙවැනි නියෝගයක් දිය හැක්කේ කවරෙකු විසින් ද ?—එවැනි නියෝගයක් දීමට තිබිය යුතු කරුණු.

තීන්දුව :—(1) ළමයින් සහ තරුණයන් පිළිබඳ ආඥාපණතේ 35 (1) (ඩී) ඡේදය යටතේ නියෝගයක් දිය හැක්කේ මහේස්ත්‍රාත් වරයෙකුගේ උසාවිය ළමා උසාවියක් වශයෙන් කටයුතු කරණ අවස්ථාවක පමණකි.

(2) මෙවැනි නියෝගයක් දිය හැක්කේ ප්‍රදේශීය පාලන මණ්ඩලයක නිලධාරියෙකු හෝ පොලිස් නිලධාරියෙකු හෝ අන්කිසි බලයලත් පුද්ගලයකු විසින් ළමයෙකු හෝ තරුණයකු උසාවියට ඉදිරිපත් කරණ ලද කල්හි පමණකි.

නීතිඥවරු :—චිත්තිකාර–ඇපැල්කරු තමාම පෙනී සිටියේය.
පී. නගුලේස්වරම්, රජයේ අධිනීතිඥතැන, ඇටෝර්නි-ජනරල්තුමා වෙනුවෙන්.

ගරු අබයසුන්දර විනිශ්චයකාරතුමා,

සුරාබද්ද ආඥාපණතේ චෝදනාවක් පිළිබඳව වැරදිකරු යයි කියනු ලැබූ චිත්තිකාර-ඇපැල්කරු එම චෝදනාවට වරදකාරයා යයි පිළිගත්තේය. ඔහුට නීති ප්‍රශ්නයක් උඩ මිස ඇපැල් පෙත්සමක් ඉදිරිපත් කිරීමේ අයිතිවාසිකමක් නොතිබිණි. ඔහුගේ පෙත්සමේ (4) (සී) දරණ ඡේදයෙහි ඔහු කියා සිටින්නේ "මන්නාරමේ ළමා උසාවියේ මෙම නඩුව පටන් නොගෙන ඒවෙනුවට එය මන්නාරමේ මහෙස්ත්‍රාත් උසාවියෙහි පටන් ගත් බවකි". මෙම නඩුවෙහි දී ඇති නියෝග දෙකින් එකක් සම්බන්ධයෙන් මෙම නීති ප්‍රශ්නය අදාල වන බව මට පෙනියන්නේ එය ළමයින් හා තරුණ අය පිළිබඳ පණතේ පැනවීම් වලට අනුව කෙරී තිබෙන නිසාය. එබැවින් මම මෙම ඇපැල් පෙත්සම භාරගනිමි.

මෙහිදී චිත්තිකාර–ඇපැල්කරු වරදකරු යයි නිගමනය කළ උගත් මහෙස්ත්‍රාත්තුමා ළමයින් හා තරුණ අය පිළිබඳ ආඥාපනතේ 28 (1) ඡේදයට අනුව ඔහුට ඔහුගේ පියා විසින් ගෙවනු ලැබිය යුතු සේ නියෝග කරමින් රුපියල් 200/- යක දඩයක් නියම කළේය. වැඩිහිටියෙකුට දඩයක් ගසා දඬුවම් කළ හැකි කිනම් වරදකට වුවද බාල වයස් කරුවෙකුට විරුඬව යම්කිසි උසාවියක නඩු පවරා ඇතිවිට මෙම ඡේදයට අනුව ක්‍රියා කළ හැක. ඉහත සඳහන් ආඥාපණතේ 88 වැනි ඡේදයට අනුව "ළමයා" යන්නෙන් අදහස් කෙරෙන්නේ වයස 14 කින් අඩු කෙනෙකු වන අතර "වයසින් බාල තැනැත්තා යනුවෙන් අදහස් කරනුයේ වයස 14 ට පිළිපන් එහෙත් වයස 16 ට අඩු තැනැත්තෙකුය. මෙම නඩුවෙහි නඩුපොත දෙස අවධානය යොමු කරන ලද මට 25.3.58 දනම දරණ පරිවාස නිලධාරියාගේ (Probation Officer's) වාර්තාවෙන් පෙනී යන්නේ 22.9.45 දරණ දින උපන් චිත්තිකාර–ඇපැල්කරු 13 හැවිරිදි වියෙහි කෙනෙකු බවය. පරිවාස නිලධාරියාගේ මෙම ප්‍රකාශයෙන් තෘප්තියට පත් මහෙස්ත්‍රාත්වරයා චිත්තිකාර-ඇපැල්කරු

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 63 වෙනි කා., 25 වෙනි පිට බලනු.

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වරදකරු වූ අවස්ථාවෙහි ළමයින් හා තරුණ අය පිළිබඳ ආඥාපණතෙහි සඳහන් වූ පරිදි ළමයෙකැයි ඒත්තුගෙන තිබේ. විත්තිකාර–ඇපැල්කරු වරදකරු කිරීම හා ඒ පිළිබඳව උගත් මහෙස්ත්‍රාත්වරයා විසින් ළමයින් හා තරුණ අය පිළිබඳ ආඥාපණතේ 28 (1) ඡේදය යටතේ දෙන ලද දඬුවම මම ස්ථිර කරමි.

28.3.58 දරණ දින උගත් මහෙස්ත්‍රාත්තුමා විසින් ළමයින් හා තරුණ අය පිළිබඳ ආඥාපණතේ 35 (1) (ඩී) ඡේදයට අනුව දෙන ලද තවත් නියෝගයක් තිබේ. ඉන් විත්තිකාර-ඇපැල්කරු පරිවාස නිලධාරියෙකුගේ පරිපාලනයට යටත් වේ. මෙම නියෝගය දෙන විට උගත් මහෙස්ත්‍රාත්වරයාගේ උසාවිය ළමා උසාවියක් හැටියට කටයුතු කළ බවක් මෙම නඩුකොපියෙන් මට නොපෙනේ. මෙවැනි නියෝගයක් දිය හැක්කේ මහෙස්ත්‍රාත් උසාවියක් ළමා උසාවියක් වශයෙන් කටයුතු කිරීම සඳහා රැස්වූ අවස්ථාවක පමණි. එසේම තවදුරටත් සලකා බැලූවිට මෙබඳු නියෝගයක් දිය හැක්කේ යම්කිසි ළමයෙකු හෝ බාල වයස් කාරයෙකු කිසියම් ප්‍රාදේශීය බලමණ්ඩලයක නිලදරුවෙකු විසින් හෝ පොලිස් නිලදරුවෙකු විසින් හෝ අවසරය ලත් වෙන අයෙකු විසින් හෝ උසාවියට ඉදිරිපත්කල විටක පමණකි. මෙම නඩුවෙහි විත්තිකාර–ඇපැල්කරු උසාවියට ඉදිරිපත්කර ඇත්තේ සුරාබදු පරීක්ෂකයෙකු විසිනි. ළමයින් හා තරුණ අය පිළිබඳ ආඥාපණතේ 35 (3) ඡේදයේ විග්‍රහවී ඇති අන්දමට මෙම සුරාබදු පරීක්ෂකයා ''අවසර ලත් තැනැත්තෙකු'' බවට සාක්ෂි නොමැත. එබැවින් 28.3.58 දරණ දින උගත් මහෙස්ත්‍රාත්වරයා විත්තිකාර–ඇපැල්කරු එම ආඥාපණතේ 35 (1) (ඩී) දරණ ඡේදය යටතේ පරිවාස නිලධාරියෙකුගේ පරිපාලනයෙහි තැබිය යුතුයයි කළ නියෝගය මම ඉවත හෙලමි. එසේම 5.5.62 වන දින විත්තිකාර-ඇපැල්කරු වරදකරු කරමින් රුපියල් 175 ක දඩයකට යටත්කර දුන් තීන්දුව මෙ නියෝගය දෙන විට විත්තිකාර–ඇපැල්කරු පරිවාස නිලධාරිකුගේ පරිපාලනයේ සිටිය යුතු නියෝගය ක්‍රියාත්මක වී තිබියදී වෙන නඩුවක චෝදනාවකට දුන් තීන්දුවක් නිසා එය ප්‍රතික්ෂෙප කොට ඉවත හෙලමි.

ඇපැලට ඉඩ දෙන ලදී.

එච්. ඇන්. ජී. ප්‍රනාන්දු විනිශ්චයකාරතුමා සහ සින්නතම්බි විනිශ්චයකාරතුමා ඉදිරිපිට.

රෙජිස්ට්‍රාර් ජනරාල් එ. කේ. ඒ. ටිකිරි බණ්ඩා සහ තවත් අය*

ශ්‍රෙ. අධිකරණයට කළ ඉල්ලීම් අංකය: **236/1961**—කොළඹ දිස්ත්‍රික් උසාවියේ පරිශෝධන, **2927/X**

විවාද කළ දිනය : **7. 7. 1961**
තීන්දු කළ දිනය : **15. 12. 1961**

උත්පත්ති සහ මරණ ලියා පදිංචි කිරීමේ පණත, වර්ෂ **1951** නො. **17**—ලියා පදිංචි කිරීමේදී නම සහ ස්ත්‍රී-පුරුෂ භාවය ගැන ඇතිවූ වරදක්—නිවැරදීසේ සටහන් කිරීමට නියෝගයක් දිස්ත්‍රික් උසාවියෙන් ඉල්ලීම—පණතේ අංක **28** දරණ ඡේදය යටතේ රෙජිස්ට්‍රාර් ජනරාල් තුමාට කළ නියෝගයක්—එම නියෝගය ආඥා බලය ඇතුව කරණ ලද්දක් ද යන වග.

තම ස්වාමිපුරුෂයා වන **1** වන වගඋත්තරකරුට දාව වර්ෂ **1954** අප්‍රියෙල් මස **2** වන දින වගඋත්තරකාරියට **3** වන වගඋත්තරකාරිය වන තම ළමයා බිහිවිය. ළමයාගේ නම ''සුනිල්'' හැටියටත් ස්ත්‍රී-පුරුෂ භාවය ''පිරිමියා'' හැටියටත් සටහන්වී මෙම උත්පත්තිය වර්ෂ **1954** අප්‍රියෙල් මස **14** වන දින ලියා පදිංචි විය. ළමයාගේ නම ''සුනිලා'' යයි ද ස්ත්‍රී-පුරුෂ භාවය ''ගැහැණිය'' යයි ද පිළිවෙලින් වෙනස් කරණ ලෙස රෙජිස්ට්‍රාර් ජනරාල්තුමාට නියෝගයක් දෙන ලෙස වර්ෂ **1960** ජූනි මස **3** වන වග-උත්තරකාරි කොළඹ දිස්ත්‍රික් උසාවියෙන් ඉල්ලීමක් කළාය. කලින් කර

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයේ 63 වෙනි කා., 53 වෙනි පිට බලනු.

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තිබෙන මෙම සටහන් යම්කිසි වැරදීමකින් කෙරී තිබේ යයි තෘප්තියට පත් දිස්ත්‍රික් උසාවිය ඉල්වන ලද එම වෙනස් කිරීම් සටහන් කිරීමටයි වර්ෂ 1951 අංක 17 දරණ උත්පත්ති සහ මරණ ලියා පදිංචි කිරීමේ පණතේ 28 වන ඡේදය අනුව යයි සලකා ගෙන රෙජිස්ට්‍රාර් ජනරාල්තුමාට නියෝගයක් කළේය. මෙහි දැනට ඉදිරිපත්වී ඇති ඉල්ලීමෙන් රෙජිස්ට්‍රාර් ජනරාල්තුමා එම නියෝගය පරිශෝධනය කරණ මෙන් ඉල්වා සිටියේය.

තීන්දුව :—(1) මෙම නියෝගය ආඥාබලය නොමැතිව කරණ ලද්දකි. මීට හේතුව— (ඒ): 28 (1) ඡේදයේ (1) දරණ කොටසින් උත්පත්තිය ලියා පදිංචි වී ඇති යම් කෙනෙකුගේ නම වෙනස් කිරීමට උසාවියට බලයදී ඇතත් මෙය කළ හැක්කේ ඒ තැනැත්තාගේ වයස සම්පූර්ණ වූ පසුවයි; (බී)— උප්පැන්න සහතිකයක කෙනකුගේ ස්ත්‍රී-පුරුෂ භාවය ගැන කෙරී ඇති සඳහන වෙනස් කිරීමට 18 වන ඡේදයෙන් කිසි ලෙසකින්වත් විධිවිධානයක් යෙදී නැත.

(2) මෙම පණතේ 52 (1) (h) ඡේදය අනුව රෙජිස්ට්‍රාර් ජනරාල් තුමාටම යම්කිසි කරුණක හෝ අර්ථයක වරදක් නිවැරදි කළ හැකි බව පෙනීගියත් මෙම බලය දී තිබෙන වාක්‍ය පාඨ සම්බන්ධය ගැන සලකා බැලීමේදී එය කළ හැක්කේ එම උත්පත්තිය ලියා පදිංචි කිරීමට කලින් තමා වෙත ඉදිරිපත් කොට ඇති ''නිවේදන කරුණු'' අනුව එම ලියා පදිංචි කිරීම කර නැති බව පැහැදිලිව වැටහුණු අවස්ථාවක පමණකි

එච්. ඇන්. ජී. ප්‍රනාන්දු විනිශ්වයකාරතුමා විසින් :—'' . . . මෙම ළමයාගේ දෙමව්පියන් විසින් කියා සිටින අන්දමට උද්ගතවී ඇති මේ තත්වය සකස් කිරීමට කිසිම පිළිසරණක් දැනට පවත්නා හැටියට නීතියෙහි නොදැක්වේ. මෙවැනි අපූර්ව තත්ත්වයක් උද්ගතවූ විට ක්‍රියා කරණු සඳහා නීතියේ යම් කිසි සංශෝධනයක් අවශ්‍ය බව සැලකිරීමෙන් මේ සඳහා එම කාර්‍ය්‍යයෙහි නිරතව ඇති අධිකාරින්ගේ අවධානය රෙජිස්ට්‍රාර් ජනරාල්තැන විසින් යොමු කරණ බවට මට කිසිදු සැකයක් නැත.''

නීතිඥවරු : මර්වින් ප්‍රනාන්දු, රජයේ අධිනීතිඥ, පෙත්සම්කරු වෙනුවෙන්.

ඇප්. සී. පෙරේරා, වගඋත්තරකරුවන් වෙනුවෙන්.

ගරු එච්. ඇන්. ජී. ප්‍රනාන්දු විනිශ්වයකාරතුමා:

මෙය වර්ෂ 1951 නොවැම්බර 17 දරණ උත්පත්ති සහ මරණ ලියා පදිංචි කිරීමේ පණත අනුව කොළඹ දිස්ත්‍රික් උසාවිය විසින් කරණ ලද නියෝගයක් පරිශෝධනය කිරීමට යයි රෙජිස්ට්‍රාර් ජනරාල්වරයා විසින් කරණ ලද ඉල්ලීමකි. වර්ෂ 1954 අප්‍රියෙල් මස 2 වන දින උපන් මෙම නඩුවේ දැනට සිටින 2 වන වගඋත්තරකාරිය 1 වන වග-උත්තරකරු වන ස්වාමිපුරුෂයාට දාව 3 වන වගඋත්තරකාරියට උපන් දරුවා බැව් පෙනී යයි. ළමයාගේ නාමය ''සුනිල්'' හැටියටත් ස්ත්‍රීපුරුෂත්ත්වය ''පිරිමියා'' හැටියටත් මෙම ළමයා වර්ෂ 1954 අප්‍රියෙල් මස 24 වෙනි දින ලියා පදිංචි කරණු ලැබුවාය.

වර්ෂ 1960 ජුනි මස මෙම ළමයාගේ උප්පැන්න සහතිකයෙන් ඇති සටහන්වල නම ''සුනිලා'' යන ගැහැණු නාමයක් ලෙස වෙනස් කිරීමට සහ එහි වූ ස්ත්‍රී පුරුෂ භෙදයේ සටහන ''ගැහැනියක්'' යන ලෙස වෙනස් කිරීමට ද රෙජිස්ට්‍රාර් වරයාට උපදෙස් දෙන ලෙස 3 වන වග-උත්තරකාරී කොළඹ දිස්ත්‍රික් උසාවියෙන් ඉල්ලීමක් කළාය. සාක්ෂි ස්වල්පයක් සටහන් කළ දිස්ත්‍රික් විනිශ්වයකාර තැන මෙය උත්පත්තිය ලියා පදිංචිකිරීමේදී සිදුවූ යම්කිසි වැරදීමකින් හෝ ''කර්ම විකෘතියකින්'' (twist of fate) සිදුවන ලද්දක්යයි තෘප්තියට පැමිණ (එම ළමයාගේ නම සහ ස්ත්‍රී පුරුෂ භාවය පිළිබඳව) එම ඉල්ලීමට ඉඩදී එම වෙනස් කිරීම් කළයුතු යයි රෙජිස්ට්‍රාර් ජැනරාල් වරයාට නියෝග කෙළේය. මෙම නියෝගය ආඥා පණතේ 28 වන ඡේදය යටතේ කළ දෙයක් මෙන් පෙනීයතක් එහි පහත සඳහන් කරුණු ඉතාම පැහැදිලිය.

(1) උත්පත්තිය ලියා පදිංචි කළ කෙනකුගේ, නාමය වෙනස් කිරීමට 28 (1) දරණ ඡේදයේ (ඒ) අක්-

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ෂරය දරණ ඡෙදයෙන් උසාවියට බලය ඇති නමුත් එම වෙනස් කිරීම ඒ නැනැත්තාගේ වයස් පිරෙණ තුරු කළ නොහැක.

(2) උප්පැන්න සහතිකයක ස්ත්‍රී පුරුෂ භාවය ගැන ලියවී ඇති සටහන වෙනස් කිරීමට එම 28 වන ඡෙදයෙන් කොයි ලෙසකින් වත් විධිවිධානයක් යෙදී නැත.

එබැවින් වර්ෂ 1961 පෙබරවාරි 21 වන දින දිස්ත්‍රික් නඩුකාරවරයා විසින් උසාවිය වෙත යාඥ කරණ ලද්දට ඉඩදීම කර ඇත්තේ තමාට ආඥ බලයක් නොමැතිව බව ඉතාම පැහැදිලි බැවින් එම නියෝගය මෙයින් ඉවතට දමේ.

මෙම උත්පත්තිය ලියා පදිංචි කිරීම පිළිබඳ වරදක් ඇත්නම් සාමාන්‍ය වශයෙන් සිදු නොවන වරදකි. එමනිසා ආඥ පණතේ එවැනි තත්ත්වයකදී ගතයුතු පියවර ගැන සඳහන් නොවීම පුදුමයක් නොවේ. රෙජිස්ට්‍රාර් ජනරාල් තැනට 52 (1) (h) යන ඡෙදය යටතේ තමාටම යම්කිසි කරුණක හෝ අර්ථය ගැන හෝ වරදක් ඇත්නම් එය නිරවද්‍ය කල හැකි වුවද ඔහුටදී තිබෙන බලය එහි ඇති වාක්‍ය පාඨ සම්බන්ධය ගැන සලකා බැලීමේදී එය කළ හැක්කේ එම උත්පත්තිය ලියා පදිංචි කිරීමට කලින් තමා වෙත ඉදිරිපත් කොට ඇති "නිවේදන කරුණු" වලට අනුකූලව එම ලියා පදිංචි කිරීම කෙරී නොමැති බව පැහැදිලිව වැටහුණු අවස්ථාවක පමණක්ය යනු මගේ මතයයි. මෙම සිඩීයේදීත් සිදුවී ඇත්තේ එබඳු දෙයක් නම් එය පරීක්ෂණයකින් පසු රෙජිස්ට්‍රාර් ජනරාල් තැන 52 (1) ඡෙදය යටතේ මෙම තත්ත්වය සකස් කරණවාට මට කිසිම සැකයක් නැත. එහෙත් සිඩීය එබන්දක් නොවේ නම්, මෙම ළමයාගේ දෙමව්පියන් විසින් කියා සිටින අන්දමට උද්ගතවී ඇති මේ තත්ත්වය සකස් කිරීමට කිසිම පිළිසරණක් දැනට පවත්නා හැටියට නීතියෙහි නොදක්වේ. මෙවැනි අපූර් තත්ත්වයක් උද්ගතවූ විට ක්‍රියා කරණු සඳහා නීතියේ යම්කිසි සංශෝධනයක් අවශ්‍ය බව සැලකිරීමෙන් මේ සඳහා එම කාර්‍යයෙහි නිරතව ඇති අධිකාරීන්ගේ අවධානය රෙජිස්ට්‍රාර් ජනරාල් තැන විසින් යොමුකරවන බවට කිසිදු සැකයක් නැත.

ගරු සින්නතම්බි විනිශ්චයකාරතුමා :

මම එකඟ වෙමි.

ඉල්ලීමට ඉඩ දෙන ලදී.

ගරු ශ්‍රී ස්කන්ධරාජා විනිශ්චයකාරතුමා ඉදිරිපිට.

සේබමලේ එ. මාරිසම්පිල්ලේ*

සු. උ. නො. 836/1962—ම. උ. මඩකලපුව, නො. 2309.

පරිවාස ආඥ පණත, 3 (1) වන ඡෙදය—එම ඡෙදය යටතේ වරදකරුවෙකු නොකර කල නියෝගයක්—එම නියෝගය නීත්‍යානුකූල ද ?

තීන්දුව :—යමෙකුට විරුඩව නගන ලද චෝදනාවක් සම්බන්ධව ඔහු වරදකරුවෙකුයයි තීන්දු නොකර පරිවාස ආඥ පණත යටතේ නියෝගයක් කිරීමට බලයක් නැත.

නීතිඥවරු:— ජේ. ඒ. පී. චෙරබිම් මහතා, විත්තිකාර-ඇපල්කරු වෙනුවෙන්.
පී. පී. ඇස්. ද සිල්වා, ආණ්ඩුවේ අධිනීතිඥ, ඇටෝර්නි-ජනරාල් වෙනුවෙන්.

ගරු ශ්‍රී ස්කන්ධරාජා විනිශ්චයකාරතුමා :

විත්තිකරුට විරුඩව නගන ලද චෝදනාව ඔප්පුවී තිබේ යයි මහේස්ත්‍රාත් තුමා හොඳින් කල්පනා කර පිළිගත් බව පමණක් කියා තිබේ. එයින් පෙනෙන්නේ එම චෝදනාවට විත්තිකරු වරදකරුවෙකුයයි තීන්දු කර නැති බවයි. මහේස්ත්‍රාත් තුමා ක්‍රියා කර තිබෙන්නේ අපරාධ නඩු සංවිධාන සංග්‍රහයේ 325 (1) වෙනි ඡෙදය අනුව පමණයි. පරිවාස ආඥ පනතේ 3 (1) වෙනි ඡෙදයේ මෙසේ සඳහන් වේ—"අධිකරණ කොට්ඨාසයක් තුල යම් වරදක් කලේයයි කෙනෙකුට නගන ලද චෝදනාවකට ඔහු වරදකාරයා යයි තීන්දුකල අවස්ථාවකදී . . ." යනුයි. එබැවින් පරිවාස ආඥ පනත යටතේ නීත්‍යානුකූල නියෝගයක් කිරීමට පෙර, කෙනෙකු වරදකාරයෙකු ලෙස තීන්දුවී තිබිය යුතු යයි මගේ අදහසයි. මේ නඩුවේ කරුණු උඩ මහේස්ත්‍රාත් තුමා විත්තිකාරී— වරදකරු බවට තීන්දු නොකිරීම යුක්ති සහගතයි. මක්නිසාද, පැමිණිලිකාරී විත්තිකාරීගේ පුරුෂයා සමග රහසිගත කුලුපග කමක් ඇතිකර ගැනීමෙන් ඇය කුපිත කරවී යයි කරුණු පෙන්වා තිබුන හෙයිනි.

උගත් මහෙස්ත්‍රාත්වරයා විත්තිකාරී වරදකාරියෙකු නොකර පරිවාස ආඥ පනත යටතේ දී තිබෙන තීන්දුව අවලංගු කරමින් ඇයට අවවාදයකුත් සමග ගාස්තුව වශයෙන් රුපියල් විසිපහක් ගෙවීමටත් නියම කරමින් ඈ නිදහස් කරමි.

පරිවාස ආඥපනත යටතේ කල තීන්දුව අවලංගු කරන ලදී.

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* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 63 නි කා., 55 වෙනි පිට බලනු.

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ගරු ජී. පී. ඒ. සිල්වා විනිශ්චයකාරතුමා ඉදිරිපිට.

අධිකරණ ආඥා පණතේ 20 වන ඡේදය යටතේ තහනම් නියෝගයක් ඉල්ලීමක් පිළිබඳවයි.

මීරා මොහිදීන් එ. කල්මුනේ සුලු නගර සභාව සහ තවත් කෙනෙක්*

ඉල්ලුම් පත්‍රයේ අංකය: 520/62.

විවාද කොට තීන්දු කරන ලද දිනය: වර්ෂ 1962 දෙසැම්බර 12 වෙනි දින දිය.

අධිකරණ ආඥා පණත—20 වන ඡේදය—ඉන්ජන්ෂන් තහනම—කලින් මසක් කල් නොදී සුලු නගර සභාවකට විරුඬව පෙත්සම් කරුට නඩුවක් පැවරීමට නුපුළුවන් බව— නඩුව සැනෙකින් නොදමුවහොත් පෙත්සම් කරුට පිරිමැසිය නොහැකි පාඩු සිදුවන බවට ඇති භීතිය—සුළු නගර සභා ආඥා පණතේ 218 වන ඡේදය (පරිච්ඡේදය).

වර්ෂ 1960 ජූනි මාසයේදී සුළු නගර සභාවක එවකට සිටි සභාපති මහතා කඩවීදියේ කඩයක් පෙත්සම් කරුට කුලියට දුන්නේය. මින්පසු කිසිම නීත්‍යානුකූල අවසරයක් නොමැතිව "කේ" නමැත්තෙක් එම ගොඩනැගිල්ලෙන් කොටසක පදිංචි වූ නිසා ඔහු ඉන් බැහැර කිරීමට සුළු නගර සභාව විසින් නඩු පවරණ ලදි. මෙම නඩුව විභාගවී නිමවීමට පෙර සුළු නගර සභාවට අළුත් සභාපති වරයකු තේරී පත්විය. යම් කිසි ආරංචියක් ලැබූ පෙත්සම්කරු අලුත් සභාපති වරයා "කේ" නමැත්තා එහි නියම කුලී ගෙවන පදිංචි කරුවකු ලෙස සලකාය යන බියෙන් එම සභාපතිවරයා "කේ" නමැත්තාට එහි පදිංචිවීමේ අයිතිවාසිකම දීමෙන් වැළැක්වීම පිණිස,

(ඒ) තමා සභාපතිවරයාට විරුඬව නඩුවක් දැමීමට අදහස්කර ඇතත් සුළු නගර සභා ආඥා පණතේ 218 (1) දරණ ඡේදයට අනුව මසකට කලින් මේ බව ලියවිල්ලකින් දැනුම් දිය යුතු නිසා එම කටයුත්ත වැළකීමේ හේතුවෙනුත්,

(බී) මෙසේ මසක් ගතවනතුරු නඩු දැමීම පමා කළොත් ඔහුට පිරිමැසිය නොහැකි පාඩුවක් සිදුවීමේ හේතුවෙනුත්,

සභාපතිවරයාට විරුඬව තහනම් නියෝගයක් ශ්‍රේෂ්ඨාධිකරණයෙන් ඉල්ලා සිටියේය.

තීන්දුව: මෙම කරුණු අනුව අධිකරණ ආඥා පණතේ 20 වන ඡේදය යටතේ අතුරු තහනම් ආඥාවක් ලැබීමට පෙත්සම්කරු සුදුසු තත්වයක සිටී. එම ආඥාවේ බලපැවැත්වීම සතියකට සීමාවේ.

සඳහන් කළ නඩු; සිල්වා එ. තම්බයියා, 63 න.නී.වා. 228.

නීතිඥවරු: ගරු රාජනීතිඥ ඇම්. තිරුවෙල්වම් මහතා, ඒ. ආර්. මන්සූර් සහ ඒ. නසීම් සමග, පෙත්සම්කරු වෙනුවෙන්.

ගරු ජී. පී. ඒ. සිල්වා විනිශ්චයකාරතුමා,

මෙම නඩුවෙහි පෙත්සම්කරු කල්මුණේ නගර සභාවේ බදු ගෙවන්නෙක් වූ අතර දෙවන වග-උත්තරකරු එම නගර සභාවේ සභාපතිවරයා ය. මෙම නගර සභාවේ කඩවීදියේ පිහිටි නො: 2 දරණ කඩය මසකට රු. 27.03 කුලිය වශයෙන් ගෙවන ලෙස පෙත්සම් කරුට මෙම නගර සභාවේ කලින් සිටි සභාපතිවරයා විසින් 1960 ජූනි මාසයේ දී දෙන ලදි. ටික කලකට පසු මෙම ඉඩමෙන් එක් කොටසක නීත්‍යානුකූල අවසරයක් නැතිව ඇස්. ඇම්. කනගරත්නම් නමැත්තෙක් පදිංචිවීමට පටන් ගත් නිසා පෙත්සම්කරු විසින් නගර සභාවට පැමිණිලි කරන ලදුව කල්මුණේ දිස්ත්‍රික් උසාවියෙහි නගර සභාව විසින් ඇස්. ඇම්. කනගරත්නම්ට විරුඬව ඔහු එතැනින් පිටමං කිරීමටයැයි නො: 885/2 දරණ නඩුව පවරන ලදි. මෙම නඩුව එම දිස්ත්‍රික් උසාවියේ විභාගයට ගැනීමට පෙර කල්මුණේ නගර සභාවට අළුත් සභාපතිවරයෙක් පත්විය. යම්කිසි ආරංචියක් අනුව කිසිම නීත්‍යානුකූල අවසරයක් නොමැතිව එහි පදිංචිවී

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයේ 63 වෙනි කා., 57 වෙනි පිට බලනු.

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ඇති කනගරත්නම් කඩය කුලියට ගත් තැනැත්තා හැටියට අභිනව සභාපතිවරයා සලකන බව නියම පදිංචි කරුවාවූ පෙත්සම්කරුවා සැක කලේය. එබැවින් පළමු වන දෙවන වග–උත්තර කරුවන්ට විරුද්ධව පෙත්සම්කරුවා දිස්ත්‍රික් උසාවියේ නඩුවක් පැවරීමට බලාපොරොත්තුවිය. කෙසේ වුවද නගර සභා ආඥා පණතේ 218 (1) ඡෙදයේ පැනවීම් අනුව ඔහුට පළමු වන දෙවන වග–උත්තරකරුවන්ට නඩු දැමීමට මසකට කලින් නිවේදනයක් නොදී මෙය නොකළහැකි වේ. පෙත්සම්කරු දැමීමට අදහස් කරන නඩුවෙන් බලාපොරොත්තු වන්නේ පහත සඳහන් කරුණුය:

(ඒ) කල්මුණෙ කඩ විදියේ නො: 2 දරණ කඩයෙහි නීත්‍යානුකූල භුක්තිය ඔහු සතු බව කියන ප්‍රකාශයක් ලබා ගැනීම,

(බී) කල්මුණෙ කඩවීදියේ ඇති මෙම කඩයෙහි භුක්තිය ගැනීමට හෝ පදිංචි වීමට කනගරත්නම් සමග ගෙවල් කුලි කොන්ත්‍රාත්තුවක් ඇතිකර ගැනීමෙන් වග–උත්තරකරුවන් වැලක්වීම සඳහා සැමදා බලපවත්වන තහනම් ආඥාවක් ලබා ගැනීම,

(සී) කල්මුණෙ දිස්ත්‍රික් උසාවියේ නඩුවක් තීරණය වනතුරු කල්මුණෙ කඩවීදියේ නො: 2 දරණ මෙම කඩය භුක්ති විදීමට හෝ එහි පදිංචි වීමට කනගරත්නම්ට අවසර දෙමින් වග–උත්තරකරුවන්ට කොන්ත්‍රාත්තුවකට බැඳිය නොහැකි ලෙස තාවකාලික ආඥාවක් ලබා ගැනීම.

පෙත්සම්කරු වෙනුවෙන් පෙනී සිටින තිරුවෙල්වම් මහතා කියන හැටියට දවස් කීපයකට පෙර මෙම නිවේදනය දී තිබේ. එසේම දිස්ත්‍රික් උසාවියට මේ සම්බන්ධව අවශ්‍ය ලියකියවිලි බාරදීමට පෙර පෙත්සම්කරුට අධිකරණ ආඥා පණතේ 20 වන ඡෙදයේ ඇති විධානයට අනුව වග–උත්තරකරුවා එකී කනගරත්නම් සමග නො: 2 දරණ එම කඩය පිළිබඳව ඇතිකරගතහැකි කොන්ත්‍රාත්තුවක් වැලැක්වෙන ලෙස ආඥාවක් නිකුත් නොකළහොත් පිරිමසා ගත නොහැකි අලාභයන්ට පෙත්සම්කරු ගොදුරුවේ. 63 නව නීති වාර්තාවෙ 228 වෙනි පිටේ වාර්තාවී ඇති ආර්. අරනෝලිස් සිල්වා, ඒ. ඩී. තම්බයියා යන නඩුවෙහි සුප්‍රීම් උසාවියට යම් ඉල්ලුම් පත්‍රයක් පාර්ශව කරුවකු විසින් ඉදිරිපත් කළ විට ඔහුට තහනම් ආඥාවක් නොදුන්නොත් අලාභයක් වන බව සහ එය ප්‍රමාද වුවහොත් එබඳු ආඥාවකින් බලාපොරොත්තු වන පරමාර්ථය සම්පූර්ණයෙන් විනාසේ යයි වැටහී ගියොත් විරුද්ධ පාර්ශවයෙන් කරුණු නොඅසා වුවද එසේ කළ හැකි බව සඳහන්වේ.

මේ නයින් සලකා බලා අධිකරණ ආඥා පණතේ 20 වන ඡෙදය යටතේ වගඋත්තරකරුවන් හෝ ඔවුන්ගේ නියෝජිතයන් ඇස්. ඇම්. කනගරත්නම් සමග ඇති කර ගන්නා කුලියට ගැනීමේ කොන්ත්‍රාත්තුවක් අනුව කල්මුණෙ කඩවීදියේ නො: 2 දරණ කඩය කල්මුණෙ කනගරත්නම්ට අයිතිවීමට හෝ පදිංචි වීමට දීමෙන් වැළකෙන හැටියට එම තාවකාලික තහනම් ආඥාවක් නිකුත් කරන ලෙස නියෝග කරමි. මෙම තාවකාලික ආඥාව අද සිට සති හයක් බලපැවැත්වෙනු ඇත. නඩු ගාස්තුව සම්බන්ධයෙන් මම කිසිදු නියෝගයක් නොකරමි.

තාවකාලික ආඥාවක් නියෝග කරන ලදි.

ගරු ටී. ඇස්. ප්‍රනාන්දු සහ හේරත් යන විනිශ්චයකාරතුමන්ලා ඉදිරිපිටදිය.

කාරෝලිස් සියෙඩූ එ. හෙන්ද්‍රික් සියෙඩූ සහ අනෙක් අය*

ශ්‍රෙෂ්ඨාධිකරණයේ අංකය : 602 (අවසාන) 1959 — දිස්ත්‍රික් උසාවිය, ගම්පහ නො : 7145/පී.

විවාද කළ දිනය : 1962 පෙබරවාරි 1 ද.
තීන්දු කළ දිනය : 1962 නොවැම්බ 2 ද.

පිත කොමිසම—තෑගි ඔප්පුවක්—'' ඔවුන්ගේ මරණයෙන් පසුව එකී ඉඩම සමාන කොටස් වලින් ඔවුන්ගේ නීත්‍යානුකූල දරුවන් වෙත පැවරිය යුතුය '' යන වචනවල තේරුම.

ඉංග්‍රීසි බසට පරිවර්තනය කළවිට පහත සඳහන් පරිදි කියවෙන මෙම ඡෙදය එක්තරා පියෙකු විසින් තම පුතුන් පස්දෙනාගේ යහපත පිණිස ලියන ලද තෑගි ඔප්පුවක ගැබ්වී තිබිනි :—

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 63 වෙනි කා., 58 වෙනි පිට බලනු.

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'' කෙසේ වුවද ඉහත සඳහන් ත්‍යාගලාභීන් එකී ඉඩම භුක්ති විඳිනවා හැර එය ඔවුන් විසින් විකිණීම, උකස් කිරීම, ප්‍රදානය කිරීම, හුවමාරු කිරීම හෝ අන්කිසි විධියකින් අන්සතු කිරීම නොකළ යුතුය. ඔවුන්ගේ මරණයෙන් පසුව එකී ඉඩම සමාන කොටස් වලින් ඔවුන්ගේ නීත්‍යානුකූල දරුවන් වෙත පැවරි යායුතු අතර එම දරුවන්ට එම ඉඩම භුක්තිවිඳීමට හෝ ඔවුන්ගේ කැමැත්ත පරිදි එම ඉඩමට යම්කිසි දෙයක් කිරීමට හෝ පුළුවන.''

මෙම ඡේදය විත කොමිසමක් ඇති කිරීමට සොහොසත්ය යන්න ගැන තර්කයක් මතුවී නැත.

තීන්දුව:— මෙම වාක්‍ය කොටසෙහි ප්‍රකාශිත ව ඇති අන්දමට මෙම ඉඩම තෑගි දුන් අයගේ අදහස වූයේ ඔහු විසින් නම් කරණ ලද ඔහුගේ පුතුන්ට එය භුක්ති විඳීමට අවසර දීම සහ ඒ සියලු දෙනාම මැරුණු පසුව එකී නම් කරණ ලද අනුන්ගේ දරුවන් සම සමව එම ඉඩම සම්පූර්ණයෙන්ම ලබාගත යුතුය යන්නය.

සඳහන් කරණ ලද නඩු:— අබේරත්න එ. ජාගිරිස්, (1921) 26 න. නී. වා. 181 වන පිට.
ප්‍රනාන්දු එ. ප්‍රනාන්දු (1924) 27 න. නී. වා. 321 වන පිට.

නීතිඥධරු:— ගරු රාජනීතිඥ එච්. ඩබ්ලිව්. ජයවර්ධන මහතා, ඇම්. ඇල්. ඇස්. ජයසේකර සහ ඇල්. සී. සෙනෙවිරත්න මහතුන් සමග, පැමිණිලිකාර ඇපල්කරු වෙනුවෙන්.
ගරු එච්. ඒ. කෝට්ටෙගොඩ මහතා, පළමුවන සහ දෙවන විත්තිකාර වගඋත්තරකරුවන් වෙනුවෙන්.

ගරු ටී. ඇස්. ප්‍රනාන්දු විනිශ්චයකාරතුමා:

මෙම ඇපැල් පෙත්සමෙහි මතුවී ඇති ප්‍රශ්නය පැන නැගී ඇත්තේ නිෂ්ප්‍රභා කරන ලද බෙදුම් නඩුවකිනි. වර්ෂ 1911 පෙබරවාරි 26 වන දින ලියන ලදුව 'පී' 1 දමා සලකුණු කරන ලද යම්කිසි තෑගි ක්‍රමයක සඳහන් ඡේදයක නිවැරදි අර්ථ කථනය කුමක් ද යන්න විසඳීම මෙහි පරමාර්ථය වේ. එම නඩුවෙන් බෙදීමට උත්සාහ කරන ලද ඉඩම් කැබැල්ල විතානගේ හරමානිස් නැමැත්තෙකු විසින් මෙම තෑගි ඔප්පුවෙන්, පේදිරිස් අප්පු, හෙන්ද්‍රික් අප්පු (පළමු වන විත්තිකරු), ජෝන් සිංඤෝ, ජේම්ස් අප්පු සහ කොරනේලිස් (දෙවන විත්තිකරු) යන ඔහුගේ පුතුන් පස්දෙනෙකුහට දෙන ලද්දේය. ඉංග්‍රීසි බසට පරිවර්තනය කළ කල පහත සඳහන් පරිදි කියවෙන ඡේදයක් එම ඔප්පුවෙහි අන්තර්ගතව තිබේ.

'' කෙසේ හෝ වේවා ඉහත සඳහන් ත්‍යාගලාභීන්ට මෙම ඉඩම භුක්ති විඳිනවා හැර විකිණීමට උකස් තැබීමට තෑගිදීමට හුවමාරු කිරීමට හෝ වෙන අන්කිසි විදියකින් අන් සතු කිරීමට නොහැකි වන අතර ඔවුන්ගේ මරණයෙන් පසු ඔවුන්ගේ නීත්‍යානුකූල දරුවන් වෙත සමකොටස් වලින් පැවරෙන මෙම ඉඩම ඔවුන්ට භුක්ති විඳීමට හෝ එයට ඔවුන් කැමති දෙයක් කිරීමට හෝ පිළිවන.''

මෙහි ත්‍යාගලාභීන්ගේ දරුවන්ගේ ප්‍රයෝජනය සඳහා විතකොමිසමක් මෙම ඡේදයෙන් ඇතිවී නැතැයි කිනම් අවස්ථාවකවත් විවාද කොට නැත. මෙම බෙදුම් නඩුවෙහි පැමිණිලිකරු ඉහත නම් සඳහන් ත්‍යාගලාභීන්ගේ සහෝදරයෙකි. හරමානිස් නැමැති ත්‍යාගදායකයාට මෙම ත්‍යාගලාභීන් පස්දෙනා හැර තවත් දරුවන් සිටි බව පිළිගෙන තිබේ. ත්‍යාගලාභීන් පස්දෙනාගෙන් ජේම්ස් අප්පු නැමැත්තා ගැන අවුරුදු විසිපහක කාල පරිච්ඡේදයක් ඇතුළත කිසිම ප්‍රවෘත්තියක් දැනගන්නට ලැබී නැත. ඔහු මරුමුවට පත්වන ලදැයි සලකන අතර ඔහුට දරුවන් නොමැති බවත් සලකන ලදී. එපමණක් නොව සේදිරිස් අප්පු සහ ජෝන් සිඤ්ඤෝ යන තවත් ත්‍යාගලාභීන් දෙදෙනෙක් කසාද නොබැඳ දරුවන් නොලබා මියගියහ. මේ තාක් ජීවත් වන අනිත් ත්‍යාගලාභීන් දෙදෙනා පළමු වන දෙවන විත්තිකරුවෝ වී මෙම ඇපැල් නඩුවෙහි ද වගඋත්තරකරුවෝ වූහ. පළමු වන විත්තිකරුට ළමයි තිදෙනෙක් සිටිති. දෙවන විත්තිකරුට ළමයි නැත.

නඩුව විභාග කිරීමෙන් පසු, අඩුවශයෙන් එක් ත්‍යාගලාභියෙකුට වත් දරුවන් ඇතිකල දරුවන් නොමැති අනිත් ත්‍යාගලාභීන්ගේ දේපළ ඔවුන් විසින් නොලියන ලද උරුමක්කාරයින්ට ''පී 1'' දරණ ඔප්පුවෙන් කිසිම ප්‍රයෝජනයක් අයත් නොවන බව සැලකූ උගත් දිස්ත්‍රික් විනිශ්චයකාරතුමා මෙම නඩුව ගාස්තුවටත් යටත්කොට නිෂ්ප්‍රභා කෙළේය.

මේ තීරණයට විරුද්ධව පැමිණිලිකරු ඇපැල් පෙත්සමක් ඉදිරිපත් කෙළේය. මෙහිදී සේදිරිස් අප්පු සහ ජෝන් සිඤ්ඤෝ යන සහෝදරයන් ගෙන් එක් එක් අයගේ මරණයෙන් පසුව ද එසේම ජේම්ස් අප්පු මරුමුවට පත්වීයයි සැලකීමෙන් පසුව ද දරුවන් නොමැති ඒ අයගෙන් එක් එක් කෙනාට අයත් දේපළවල කොටස ඒ ඒ අය විසින් දේපළ ලියා නැති උරුමක්කාරයින්ට

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පැවරෙන බව ඔහු වෙනුවෙන් ඉදිරිපත් කරන ලද තර්කයයි. **අබයරත්න එ. ජාගරිස්,** (1924) 26 න. නී. වාර්තා 26, 181 පිට, නැමති නඩුවේ පිලිසරණ අධිනීතිඥවරයා විසින් මේ සඳහා පතන ලදී. මෙම නඩුවෙහි දී න්‍යාගදයකයෙකු යම්කිසි දීමනාවක් දෙමින් ඔහු විසින් ලියවන ලද ඔප්පුවක "තමා "ඊ" ට සහ "ඕ" ට සහ ඔවුන්ගේ උරුමක්කාරයින්ට, පොල්මක්කාරයින්ට, අද්මිනිස්ත්‍රාසි කාරයින්ට සහ පවරන ලද අයට දෙන්නෝය, ප්‍රදනය කරන්නෝය, පවරා දෙන්නෝය" යන ඡේදය යම් ඉඩමක් පිළිබඳව ලියන ලද ඔප්පුවක සඳහන් කර තිබුණ බව පෙනීගියේ "ඊ" ට සහ "ඕ" ට මෙම ඉඩම විකිණීමට, උකස් කිරීමට හෝ වෙන අයුරකින් අන්සතු කිරීමට නොහැකි බවත් ඔවුන්ගේ මරණයෙන් පසු එම ඉඩම ඔවුන්ගෙ දරුවන්ට පැවරී භුක්තිය ලැබී එම දරුවන්ට එය සම්පූර්ණ වශයෙන් තමන්ගේ ඉඩමක් හැටියට පරිහරණය කිරීමට බලය ලැබිය යුතුය" යන කොන්දේසියක් ද සඳහන් කරමිනි. මෙහිදී තීන්දුව දෙමින් අග්‍රවිනිශ්වයකාර බර්ට්‍රම් මහතා (මේ සඳහා වැඩ බලන විනිශ්වයකාර ජයවර්ධන මහතාගේ අනුමැතිය ද ඇතිව) ප්‍රකාශ කෙළේ මෙහි සඳහන් "ඔවුන්ගේ මරණය" යන වාක්‍ය ඛණ්ඩය තේරිය යුත්තේ එය "ඔවුන් එක් එක්කෙනාගේ මරණය" යන අදහස ඇතිව බවත් "ඔවුන්ගෙ දරුවන්" යන ඡේදය තේරිය යුත්තෙ "ඔවුන්ගේ ඒ ඒ අයට අයත් දරුවන්" යන ලෙසට බවත් ය යන අදහස දෙමිනි. මෙය කෙසේවෙතත් තුන්මසකට පසු නැවතත් විනිශ්වය කරනු ලැබූ නඩුවකදී එම විනිශ්වයකාර යුවල විසින්ම—එනම් **ප්‍රනාන්දු එ. ප්‍රනාන්දු,** 27 (1924) න. නී. වාර්තා—321 පිට, —යන නඩුවේදී "සි. ඩී." සහ "ඇම්. ඇෆ්." නැමති තමන්ගේ දියණියට සහ බෑණාට දෙන ලද ඉඩමක පහත සඳහන් කොන්දේසියකුත් ඇති ඡේදය වෙනස් අයුරකින් තේරුම් කරන ලදී. එම ඡේදය මෙසේය:—

"ඉහත සඳහන් 'සි. ඩී.' සහ 'ඇම්. ඇෆ්.' යන දෙදෙනා හෝ ඒ දෙදෙනාගෙන් කෙනෙකු හෝ මෙම ඉඩම විකිණීම උකස් කිරීම හෝ අන්කිසි ලෙසකින් අන්සතු කිරීම හෝ නොකළයුතු වන අතරම එය භුක්ති විඳ එයින් ලැබෙන කුලී, ලාභ, සහ ආදායම ඔවුන්ගේ සාමාන්‍ය මිනිස් ජීවිතයේදී පරිහරණය කළ පසු ඔවුන් මැරුණු කල එම ඉඩම සම්පූර්ණයෙන් ඔවුන්ගේ නීත්‍යානුකූල දරුවන්ට හිමිවිය යුතුය."

"සි. ඩී." නැමත්තිය ජන්මාන්තර ගතවිය. මේ කාලයේදී ඇයගේ ස්වාමිපුරුෂයා වන "ඇම්. ඇන්." නැමත්තා ද එක් දරුවෙක් ද ජීවතුන් අතර සිටියාහ. නමුත් විනිශ්වයකාර යුවල මවුපියන් දෙදෙනාම අභාවයට යන තුරු දරුවාට දේපළ පිළිබඳව කිසිම අයිතියක් නොලැබෙන බව නිගමනය කෙළේය.

බර්ට්‍රම් අග්‍රවිනිශ්වයකාරතුමා (ජයවර්ධන වැඩ බලන විනිශ්වයකාරතුමාගේ අනුමැතිය ද ඇතුව) එහිදී ප්‍රකාශ කළ දෙය විශේෂයෙන්ම කල්පනාකාරිව සලකා බැලිය යුතුය. එය මෙසේය:

"පළමුවෙන්ම මෙහිලා අප විසින් අර්ථකථනයට භාජන කළ යුත්තේ 'ඔවුන්ගේ මරණයෙන් පසු' යන වාක්‍ය ඛණ්ඩයයි. මුල් බැල්මට පෙනී යන්නේ මෙහි තේරුම දෙමාපියන් දෙදෙනාගේම මරණයෙන් පසුව යනුයි. මෙවැනි තැනක සටහන් වී ඇති කරුණු අනුව එසේ කළ යුතුයයි පෙනෙන විට මෙම අර්ථකථනය එක් එක්කෙනාට බෙදී බලපැවැත්වෙන හැටියට කළ යුතු බව ද මෙහි දී සලකමු. ඒ අයුරින් බලන කල **අභයරත්න එ. ජාගරිස්,** (ඉහත සඳහන්) නඩුවේදී යම්කිසි දේපලක් සහෝදරයන් දෙදෙනෙකුට හිමිවන පරිදි ලියා තිබී ඔවුන්ගේ මරණයෙන් පසුව දරුවන්ට හිමිවිය යුතුවූ තැනක මෙහි තේරුම ඒ එක් එක්කෙනාගේ මරණයෙන් පසුවයැයි නිගමනය කිරීමට අපට පුළුවන් විය. එහෙත් දැනට උද්ගත වී ඇති මෙම ප්‍රශ්නයේදී එවැනි අර්ථ පැහැදිලි කිරීමකට සරිලන තේරුමක් නැති බව පෙනේ."

තෑගි ඔප්පුවක් සම්බන්ධයෙන් අර්ථ කීමේදී එහි න්‍යාගදයකයාගේ අදහස තේරුම් ගතහැකි පරිදි එම වචන පරීක්ෂා කළ යුතුය. පියෙකු විසින් ඔහුගේ දරුවන්ගෙන් ස්වල්ප දෙනෙකුට පමණක් භුක්තිය විඳීමට ඉඩමක් දී ඔවුන්ගේ මරණයෙන් පසු එය ඔවුන්ගෙ දරුවන්ට සම කොටස් වලින් බෙදී යායුතු යයි ද ඉන්පසු එම ළමයින්ට එම ඉඩම කැමති හැටියකට පරිහරණය කිරීමට පිළිවනැයි ද කියා ඇති කලක න්‍යාගදයකයාගේ එම පුතුන් පස්දෙනාගෙන් අන්තිම ජීවත්ව සිටින්නාගේ මරණය තෙක් ඒ දේපළ දරුවන් පිට නොපැවරෙන බව "පී 1" දරණ ඔප්පුව ගැන සලකා බැලීමේදී මට පැහැදිලිව පෙනේ. මෙහිදී විවාදයට භාජනවූ අනිත් තේරුම එනම්:— "පී 1" දරණ ඔප්පුවෙහි සඳහන් එක් එක් පුත්‍රයාගේ මරණයෙන් පසු ඒ පුද්ගලයාගේ කොටස ඔහුගේ ළමයින්ට පැවරෙන අතර ඔහුට ළමයි නොමැති නම් එය ඔහුගේ අනිත් උරුමක්කාරයන්ට පැවරේය යන තර්කය අනුව හරමානිස් විසින් "පී 1" දරණ ඔප්පුවෙහි සඳහන් කළ පුතුන් පස්දෙනාගේ දරුවන්ට සමකොටස් වලින් පැවරීම අසීරු බව මෙහිදී නීතිකළ යුතුය. මාගේ අදහසේ හැටියට න්‍යාගදයකයාගේ "පී 1" දරණ ඔප්පුවෙහි සඳහන්ව ඇති අදහස එහි නම්කළ ඔවුන්ගේ පුතුන්ට භුක්ති විඳීමට අවසර දී ඔවුන් සියළුදෙනාම මරුමුවට පත්වූ පසු ඒ නම්කළ පුතුන්ගේ දරුවන් එම සම්පූර්ණ ඉඩම සමාන කොටස් වලින් හිමිකරගත යුතු බවය. එමනිසා නඩුව විසඳූ උගත් විනිශ්වයකාර තුමා අවසානයේදී බැසගත් නිගමනය නිවැරදියයි සලකමු. එබැවින් ගාස්තුවට යටත් කොට මෙම ඇපැල නිෂ්ප්‍රභා කළ යුතුය.

ගරු හේරත් විනිශ්වයකාරතුමා:

මම එකඟවෙමි.

ඇපැල නිෂ්ප්‍රභා කරන ලදී.

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ගරු වීරසූරිය විනිශ්චයකාරතුමා ඉදිරිපිට.

සෝමවතී එ. කුරේ*

සු. උ. නො: 406 (සංශෝධන)—කොළඹ රික්වැස්ට් උසාවිය, 74842.

වාද කළේ : 1961. 9.20.
තීන්දු කළේ : 1961.10.11.

සිවිල් නඩු සංවිධාන සංග්‍රහයේ—326, 327 සහ 327 (ඒ) යන ඡෙදයන්—බුත්තිය භාරදීමේ ආඥව ගෙනගිය පිස්කල් නිලධාරියාට බාධා කිරීම—එම බාධා කිරීම අවිචාරීවූ බවත් පීඩාකාරීවූ බවත් පිළිගැනීම—327 (ඒ) යන ඡෙදය යටතේ ආඥවක් නියෝග කිරීම—එම නියෝගය සංශෝධනය කිරීමට සුප්‍රීම් උසාවියෙන් ඉල්ලුම් කිරීම—පසුව 327 (ඒ) ඡෙදයේ උපවගන්තිය යටතේ බුත්තිය ඔප්පුකිරීමට නඩුවක්—ඉල්ලන ලද සංශෝධනයට ඉඩ තිබේ ද?—විනිශ්චිත නය හිමියාට බුත්ති භාරදීමට නියෝග කරණ විට කොන්දේසි පිට භාරදිය යුතු ද?

තීන්දුව :— සිවිල් නඩු සංවිධාන සංග්‍රහයේ 327 (ඒ) යන ඡෙදය යටතේ විනිශ්චිත නය හිමියා වෙත භාරදීමට යයි කරණ ලද ආඥවේ විස්තර කරණ ලද ඉඩම එසේ භාරදීමට, භාරදීමේ නියෝගය සංශෝධනය කිරීමට යයි සුප්‍රීම් උසාවියෙන් කරණලද ඉල්ලීමක් විභාග කිරීමට එම උසාවියට බාධාවක් හෝ බල සීමිත බවක් හෝ සඳහන් නැත.

ගරු වීරසූරිය විනිශ්චයකාරතුමා විසින් :— "විනිශ්චිත නය හිමියා ඉඩමේ භුක්තිය ලබනසේ නියෝගයක් කිරීමට මෙම ඡෙදය යටතේ උසාවියට දී ඇති බලයට, විනිශ්චිත නය හිමියා විසින් මෙම ඡෙදය යටතේ දමා ඇති නඩුවක තීන්දු ප්‍රකාශයෙන් කියැවෙන යම් යම් කටයුතු ඒ අයුරු ඉටුවන හැටියට ඇප දිය යුතු යයි කීමට බලය ද ඇතුලු වේය යනු මගේ හැඟීමයි."

මෙහි සඳහන් නඩු:— ගුණරත්න එ. ද සිල්වා, 58 න. නි. වා., 542.
අප්පුහාමි එ. සිමන්, 48 න. නි. වා., 298.

නීතිඥවරු:— වී. නඩරාජා මහතා පෙත්සම්කරු වෙනුවෙන්,
ඇස්. ශර්වානන්ද මහතා, ඇම්. ටී. ඇම්. සිවාර්ඩීන් මහතා සමග වගඋත්තරකරු වෙනුවෙන්.

ගරු වීරසූරිය විනිශ්චයකාරතුමා,

මෙම ඉල්ලුම් පත්‍රයෙහි වග-උත්තරකරුවා යම්කිසි ගොඩනැගිල්ලක් කුලියට ගත් අයෙකු වන මහදේවන් නැමැත්තෙකුට විරුඬව ඒ ගොඩනැගිල්ලේ හිඟව ඇති කුලිය අයකරගනු පිණිසත් ඔහු ගෙයින් පිටමං කරගනු පිණිසත් මේ නිසා සිදුවූ අලාභය අයකරගනු පිණිසත් කොළඹ රික්වැස්ට් උසාවියේ නො: 74824 දරණ නඩුව දමා තිබේ. පෙත්සම්කාරිය මේ කාලසීමාවේදී මහදේවන් සමග විවාහ වී එම ගොඩනැගිල්ලේම පදිංචිව සිටියාය. කල්ගතවත්ම මහදේවන් සහ පෙත්සම්කාරිය අතර අමනාපයක් ඇතිවී මහදේවන් පදිංචි ස්ථානයෙන් පිටව ගියේය. ඉන්පසු පෙත්සම්කාරිය ද්වේෂසහගතව තමා අත්හැර යෑමේ හේතුවෙන් මහදේවන්ට විරුඬව දික්කසාද නඩුවක් දමා ඇයගේ වාසියට යථාකාලයේදී තීන්දු ප්‍රකාශයක් ලබාගත්තාය.

එම දික්කසාද නඩුව නිමාවට යාමට පෙර වර්ෂ 1961 අප්‍රේල් මස 24 වෙනි දින නො: 74824 දරණ නඩුවේ යාඥකර ඇති පරිදි තමාට විරුඬව තීන්දුවක් දීමට මහදේවන් නැමැත්තා කැමති වී තිබේ. වර්ෂ 1961 මැයි මස 8 වන දින පිස්කල් නිලධාරි තැනට මෙම ඉඩමේ භුක්තිය භාරදෙන ලෙස අණ දෙන ආඥවක් ද නිකුත් විය. එහෙත් තදනන්තරව වගඋත්තරකරු විසින් සිවිල් නඩුවිධාන සංග්‍රහයේ 325 වන ඡෙදය යටතේ ඉදිරිපත් කරන ලද පෙත්සමක් නිසා එම ආඥව ක්‍රියාත්මක නොවී වැලකුණි. මෙම පෙත්සමෙන් වග උත්තරකරු කියා සිටියේ පිස්කල්කරුගේ නිලධාරියාට පෙත්සම්කරු සහ තවත් තිදෙනෙක් බාධාකළ බැවින් ආඥව ක්‍රියාත්මක කිරීමට නොහැකි බවත් මේ නියාමයෙන් එසේ බාධාකළ අයවළුන්ට විරුඬව එම නඩුවිධාන සංග්‍රහයේ 326, 327, සහ 327 (ඒ) යන ඡෙදයන්ට අනුව උසාවිය මගින් පියවර ගතයුතු බවත් ය. මේ පිළිබඳව කරණ ලද පරීක්ෂණයේදී පෙත්සම් කරු කියා සිටියේ වර්ෂ 1959 ඔක්තෝබර් මාසයේ සිට වග-උත්තරකරු විසින් පෙත්සම්කාරිය මෙම ගොඩනැගිල්ල කුලියට ගත් අය හැටියට පිළිගෙන ඇති බව ද ඒ කාල-සීමාවට පසු මෙම හැඟීමෙන් යුක්තව ඇය විසින් ඔහුට ගෙවල් කුලී ගෙවා ඇති බව ද, මේ නිසා ඇයට එම ගෙයි පදිංචිව සිටීමට බලය තිබෙන බව ද වේ. එහෙත් රික්වැස්ට් උසාවියේ උගත් කොමසාරිස් වරයා මෙම ආයාචනය ප්‍රතික්ෂේප කොට තිබේ. ඔහුගේ නිගමනය වූයේ පෙත්සම්කාරිය සහ අනෙක් තිදෙනා විසින් කරන ලද අවහිරය අවිචාරවූ ද පීඩාකාරීවූ ද ක්‍රියා පිළිවෙලක්ය යනුයි. එබැවින් එම නඩුවිධාන සංග්‍රහයේ 327 (ඒ) ඡෙදය යටතේ නැවතත් මෙම ආඥව ඒ සියලු දෙනාටම විරුඬව නිකුත් විය යුතුයයි ඔහු තීරණය කළේය. මෙම නියෝගය දී ඇත්තේ වර්ෂ 1961 අගෝස්තු 25 වෙනි දින දීය. එදිනම පෙත්සම්කාරිය එම නියෝගය සංශෝධනය කරගනු පිණිසත් එම ආඥව ක්‍රියාත්මක කිරීම අත්හිටුවීම පිණිසත් ක්‍රියාත්මක කළාය. එමෙන්ම වර්ෂ 1961 අගෝස්තු 29 වෙනි දින ඇ සිවිල්නඩුවිධාන සංග්‍රහයේ 327 (ඒ) දරණ ඡෙදය අනුව ඇ මෙම ගොඩනැගිල්ලෙහි පදිංචිවීමට ඇයට ඇති අයිතිය තහවුරු කර ගැනීමට දිස්ත්‍රික්

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 63 වෙනි කා., 81 වෙනි පිට බලනු.

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උසාවියේ නො: 9610 (ඇල්) දරණ නඩුව පැවරුවාය. වෂ් 1947 නොම්මර 7 දරණ සිවිල් නඩු විධාන සංග්‍රහයේ සංශෝධන පණතින් ඇතුලත් කරන ලද 327 (ඒ) දරණ ඡෙදය මෙසේය : "එම බාධාකිරීම හෝ වැලක්වීම විනිශ්චිත නයකරුවා හැර වෙනයම් කෙනෙකු විසින් කරන ලදව මෙම ඉඩමෙහි අයිතිය ලබා ගැනීමට එවැනි ඉල්ලීමක් කළ තැනැත්තා එය තමා සම්බන්ධයෙන්ම හෝ විනිශ්චිත නයකරුවා හැර වෙන යම් කෙනෙකු සම්බන්ධයෙන් හෝ එය කළ කල්හි එය නිසරු පීඩාකාරී ඉල්ලීමක් යයි උසාවියට ඒත්තු ගියහොත් එම (නඩුවෙහි) විනිශ්චිත නයහිමියා ඉඩම භුක්ති විදින සේ නියෝග කිරීමට උසාවියට බලය තිබේ.

මෙවැනි නියෝගයක් යමෙකුට විරුඩව පනවන ලද්දේ නම් ඒ තැනැත්තා එම ඉඩම තමාගේ භුක්තියට පත්කිරීමටයයි කරන ලද ඉල්ලීම තහවුරු කරගැනීම සඳහා මසක් ඇතුලතදී නඩුවක් දැමිය යුතුය. එහෙත් යම්පෙයකින් මෙවැනි නඩුවක් දැමූ අවස්ථාවක හැර සෙසු සැම අවස්ථාවකම එම නිගමනය තීරණාත්මක හැටියට සැලකේ. මෙම නඩුවේ වගඋත්තරකරු වෙනුවෙන් පෙනී සිටි ෂර්වානන්ද මහතා මෙම ඉල්ලීම අධිකරණය විසින් කල්පනාවට භාජනය කිරීමට විරෝධය දක්වමින් 327 (ඒ) ඡෙදය අනුව යමෙකුට විරුඩව නියෝගයක් නිකුත්වූ විට එම තැනැත්තා විසින් එම ඉඩම භුක්ති විදිමට තමාට ඇතැයි කියා සිටින අයිතිය තහවුරු කරගැනීමට එකී ඡෙදයේ 2 වන කොටසින් කියවෙන පරිදි නඩුවක් දැමීම ඔහුට ඇති එකම පිළිසරණ බව කියා සිටියේය. මේ න්‍යායෙන් ෂර්වානන්ද මහතා විසින් කරුණු සැල කිරීම නිවැරදි නම් පෙත්සම්කාරියට මෙම ඉඩමෙහි භුක්තියට බැලූ බැල්මට පෙනෙන වලංගු අයිතිවාසි කමක් ඇතිවූ කලක පවා මෙම නඩුව සිවිල් නඩුවිධාන සංග්‍රහයේ 327 වන ඡෙදය යටතේ වැටෙන නඩුවක් හැටියට ගිණිය යුතු අතර 327 (ඒ) දරණ ඡෙදය අනුව මෙය නොගිණිය යුතුසේ පෙනේ. එවිට ඇයට කොමසාරිස් වරයාගේ නියෝගයට විරුඩව ඇපැල් පෙත්සමක් ඉදිරිපත් කළ නොහැකි නිසා වග–උත්තරකරුට භුක්තිය පවරණු පිණිස ඇය එම ඉඩමෙන් වනාම පිටමං කර වග–උත්තරකරු එම ඉඩමෙහි භුක්තිය විදින අයුරු කරුණු සලසනු ඇත. මාගේ සහෝදර එච්. ඇන්. ජේ. ප්‍රනාන්දු මහතා විසින් **ගුණරත්න එ. සිල්වා, 58 න.නී.වා., 542** වෙනි පිට, යන නඩුවෙහි දුන් තීන්දුව කෙරෙහි විශ්වාසය තැබිය. මෙම නඩුවෙහිදී විනිශ්චයකාරතුමා 327 (ඒ) ඡෙදය යටතේ දෙන ලද තීන්දුවකට විරුඩව ඇපැලක් නැතැයි තීන්දු කෙළේය. **අර්ලිස් අප්පුහාමි සහ තවත් කෙනෙක් එ. සිමන්.** 48 න.නී.වා., 298 වන පිට, අතර කියවුණු නඩුවෙහි දිස්ත්‍රික් නඩුකාරතුමා විසින් තීන්දු කරන ලද්දේ සිවිල් නඩු විධාන සංග්‍රහයේ 330 (1) ඡෙදය යටතේ දෙන තීන්දුවක් එයට විරුඩව ඇපැල් ගතහැකි තීන්දුවක් බවය. 330 (2) දරණ ඡෙදය එහි යෙදී ඇති ප්‍රභේදතීන් අනුව බලන කල 327 (ඒ) දරණ ඡෙදයේ දෙවන කොටසට සමාන බව පෙනේ. එයට හේතුව 330 (1) දරණ ඡෙදය යටතේ නියෝගයක් ලැබූ කෙනෙකුට එම නියෝගයට විරුඩව මසක් ඇතුලතදී තමා එම ඉඩමේ භුක්තියට ඇති අයිතිය ලබා ගැනීමට නඩුවක් දැමීමට හැකිවන නිසාත් එම නඩුවේ ප්‍රතිඵලයට පමණක් යටත්ව ඒ නියෝගය අවසාන නියෝගයක් හැටියට ප්‍රකාශයක් කළ හැකි නිසාත් ය.

327 (ඒ) දරණ ඡෙදයට අනුව දෙන ලද නියෝගයකට විරුඩව ඇපැල් ගත හැකි ද නැද්ද යන්න මෙහිදී මා විසින් තීරණය කළ යුතු ප්‍රශ්නයක් හැටියට පැන නොනැගේ. මෙම ඉල්ලීමෙන් කෙරෙන්නේ ශ්‍රේෂ්ඨාධිකරණයට ඇති සංශෝධන බලය කොමසාරිස් තුමාගේ නියෝගයෙන් යම්කිසි පිළිසරණක් ලැබීම සඳහා යොදවන ලෙසය. සමහරවිට පෙත්සම්කාරියට මෙම ඉල්ලීම කිරීමටයයි අවවාද දෙන ලද්දේ 327 (ඒ) දරණ ඡෙදය යටතේ දෙන ලද නියෝගයකට විරුඩව (ඉහත සඳහන්) **ගුණරත්න එ. ද සිල්වා** අතර කියැවුණු නඩුවෙහි තීන්දුවූ පරිදි ඇපැල් පෙත්සමක් ඉදිරිපත් කිරීමට නොහැකිය යන පිළිගැනීම උඩ විය හැක. එම තීන්දුව නිවැරදි වුවත් 327 (ඒ) දරණ ඡෙදය එවැනි නියෝගයක් සංශෝධනය කිරීමට මෙම උසාවියට ඇති බලය කොයි ලෙසකින් වුවත් කෙලෙසී හෝ සීමාවී හෝ ඇතැයි මා විශ්වාස නොකරන නිසා අප ඉදිරියේ ඇති මෙම ඉල්ලීම ගැන සලකා බැලිය හැකියි මම තීරණය කරමි. නමුත් නඩුවෙහි කරුණුවල වටිනාකම ගැන සලකා බැලීමේදී පෙත්සම්කාරිය නම් එම ඉඩමෙහි කුලියට පදිංචිව සිටින්නී හැටියට වගඋත්තරකරු 1959 ඔක්තෝම්බර මාසයේ සිට පිළිගත්තේයයි කියා සිටින නමුත් මෙම කරුණ සඳහා උපයෝගී කරගැනීමට ඇයට කිසිදු ලියමනක් නොමැත. තවදුරටත් ඉන්පසු දෙන ලද කුවිතාන්සි මහාදේවන් නමින් නිකුත්කර ඇති බව ඈ පිළිගන්නාය. එම නිසා මෙම නඩුව 327 (ඒ) දරණ ඡෙදය යටතේ සැලකිය හැකි නඩුවක් හැටියට කොමසාරිස්තුමා විසින් ගණන් ගැනීම යුක්ති සහගතය. විනිශ්චිත නයහිමියා ඉඩමේ භුක්තිය ලබනසේ නියෝගයක් කිරීමට මෙම ඡෙදය යටතේ උසාවියට දී ඇති බලයට, මා සිතන හැටියට විනිශ්චිත නය හිමියා විසින් මෙම ඡෙදය යටතේ දමා ඇති නඩුවක තීන්දු ප්‍රකාශයෙන් කියැවෙන යම් යම් කටයුතු ඒ අයුරු ඉටුවන හැටියට ඇප දිය යුතුයයි කීමට බලය ද ඇතුළු වේය යනු මගේ හැඟීමයි. එම නිසා වග–උත්තරකරුට මෙම ඉඩමේ භුක්තිය ලැබෙන ලෙස පැවරීමට පෙර ඔහු කොළඹ දිස්ත්‍රික් උසාවියේ නොම්මර 9610 ඇල් දරණ නඩුවෙන් දියහැකි යම්කිසි තීන්දු ප්‍රකාශයක (එහෙත් එහි ඇපැලට යටත්ව) සඳහන් වන කටයුතු ඒ හැටියට ඉටුකරන බවට රික්වැස්ට් උසාවියේ කොමසාරිස් තුමාගේ අභිමතය පරිදි යම්කිසි ඇපයක් තිබිය යුතුයයි ද මම උපදෙස් දෙමි. කොමසාරිස් තුමා විසින් 327 (ඒ) දරණ ඡෙදයට අනුව නිකුත් කරන ලද නියෝගය මෙම වෙනස් කිරීමට පමණක් භාජන නොකොට මෙම ඉල්ලීම නිෂ්ප්‍රභා වේ.

ගාස්තුව පිළිබඳ මම කිසිම නියෝගයක් නොකරමි.

ඉල්ලීම නිෂ්ප්‍රභා විය.

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ගරු හේරත් විනිශ්චයකාරතුමා ඉදිරිපිට.

රොබට් තේලිස් එ. ද සිල්වා, ආදායම් පරීක්ෂක, නාගරික සභාව, කුරුණෑගල*

සු. උ. නො: 51—ම. උ. කුරුණෑගල, නො: 14133.

වාද කළේ සහ තීන්දු කළේ : 1963.2.13.

ශ්‍රෙ. අංකය : 51—කුරුණෑගල මහේස්ත්‍රාත් උසාවිය, නො : 14133.

මහ නගර සභා පණත 1947 තේ නො: 29, 148 (3) ඡෙදය යටතේ චෝදනාවක්—විත්තිකරු වරදකරු වීම—ඇපැලක් ගැනීම—ඇපැල විභාග කරන දිනයෙහි ඇපැල්කරු හෝ ඔහු වෙනුවෙන් නීතිවේදියෙක් නොපෙනී සිටීම—විත්තිකරුට විරුඩව ඇපැල් ගාස්තු නියම කළ යුතු ද?

තීන්දුව:— මහ නගර සභා ආඥා පණත යටතේ විත්තිකරුවෙකු වරදකරුවෙකු කරනු ලැබූකල්හි ඔහු විසින් ඇපැල් පෙත්සමක් ඉදිරිපත් කොට තමා වෙනුවෙන් පෙනී සිටීමට කිසි නීතිවේදියෙකු ඉදිරිපත් නොකර එමෙන්ම ඇපැල් පෙත්සම විභාග කරන අවස්ථාවේදී උසාවියට ද නොපැමිණ සිටි නම් නාගරික සභාව මගින් ඒ වෙනුවෙන් පෙනී සිටීමට නීතිඥයින් ඉදිරිපත් කිරීමෙන් ඔවුන් දරූ අනවශ්‍ය වියදම නිසා විත්තිකරු ගාස්තුවට යටත්කල යුතුයි.

නීතිඥවරු:— විත්තිකාර-ඇපැල්කරු වෙනුවෙන් නීතිඥවරයෙක් පෙනී නොසිටියේය.

ඊ. ඒ. ජී. ද සිල්වා මහතා, පැමිණිලිකාර වග-උත්තරකරු වෙනුවෙන්.

ගරු හේරත් විනිශ්චයකාරතුමා,

වර්ෂ 1947 නො. 29 දරණ මහ නගර සභා ආඥා පණතේ, 148 (3) වන ඡෙදය යටතේ දඬුවම් ලැබිය හැකි වරදක් හැටියට ගිණිය හැකි අන්දමට තමාගේ ඉඩමේ යාන්ත්‍රිය බලය නිෂ්පාදනය කරණ උපකරණයක් ඊට අවශ්‍ය බලපත්‍රය නොලබා තබා සිටියේ ය යන චෝදනාව උඩ විත්තිකරු වූ ඇපැල්කරුට විරුඩව නඩු පවරණු ලැබීය. මෙහිදී වරදකරු වූ ඔහු එයට විරුඩව ඇපැල් පෙත්සමක් ඉදිරිපත් කර තිබේ.

විත්තිකාර-ඇපැල්කරු වෙනුවෙන් කිසිවෙකු පෙනී නොසිටි අතර ඔහු උසාවියට පැමිණ නොමැත. එහෙත් පැමිණිලිකාර වගඋත්තරකරු වෙනුවෙන් පෙනී සිටින ඊ. ඒ. ජී. ද සිල්වා මහතා මෙයට සම්බන්ධ සියලු කරුණු අලලා කථා කොට මට කාරණය පැහැදිලි කර දුන්නේය. විත්තිකරු වරදකරු කිරීම සම්බන්ධයෙන් මැදහත්වී පියවරක් ගැනීමට කිසිම සුදුසු කමක් මට පෙනී නොයන නිසා මම ඇපැල නිෂ්ප්‍රභා කරමි.

විත්තිකාර-ඇපැල්කරු විසින් පැමිණිලිකාර වග-උත්තරකරුට ඇපැල් නඩු ගාස්තුව ගෙවිය යුතුය යි නියෝගයක් කරණ ලෙස ඊ. ඒ. ජී. ද සිල්වා මහතා ඉල්වා සිටී. මහනගර සභා ආඥා පණතේ 313 ඡෙදයෙන් එම ආඥා පණත යටතේ පවරණ නඩු අපරාධ නඩු විධාන සංග්‍රහයේ ඇති පැණවීම් වලට යටත්ව පවත්නා බව පෙන්වා දී සිටින ඔහු අපරාධ නඩු විධාන සංග්‍රහයේ 352 ඡෙදයෙන් එම නඩුවිධාන සංග්‍රහය යටතේ පවරණ ලද නඩුවලට ගාස්තුවක් ලබාදීම සඳහා සුදුසු නියෝග-යක් උසාවියට කිරීමට හැකි බව ද පැලකර සිටී.

මෙවැනි නඩුවක විත්තිකරුවකුට නීතිසංස්ථා ගතවූ වරදකට නඩු පවරණු ලැබ ඉන් ඔහු වරදකරුවකු කරණ ලැබූ කල්හි ඔහු විසින් ඇපැල් පෙත්සමක් ඉදිරිපත් කොට තමා වෙනුවෙන් පෙනී සිටීමට කිසි නීතිවේදියකු ඉදිරිපත් නොකර එමෙන්ම ඇපැල් පෙත්සම විභාග කරණ අවස්ථාවේදී උසාවියට ද නොපැමිණ සිටි නම්—නාගරික සභාව විසින් ඒ වෙනුවෙන් පෙනී සිටින්ට නීතිඥයින් ඉදිරිපත් කිරීමෙන් ඔවුන් දරූ අනවශ්‍ය වියදම නිසා විත්තිකරු ගාස්තුවට යටත් කළ යුතුයයි මම කල්පනා කරමි. එබැවින් විත්තිකාර-ඇපැල් කරු විසින් පැමිණිලිකාර වග-උත්තරකරුට රු. 52. 50 ක මුදලක් ගෙවිය යුතුයයි මම නියෝග කරමි.

ඇපැල නිෂ්ප්‍රභා කරන ලදී.

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයේ 63 වෙනි කා., 111 වෙනි පිට බලනු.

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ගරු අබේසුන්දර විනිශ්චයකාරතුමා ඉදිරිපිට.

ද සිල්වා එ. උප ඉන්ස්පැක්ටර්, නුවර පොලිසිය*

ශ්‍රේෂ්ඨාධිකරණයේ ඉල්ලුම් පත්‍රය, නො. 106, වෂ් 1963—මහනුවර මහේස්ත්‍රාත් උසාවිය, නො. 26794.

අපරාධ නඩුවිධාන සංග්‍රහයේ 356 වන ඡේදය යටතේ පරිශෝධනය කිරීමටයයි
ඉදිරිපත් කරන ලද ඉල්ලීමක් පිළිබඳවයි.

විවාදකොට තීන්දු කළ දිනය : 1963 අප්‍රියෙල් 8.

අපරාධ නඩුවිධාන සංග්‍රහයේ 411 වෙනි ඡේදය—ඊට අනුකූලව නොකළ නියෝගය—ඇපකරයක් රාජසන්තක කිරීම—එම නියෝගය නිෂ්ප්‍රභා කළ යුතු ද?

විත්තිකරුවෙක් උසාවිය කී අවස්ථාවක එම උසාවියට ඔහුව ඉදිරිපත් කරන්ට පොරොන්දුවී ඇපකාරියෙකු විසින් දුන් ඇප ඔප්පුවක් රාජසන්තක කරමින් මහේස්ත්‍රාත්තුමා මෙහි පහත පෙනෙන නියෝගය කෙළේය:—

" ඇපකාරියට තමාගේ ඇපකරය රාජසන්තක නොකිරීමට හේතු ඇත්නම් දක්වීමට යයි කියන ලදී. මේ සඳහා දක්විය හැකි කිසිම හේතුවක් ඇයට නොමැත. එම ඇපකාරිගේ ඇපකරය රාජසන්තක කරමි. මෙම මුදල නොගෙව්වොත් ඈ සති හයක් වැඩ නැතිව සිරගෙයි සිටිය යුතුය. ගෙවීමට ඇයට 63.3.20 දක්වා කාලය දෙමි. පළමු වෙනි විත්තිකරු හිරබාරයේ තබනු . . ."

තීන්දුව : මෙම නියෝගය අපරාධ නඩුවිධාන සංග්‍රහයේ 411 වෙනි ඡේදයේ 1 වෙනි, 4 වෙනි උපඡේද වලට අනුකූල නොමැති නිසා එය අවලංගු කළ යුතුයි.

මේ නියෝගය කරන්ට පෙර ඇපකරය රාජසන්තක කිරීමට ඔප්පුවූ කරුණු සඳහන් කළ යුතුවා පමණක් නොව හිරඅඩස්සියට නියම කළ යුත්තේ දඩුවම නිසා නියම කළ මුදල නොගෙවීම නිසා හෝ එය දේපල විකුණා අයකර ගන්ට බැරිවූවොත් පමණකි.

නීතිඥවරු : සි. ඩී. ඇස්. සිරිවර්ධන මහතා, පෙත්සම්කාරිය වෙනුවෙන්.
ජී. පී. ඇස්. ද සිල්වා මහතා, රජයේ අධිනීතිඥතැන, ඇටෝර්නි-ජනරල්තුමා වෙනුවෙන්.

ගරු අබේසුන්දර විනිශ්චයකාරතුමා,

මහනුවර මහේස්ත්‍රාත් උසාවියේ අංක 26794 දරණ නඩුවේ පළමු වන විත්තිකරුට එක් ඇපකරුවෙක් ඇතිව රුපියල් 500/- කට ඇපදී නික්ම යන්ට ඉඩ හරින ලදුව මිරිය්සේ ගලප්පත්තිගේ මිලී ද සිල්වා නැමති පෙත්සම්කාරිය එක් ඉඩමක් රු: 500/- කට උසාවියට බැඳ විත්තිකරු ඉදිරිපත් කිරීමටයයි කී අවස්ථාවක ඉදිරිපත් කිරීමට පොරොන්දු වී ඒ සඳහා ඇපකාරිය වූවාය. මෙම නඩුව වෂ් 1963 ජනවාරි මස 7 වැනිදට දින දැමූ නමුත් එදින පළමුවන විත්තිකරු උසාවියට නොපැමිණියේය. නමුත් ඔහු තමාට අසනිප බවත් එබැවින් උසාවියට පැමිණිය නොහැකි බවත් සඳහන් වන වෛද්‍ය සහතිකයක් ඉදිරිපත් කළේය. මෙම වෛද්‍ය සහතිකය පිළිගත් උසාවිය නැවත නඩු විභාගය වෂ් 1963 ජනවාරි මස 30 වෙනිදට කල්දමන ලදී. එහෙත් මෙම නඩුව කල්දැමූ දිනය අසවල් දිනයයි පළමු වන විත්තිකරුට හෝ ඇපකාරියට හෝ දන්වා ඇති බවක් නඩු පොතෙන් නොපෙනේ. මින්පසු ඇපකාරියට විත්තිකරු වෂ් 1963 මාර්තු 6 වැනි දින උසාවියට ඉදිරිපත් කිරීමට යයි නිවේදනයක් ලැබිණි. මේ නියෝගයට කීකරු වූ ඈ එම දිනයෙහි පළමු වන විත්තිකරු උසාවියට ඉදිරිපත් කළාය. එහිදී උගත් මහේස්ත්‍රාත් වරයා ඇයට ඇගේ ඇපකරය රාජසන්තක නොකිරීමට හේතුවක් ඇත්නම් දක්වීමට යයි අණ කළේය. එම නඩු පොතෙහි උගත් මහේස්ත්‍රාත් වරයා විසින් කරන ලද පහත සඳහන් නියෝගය ද දක්නට තිබේ. එනම්:

"ඇපකාරියට තමාගේ ඇපකරය රාජසන්තක නො කිරීමට හේතු ඇත්නම් දක්වීමට යයි කියන ලදී.

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 63 වෙනි කා., 109 වෙනි පිට බලනු.

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මේ සඳහා දක්විය හැකි කිසිම හේතුවක් ඇයට නොමැත. එම ඇපකාරියගේ ඇපකරය රාජසන්තක කරමි. මෙම මුදල නොගෙව්වොත් ඇ සතිහයක් වැඩ නැතිව සිරගෙයි සිටිය යුතුය. ගෙවීමට ඇයට 20.3.62 දක්වා කාලය දෙමි. පළමු වන පැමිණිලිකරු සිරභාරයේ තබනු . . .''

මෙම අධිකරණයෙහි පරිශෝධන බලය ක්‍රියාවෙහි යොදා මහේස්ත්‍රාත්වරයා ඉහත සඳහන් නියෝගය නිෂ්ප්‍රභා කිරීමට යැයි පෙත්සම්කාරිය යාඥා කර සිටී.

ඉහත සඳහන් නියෝගය දීමේදී උගත් මහේස්ත්‍රාත්වරයා අපරාධ නඩුවිධාන සංග්‍රහයේ 411 වන ඡෙදයෙහි ඇති විධානයන්ට තම අවධානය යොමු කළ බවක් නොපෙනේ. එම ඡෙදයෙහි (1) දරණ උපඡෙදය යටතේ ඇපකරය රාජසන්තක කිරීමට ඔප්පු වූ කරුණු සඳහන් කළ යුතුය. එමෙන් ම (4) වන උපඡෙදය යටතේ ඇපකාරිය 6 මාසයක් දක්වා කාලසීමාවකට වැඩ නැතිව සිරකළ හැක්කේ මෙම දඩුවම සඳහා ගෙවිය යුතු මුදල නොගෙව්වොත් පමණක් නොව එය දේපළ අල්ලා විකුණා අයකර ගැනීමට බැරිවුවොත් පමණකි.

මේ කරුණු අනුව උගත් මහේස්ත්‍රාත්වරයාගේ නියෝගය නිර්බලයැයි මම තීරණය කරමි. එබැවින් එම නියෝගය නිෂ්ප්‍රභා කරමි.

නියෝගය නිෂ්ප්‍රභා කරන ලදි.

ගරු සන්සෝනි සහ ඇල්. බී. ද සිල්වා යන විනිශ්චයකාරතුමන් ඉදිරිපිට.

පුංචිබණ්ඩා එ. තානසේන*

ශ්‍රෙෂ්ඨාධිකරණයේ අංකය නො. 42 F/1961—කුරුණෑගල දිස්ත්‍රික් උසාවිය, නො. 415/L.

විවාද කළ දිනය : 5.3.63.
තීන්දු කළ දිනය : 11.3.63.

උඩරට නීති—ත්‍යාගි ඔප්පුවක්—''වෙනස් කළ නොහැකි ජීවතුන් අතර සම්පූර්ණ දීමනාවක් හෝ තෑග්ගක්'' යනුවෙන් සටහන්වී තිබීම—මෙවැනි ත්‍යාගි ඔප්පුවක් අවලංගු කරන්ට පුලුවන් ද?—උඩරට නීති හා සංශෝධන ආඥ පණත 59 වන පරිච්ඡෙදය, 4 (1) සහ 5 (1) යන කොට්ඨාස.

1948 වේ ලියා අත්සන් කරන ලද උඩරට තෑගි ඔප්පුවක, ''වෙනස් කළ නොහැකි ජීවතුන් අතර සම්පූර්ණ දීමනාවක් නොහොත් තෑග්ගක් '' යනුවෙන් සටහන් කර තිබෙ නම්:

තීන්දුව:— ''වෙනස් කළ නොහැකි ''යන වචන වලින් ත්‍යාග දයකයා එම තෑගි ආපසු ගැනීමේ බලය විශේෂයෙන් අත්හළ බව සලකාගත හැකිය. එම නිසා උඩරට නීති ප්‍රකාශ හා සංශෝධන ආඥ පණතෙහි, 5 (1) කොට්ඨාසය යටතේ, ත්‍යාග දයකයාට එම තෑගි ආපසු ගැනීම නීතිවිරෝධිය.

නීතිඥයෝ: රාජනීතිඥ ඇන්. ඊ. වීරසූරිය මහතා, ඩබ්ලිව්. ඩී. ගුණසේකර මහතා, සමග විත්තිකාර-ඇපැල්කරු වෙනුවෙන්.

සී. ආර්. ගුණරත්න මහතා, පැමිණිලිකාර-වගඋත්තරකරු වෙනුවෙන්.

ගරු සන්සෝනි විනිශ්චයකාරතුමා,

මෙම ඇපැලෙහිදී තීරණය කළයුතු එකම කරුණ නම් පී 1 සහ පී 2 යනුවෙන් සළකුණු කොට ඇති තෑගිකර දෙක අවලංගු කළ හැකි ද? නැද්ද? යන්නයි. එකී තෑගි ඔප්පු දෙකේම සඳහන්ව ඇති මෙම කරුණට අදළ ප්‍රකාශය පහත සඳහන් පරිදි යෙදී ඇත:—

''හේවාවිස්ස කෝරළයේ බෝගමුවේ පදිංචි මනාපයේ කුලතුංග මුදියන්සෙලාගේ කිරිබණ්ඩා වන මම , . . නමැත්තාට මගේ ඇති සහජ දයාව හා ආදරය නිසාත් අනිකුත් හේතු සහ අනිකුත් මා කෙරෙහි බලපවත්වන කරුණු සලකා බැලීමෙනුත් මෙසේ අවලංගු නොකළ හැකි දීමනාවක් හෝ ප්‍රදනයක් හැටියට මෙහි උපලේඛනයේ සඳහන් . . . ප්‍රමාණය

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 63 වෙනි කා., 107 වෙනි පිට බලනු.

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මගේ ජීවන භුක්තියට පමණක් යටත්කොට දෙන බවත්, ප්‍රදානය කරණ බවත්, පවරා දෙන බවත් . . . නමැති ඔහුට ස්ථිරව බාර කරණ බවත් සෑම මිනුෂ්‍යයෙක්ම මේ ලියවිල්ලෙන් දැනගත මැනවි.

මෙසේ දෙන ලද එම ඉඩම . . . නමැත්තාට තමාගේ බාරයේ තබා ගැනීමටත් තමාගේ අයිතියේ තබාගැනීමටත් ඉන්පසු ඔහුගේ උරුමක්කාර පොල්මක්කාර අද්මිනිස්ත්‍රාසිකාරයන්ට සහ ඔහු විසින් බාර දෙන්නන්ට සම්පූර්ණ ලෙස සදහටම තබාගත හැක.''

මෙම ඔප්පු දෙක වර්ෂ 1948 ජූලි මස 8 වෙනි දින ලියන ලද්දෙන් උඩරට නීතිය ප්‍රකාශ කිරීමේ සහ සංශෝධනය කිරීමේ ආඥපණත (59 වන පරිච්ඡේදය) මෙ කරුණ පිළිබඳව මෙම පාර්ශවකරුවන් උඩරට නීතියෙන් පාලනය වන අය නිසා බලපවත්වනු ලැබේ. මේ සම්බන්ධයෙන් එම ආඥ පණතේ 4 (1) සහ 5 (1) යන ඡේදයන් ගැන කල්පනා කළ යුතුය. එම ඡේදයන් පහත පෙනෙන පරිදි වේ:—

4 (1) මෙහි පහත දැක්වෙන ව්‍යතිරේකයන්ට සහ පැනවීම්වලට යටත්ව ත්‍යාගදයකයෙකුට තමාගේ ජීවන කාලයෙහිදී ත්‍යාගිලාභියාගේ හෝ අන්කිසි වෙකුගේ අනුමැතිය නොලබා යම්කිසි දීමනාවක් මෙම ආඥපණතේ ආරම්භයට පසුව හෝ පෙර ප්‍රදානය කරන ලද කල්හි එය සම්පූර්ණයෙන් හෝ ඉන් කොටසක් හෝ අවලංගු කිරීමට අවසරාව තිබේ. ඉන්පසු එම දීමනාව හෝ එය ක්‍රියාත්මක කළ ලියවිල්ල හෝ එම දීමනාව අවලංගුකර ඇති හෝ අහෝසිකර ඇති හෝ ඇති තත්ත්වය දක්වා ශූන්‍යවී අක්‍රියාකාරීවනු ඇත.

එහෙත් යම්කිසි කෙනෙකුට යම් නිශ්චල දේපලක ඇති අයිතිය, හිමිකම හෝ ප්‍රයෝජනය, එම අයිතිය, හිමිකම හෝ ප්‍රයෝජනය මෙම ආඥපණතේ ආරම්භයට කලින් ඇතිවිණි නම් එය මෙසේ එම දීමනාව අවලංගු කිරීම හෝ අහෝසි කිරීම නිසා මෙම ආඥ පණත නොපැණවිනි නම් අහෝසි වන තත්වයට වඩා වැඩි තත්වයකට අහෝසි නොවනු ඇත.

5 (1) ඉහත සඳහන් 4 (1) දරණ ඡේදයෙන් ඇති පැනවීම ගැන නොසලකා මෙහි පහත සඳහන් දීමනා මෙම ආඥ පණතෙන් පසුව කෙනෙකුට දෙන ලද්දේ නම් ඒවා අවලංගු කිරීම හෝ අහෝසි කිරීම ත්‍යාගිදයකයෙකුට නීත්‍යානුකූලව කළහැකි කරුණක් නොවේ:—

....

(ඒ) යම්කිසි දීමනාවක් දෙන ලද ලියවිල්ලෙන් හෝ ඊට පසු ඒ සඳහා ලියන ලද යම්කිසි ලියවිල්ලකින් හෝ 'මම මේ දීමනාව අවලංගු කිරීමේ අයිතිය අත්හරිමි'. යන ප්‍රකාශය හෝ සාරානුකූලව එයට සමාන වචනවලින් හෝ එම ලියවිල්ලෙහි ඇති වචන ඉංග්‍රීසි නොවන අන්‍ය භාෂාවකින් ඇතිකලක, එම ලියවිල්ලෙහි ඇති භාෂාවෙන් එයට සමාන වචන වලින් දීමනාව අහෝසි කිරීමට හෝ අවලංගු කිරීමට ඇති අයිතිය පැහැදිළි ලෙස අත්හැරීමේ ප්‍රකාශයක් ඇති දීමනාවක්.''

මෙම කරුණට සම්බන්ධ නැති අනෙක් කොටස් මම අතහැර දමමි.

දිස්ත්‍රික් විනිශ්චයකාරතුමා මෙම තෑගි ඔප්පු අවලංගු කළ හැකැයි තීන්දු කෙළේය. එම තීන්දුව විත්තිකාර–ඇපැල්කරු විසින් අභියෝගයකට භාජන කරනු ලැබේ.

මෙම ඔප්පු අවලංගු කිරීම පිළිබඳ ප්‍රශ්නය සම්පූර්ණයෙන් රඳාපවත්නේ මෙහි කලින් උපුටා දක්වන ලද එම ඔප්පුවෙහි පළමු වන වාක්‍ය ඛණ්ඩය මෙහි කල්පනාවට භාජන කරන ලද ආඥ පණතේ 5 (1) (ඒ) යන ඡේදයෙහි ගැබ්ව ඇති අවශ්‍යතාවන්ට ගොදුරුවේ ද යන්න උඩය. එම අවශ්‍යතාවන් පහත දක්වමු:—

(1) දීමනාව අවලංගු කිරීමට ඇති අයිතිය අත්හැර දැමීම.

(2) මෙය පැහැදිළි ලෙස තිබිය යුතු බව.

(3) එය ත්‍යාගදයකයා විසින් තම ප්‍රකාශයක ගැබ් කළ යුතු බව.

(4) එහි ''මම දීමනාව අවලංගු කිරීමට ඇති අයිතිය අත්හරිමි'' යන්න හෝ එහි වචන සාරානුකූලව ගත් කල එම තේරුම එන ලෙස ගැලපී ඇති වචන තිබීම.

මෙහි 4 වන අවශ්‍යතාවය අනික් තුන පැහැදිළි කිරීම පිණිස ම යොදන ලද්දක් සේ පෙනේ.

මෙහිදී කල්පනාවට භාජනව ඇති වාක්‍ය ඡේදය ත්‍යාගදයකයා විසින් එම දේපළ දීමනාවක් වශයෙන් දෙන බව සඳහන් ප්‍රකාශයකට කිසිසේත් අඩුනොවේ. මේ ප්‍රකාශය ඔහු උත්තම පුරුෂයෙන් ලියා තිබේ. එමතුද, නොව එම දීමනාව අවලංගු කළ නොහැකැයි ද එහි සඳහන් ය. ඉදින් මෙසේ එක වචනයක් පමණක්

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එහි තිබීමෙන් දීමනාව අවලංගු කිරීමට ඇති අයිතිය සම්පූර්ණයෙන් අත්හැර තිබේ ද යන්න මෙහි උද්ගත වන ප්‍රශ්නයකි. එබඳු අයිතියක් අත්හැරීමට වෙන් වශයෙන්ම වාක්‍ය-ඡේදයක් යෙදීමට අවශ්‍ය බවක් මට නොපෙනේ. එසේ දමා ඔප්පුව ලිවීමට නොතාරිස් වරයාට පුළුවන් කම තිබෙන බව සැබෑය. නමුත් ඔහු විසින් ඒ තරමටම බලපවත්වන සංක්ෂිප්ත විධියක් තෝරාගෙන තිබේ. න්‍යාගදයකයා විසින් මෙම දීමනාව අවලංගු කළ නොහැකියයි විස්තර කිරීමෙන් තමා විසින් තමාට එය අවලංගු කිරීමට ඇති අයිතිය අතහැර තිබේ. මන්ද? යම්කිසි දීමනාවක් අවලංගු කිරීමට අයිතිය ඇත්තේ එහි ප්‍රදායකයාට පමණක් බැවිනි. කරුණු මෙසේ නිසා ප්‍රදයකයා දීමනාව අවලංගු කළ නොහැකැයි සඳහන් කළ කල්හි ඔහු විසින් එය අවලංගු කිරීමට ඇති අයිතිය පැහැදිලි ලෙස අත්හැර ඇති බව සළකාගත හැකිය.

උඩරට නීතිය පිළිබඳ කොමිසමේ වාර්තාවට අපේ අවධානය යොමුකරන ලදී. (සැසි වාර්තාව වර්ෂ 1935 අංක 24) නමුත් මෙම ආඥා පණතේ ඇති වචනවල අර්ථ කථනය සඳහා ඒ වාර්තාව ප්‍රයෝජනවත් යයි මම නොසිතමි. එය උඩරට තෑගි ඔප්පු පිළිබඳව ඇති නීතිය ප්‍රයෝජනවත් ලෙස සම්පිණ්ඩනය කරන වාර්තාවක් වන අතර එහි 58 වන ඡේදයෙහි දීමනාව අවලංගු කිරීමට ඇති අයිතිය පැහැදිලි වචනවලින් නියම විධිමත් ක්‍රමයක් අනුව අත්හැරිය කලක පමණක් සාමාන්‍යයෙන් අවලංගු කළ හැකි දීමනාවක් අවලංගු කළ නොහැකි තත්ත්වයකට වැටෙන බවක් සඳහන් කොට තිබේ. මෙහි කියා ඇති අන්දමට යම්කිසි වාක්‍ය ඛණ්ඩයක් හෝ පරිසීමිත විධියක් හෝ දීමනාවක් අවලංගු කිරීමෙහිදී ඇතිවිය යුතුයයි යන වදනට පාර්ලිමේන්තුව සවන් දී නැත. එබැවින් ආඥා පණතෙහි ඇති නියම වචන වලටම අපට ලභාවීමට මේ නයින් සිදුවේ.

උඩරට තෑගි ඔප්පු අවලංගු කිරීම පිළිබඳව කලින් විනිශ්චිත නඩු ගැන සඳහන් කිරීම ඵලදායී විය හැකැයි මා නොසිතත් මෙහිදී පැන නගින ප්‍රශ්න මත ආලෝක ධාරාවක් විස්තීර්ණ වන නඩු තීන්දු දෙකක් තිබේ. කුමාරසාමි එ. බණ්ඩා අතර කියවුණු නඩුවේ—(1959) 61 න. නී. වා. 68—මෙම ඔප්පුවලට සමාන වචන මාලාවක් ඇති ඔප්පුවක් කල්පනාවට භාජන වී ඇත. එහිදී තීරණය වූයේ එම ඔප්පුවේ ප්‍රදායකයාගේ ප්‍රකාශයක් ගැබ්වී තිබෙන බවය. එමෙන්ම උක්කුබණ්ඩා එ. පවුලිස් සිඤ්ඤො—(1926) 27 න.නී.වා. 449—යන නඩුවේදී තීරණය වූයේ " කොයිලෙසකින්වත් අවලංගු කළ නොහැකි තෑගි ඔප්පුවක් " යන වචන ප්‍රදයකයාගේ දීමනාවක් අවලංගු කිරීමට ඇති අයිතිය අත්හරින පැහැදිලි වරදවා තේරුම් ගත නොහැකි වචන හැටියටය.

මෙම හේතුන් නිසා ඇපෑලට ඉඩදෙන මම උසාවි දෙකේම ගාස්තුවට යටත් කොට පැමිණිලිකරුගේ නඩුව නිෂ්ප්‍රභා කරමි.

ඇල්. බී. ද සිල්වා විනිශ්චයකාරතුමා.

මම එකඟ වෙමි.

ඇපෑලට ඉඩ දෙන ලදී.

ගරු අබේසුන්දර විනිශ්චයකාරතුමා ඉදිරිපිට.

කරෝලිස් එ. හම්බන්තොට සහකාර ගොවිජන සේවා කොමසාරිස්*

ශ්‍රෙෂ්ඨාධිකරණයේ ඉල්ලුම් පත්‍රය, අංක 96, වර්ෂ 1963.

හම්බන්තොට මහේස්ත්‍රාත් උසාවියෙහි නො. 40353 දරණ නඩුව පරිශෝධනය කිරීමටයයි ඉදිරිපත් කරන ලද ඉල්ලුම් පත්‍රයක් පිළිබඳවයි.

විවාදකොට තීන්දු කළ දිනය : 1963 අප්‍රියෙල් 9,

කුඹුරු පණත, 1958, අංක 1, 21 වෙනි ඡේදය, (2) වෙනි, (3) වෙනි උපඡේද—(2) වෙනි උපඡේදය යටතේ විත්තිකරුට නිකුත් කල සිතාසියක්—එය එම උපඡේදයට අනුකූල නොමැති බව—විත්තිකරු කුඹුරකින් පිටමං කිරීමට කරන ලද නියෝගය—එය නීත්‍යානුකූල ද?

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* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 63 වෙනි කා., 110 වෙනි පිට බලනු.

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කුඹුරු පණතේ 21 වෙනි ඡෙදයේ (2) වෙනි උපඡෙදය යටතේ නිකුත් කළයුතු සිතාසියක සඳහන් කර තිබුනේ සිතාසි ලද තැනැත්තා "කටුකුඹුර" කියන කුඹුරක බුත්තිය මිරිජ්ජවල කේ. ඩී. කරෝලිස් නමැත්තෙකුට බාරදීම පැහැරහැර ඇති බවත් ඒ නිසා ඔහු කුඹුරු පණතේ 21 වෙනි ඡෙදය අනුව දඬුවම් කළ යුතු වරදක් කර ඇති බවත්, මේ නිසා ඔහු 1963.2.1 වෙනි දින පූ. භා. 9 ට තමාගේ සාක්ෂිකරුවනුත් සමග හම්බන්තොට මහේස්ත්‍රාත් උසාවියට පැමිණ මෙම පැමිණිල්ලට උත්‍ර කිවයුතු බවත්, ඒ අනුව ඔහුට නීතියට අනුකූලව ක්‍රියා කිරීමට ඉදිරිපත් වන ලෙසත් ය.

තීන්දුව : මේ සිතාසිය කුඹුරු පණතේ 21 වෙනි ඡෙදයේ 2 (ඒ) වෙනි උපඡෙදයට එකහව නිකුත් කර නොවුවක් නිසා එම ඡෙදයේ 3 වන උපඡෙදය යටතේ සිතාසිය ලද අය එහි සඳහන් කළ කුඹුරෙන් පිටමං කළයුතු යයි කළ නියෝගය නීතිවිරෝධි නිසා එය අවලංගු කළ යුතුය.

නීතිඥවරු : ඊ. ඒ. ජී. ද සිල්වා මහතා, වගඋත්තරකාර-පෙත්සම්කරුවන් වෙනුවෙන්.

ඒ. ඒ. ද සිල්වා මහතා, රජයේ අධිනීතිඥතැන, පෙත්සම්කාර-වගඋත්තරකරු වෙනුවෙන්.

ගරු අබේසුන්දර විනිශ්චයකාරතුමා,

හම්බන්තොට දිස්ත්‍රික්කයෙහි පිහිටි "කටුකුඹුර" නමැති කුඹුරකින් තමන් පිටමං කිරීමටයයි නියෝග කරමින් වර්ෂ 1958 නො: 1 දරණ කුඹුරු පණතේ 21 වන ඡෙදයේ 3 වන උපඡෙදය යටතේ හම්බන්තොට උගත් මහේස්ත්‍රාත්වරයා දෙන ලද නියෝගයක් මෙම අධිකරණයෙහි පරිශෝධන බලය යොද නිෂ්ප්‍රභා කර වැදරීමට යයි යාඥකරමින් පෙත්සම්කරුවන් විසින් ඉදිරිපත් කරණ ලද පෙත්සමකි මේ.

මෙම නියෝගය දෙන ලද්දේ 21 වන ඡෙදයේ (2) වන උපඡෙදය යටතේ විත්තිකරුවන්ට සිතාසි නිකුත් කරණ ලදුව ඒ අනුව එහි සඳහන් නියමිත දිනයේ ඔවුන් උසාවියට නොපැමිණෙන ලදය යන මතය උඩය. නමුත් මෙම සිතාසි දෙන ලද්දේ තමන්ට නොව තමන්ගේ ගෙවල වර්ෂ 1963 ජනවාරි 29-30 වන දිනයන්හි පදිංචිව සිටි අන්කිසි කෙනෙකුන්ටයයි පෙත්සම්කරුවෝ තම දිවුරුම් පෙත්සමෙන් සැළකර සිටියහ. අනිත් අතින් සිතාසි බෙදන්නා තමාගේ දිවුරුම් පෙත්සමෙන් මෙම සිතාසි පෙත්සම්කරුවන්ටම දෙන ලද බව සැළකර තිබේ. සිතාසි බෙදන්නාගේ ප්‍රකාශය අවිශ්වාස කිරීමට මට කිසිදු හේතුවක් නැත. කෙසේ වෙතත් මෙම සිතාසි 21 වන ඡෙදයෙහි (2) උපඡෙදයේ (ඒ) කොටසට අනුකූලව නොමැති බව පෙනේ. එම කොටසට අනුව සිතාසියෙහි සඳහන් විය යුත්තේ තමා එහි නම ඇතුලත් කර ඇති තැනැත්තා පැමිණ නියමිත දිනයෙහි තමා එම සිතාසියෙහි සඳහන් කුඹුරෙන් ඉවත් නොකිරීමට හේතුවක් ඇත්නම් එය දක්වන ලෙසය. නමුත් මේ කරුණෙහිදී නිකුත් වූ සිතාසිවල ඇත්තේ සිතාසි ලද තැනැත්තා කටුකුඹුර නමැති කුඹුරක බුත්තිය මිරිජ්ජවල කේ. ඩී. කරෝලිස් නමැත්තෙකුට බාරදීම පැහැර හැර ඇති බවත් ඒ නිසා ඔහු කුඹුරුපණතේ 21 වන ඡෙදයෙන් දඬුවම් ලැබිය යුතු වරදක් කර ඇති බවය. මේ නිසා ඔහු 1.2.1963 දරණ දින පූ: භා: 9.00 ට තමාගේ සාක්ෂිකරුවනුත් සමග හම්බන්තොට මහේස්ත්‍රාත් උසාවියට පැමිණ මෙම පැමිණිල්ලට උත්තර කිවයුතු බවත් ඒ අනුව ඔහුට නීතියට අනුකූලව ක්‍රියා කිරීමට ඉදිරිපත් වන ලෙසත් එම සිතාසියෙහි වැඩිදුරටත් සඳහන් වේ. එම නිසා කටුකුඹුර නමැති කුඹුරෙන් ඉවත් නොකිරීමට හේතු දක්වීමටයයි පෙත්සම්කරුවන්ට සිතාසි නිකුත්වී නැත.

මේ නයින් සලකා බලා මම මෙහිදී නිකුත්වී ඇති සිතාසිය නීතියට එකහව නිකුත් නොවූවක් බව තීරණය කරමි. එසේම 21 වන ඡෙදයේ (3) වන උපඡෙදය යටතේ උගත් මහේස්ත්‍රාත් වරයා කළ නියෝගය ඉවත දමා මම හම්බන්තොට කෘෂිකර්ම සේවා පිළිබඳ කොමසාරිස්වරයා 21 වන ඡෙදයේ (1) වන උපඡෙදය අනුව වර්ෂ 1962 දෙසැම්බර් 17 වන දින කරණ ලද ඉල්ලීම අලුත් ඉල්ලීමක් හැටියට සලකා එම ඡෙදයෙහි විධානයන්ට අනුව කටයුතු කරණ ලෙස වැඩිදුරටත් නියෝග කරමි.

නියෝගය නිෂ්ප්‍රභා කර
ආපසු යවන ලදී.

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