The Ceylon Law Weekly

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

With a Section in Sinhala

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WITH A DIGEST

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This was an appeal from a conviction by a Bribery Tribunal. It was argued by counsel for the accused that, following the decision in *Piyadasa* v. *The Bribery Commissioner*, a Bribery Tribunal has no jurisdiction to try and find the accused guilty of the offence of bribery and that, accordingly, the conviction and sentence should be quashed.

Counsel for the Crown argued—

(1) That a conviction by a Bribery Tribunal, as distinct from the imposition of a sentence is not an exercise of judicial power.

(2) That the "office" established by the Bribery Act is the office of membership of the panel constituted under section 41 of the Act and though it is a paid office, is not a judicial office since the *panel* does not as such try charges of bribery.

(3) That because there is no express opinion in section 29 (4) of the Ceylon Constitution declaring an amending or repealing Act to be null and void if not passed by a two-thirds majority, the Court has no power to declare such an Act to be void.

(4) That once a Bill has received the Royal Assent, the Court has no power to inquire whether it was passed by the requisite majority, and must hold it to have been duly enacted.

Held : (1) That a Bribery Tribunal exercises judicial power when it *tries* a person on a charge of bribery.

(2) That there is no question of a wholesale challenge of the entire Bribery Act since the Legislature can validly confer judicial power on specially created tribunals, and the objection which lies against a conviction by a particular Bribery Tribunal is that judicial power validly vested in the special tribunals cannot be lawfully exercised by persons who are appointed to the Tribunals by the Governor-General and not by the Judicial Service Commission.

(3) That the legal effect of the Bribery Act is that it purports to appoint to a Bribery Tribunal such persons from a panel appointed by the Governor-General as the Chairman may select. The Act designates *by office*, persons holding office on the panel to be judges of Bribery Tribunals.

(4) That sections 29 (3) and (4) of the Ceylon Constitution impose a special control and a general control, respectively, on every Bill which, though not in form an amending Bill, contains provision which is in conflict with some Constitutional provision.

(5) That in the absence of the Speaker's Certificate endorsed upon the Bribery (Amendment) Act of 1958, validity cannot be claimed for any provision which is inconsistent with section 55 of the Constitution.

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S., a monk entitled to four temples, executed a deed in 1928 (P 12) in favour of his senior pupil, *G.*, granting him "full authority to manage, administer and hold the office of Adhikari" of the four temples subject to certain conditions. *G.*, in due course became Viharadhipathy and executed a deed in 1930 (P 13) in the very same terms as the said deed (P 12) in favour of his co-pupil, the plaintiff, in respect of one of the temples only. For several years, plaintiff officiated as Adhikari and the defendant then disputed the former's rights.

In an action filed by the plaintiff against the defendant for a declaration that plaintiff was the lawful Viharadhipathy, the learned District Judge held in his favour. The defendant appealed.

Held : (1) That, if P 13 in favour of the plaintiff is to be regarded as an appointment of his successor as Viharadhipathy, *G.* had no right to divert the succession from his own pupils and appoint the plaintiff to succeed him.

(2) That the contention on behalf of the plaintiff that P 13 should be regarded as an act of abandonment of *G's* rights as Viharadhipathy cannot be accepted as there are no words in P 13 which show such abandonment.

(3) The evidence led is not inconsistent with the position that the plaintiff was appointed by *G.* to act for him as *de facto* Viharadhipathy of the temple in question as *G.* was residing in another temple miles away.

(4) That although a renunciation by a monk of his right to be Viharadhipathy may be inferred from facts and circumstances such as an inference will not be drawn if the matter is left in a state of doubt.

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A minor defendant, who was represented by a *guardian-ad-litem*, in a pending action, attained majority without bringing that fact to the notice of Court. The District Court dismissed the plaintiff's action against the minor after she attained majority and when she continued to be represented by the guardian. The plaintiffs appealed to the Supreme Court which set aside the judgment of the District Court and gave judgment for them against the defendant. The same *guardian-ad-litem* represented the defendant while the appeal was pending and when the order of the Supreme Court was delivered. The defendant contended that the Supreme Court order was not binding as notice of the appeal had not been served on her and sought to have it set aside by way of revision or restitution.

Held : (1) That a minor, who is a defendant, and on attaining majority does not bring that fact to the notice of Court and ask that his *guardian-ad-litem* be released from the case is bound by all the orders of the Court.

(2) That the minor was duly represented both in the District Court as well as in the Supreme Court and the decree of the Supreme Court entered against him was not a nullity.

Held further : (3) That in any event, even if she was not given due notice of appeal, the defendant-petitioner could have applied for relief under section 771 of the Civil Procedure Code and the remedy of revision on restitution was, therefore, not available to her.

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Held : That as the 2nd defendant had improved the land for the benefit of the owner who was his wife and not for his own benefit, he could not after her death claim compensation from her heirs for that improvement.

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Held : (1) That an alienation of land executed during a lucid interval by a person adjudicated by the District Court to be of unsound mind and incapable of managing his own affairs, is valid even though the execution has taken place while the adjudication remains unreversed.

(2) That this question must be determined by the Roman-Dutch law and not by the English law. The provisions of Chapter XXXIX of the Civil Procedure Code have not superseded the Roman-Dutch law on this point.

Per T. S. FERNANDO, J.—" . . . it seems to me that the decision of the case *in re Walker* was influenced by the peculiar position of the Crown's prerogative in England in dealing with and controlling the property of a lunatic and I am unable to accede to the proposition that the basis of the relevant provisions of Chapter XXXIX of our Civil Procedure Code was not to be found in the Roman-Dutch law ".

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The accused in this case, who was charged with murder, raised, *inter alia*, the defence of provocation. The trial judge, on this question, directed the jury that if the provocation caused in the mind of the accused an actual intention to kill or cause grievous bodily harm, then the killing would be murder. The question canvassed before the Judicial Committee was whether this was such a misdirection as to vitiate the conviction of the accused. In the Appellate Court below, it had been held that this was a misdirection, but that it had not occasioned a miscarriage of justice, and the conviction had been affirmed by reason of the application of the proviso to section 82 of the Criminal Procedure Code of Hongkong, which was in the same terms as the proviso in section 4 (1) of the Criminal Appeal Act, 1907, of England.

Held : (1) That this was a misdirection. The defence of provocation may arise where a person does intend to kill or inflict grievous bodily harm but where his intention to do so arises from sudden passion involving loss of self-control by reason of provocation. The effect of the direction in this case was in effect to deprive the accused of the benefit of the defence of provocation.

(2) That in deciding that the misdirection had not occasioned a miscarriage of justice, the Appellate Court below had either misunderstood or misapplied the proviso to section 82.

(3) That, nevertheless, on a consideration of the matter afresh, and the application of the proper principles, the misdirection had not resulted in a miscarriage of justice.

The principles governing the application of the proviso discussed.

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Section 413—*Magistrate's power to make order for disposal of property in regard to which offence committed—Power not exercisable where offender not convicted—Property not to re-vest in original owner even by virtue of conviction where obtained by wrongful means not amounting to theft—Sale of Goods Ordinance, section* 24 (2)—*Power of Supreme Court to act in revision and reverse exercise of a Magistrate's discretion in proper case.*

Held : (1) That although a Magistrate is, by section 413 of the Criminal Procedure Code, vested with

a judicial discretion in making an order for the restoration of property regarding which an offence has been committed, the Supreme Court would in a proper case exercise its powers of revision so as to reverse the exercise of such discretion.

(2) That where a Magistrate holds that an offence which was the subject-matter of a trial by him was, in fact, not committed, it is not open to him to make an order for the disposal of property under section 413 of the Criminal Procedure Code. The property should in these circumstances be returned to the person in whose possession it was.

(3) That further, by virtue of section 24 (2) of the Sale of Goods Ordinance, where such property has been obtained from a person " by fraud or other means not amounting to theft ", ownership will not re-vest in the person from whom the goods were so obtained by reason only of the conviction of the offender. This section, too, was applicable to the facts of the present case inasmuch as the respondent had parted with the property voluntarily. He was, therefore, not entitled to an order for the possession of such property.

Criminal Procedure Code, section 440 (1)—*Witness summarily sentenced by the Supreme Court for giving false evidence—Failure to inform the witness of the gist or substance of the accusation and accordingly an opportunity of dealing with it—Need for the Court to form its own opinion that the evidence given was false and not depend on rider by jury—Penal Code, section* 188.

The appellant, a village headman, was a witness for the prosecution at the trial of eight persons in the Kandy Assizes on charges connected with the looting of a boutique run by a Tamil, one *M.* The appellant's evidence not only differed from that of *M.* in a number of particulars, but was also contradictory of what he had recorded in his notebook and reported to the police both as to the source of the information he had received as to the plot to loot and as to the place where he received it.

The learned Commissioner in the course of his summing-up, after reminding the jury of the evidence given by the appellant, invited the jury to return a rider indicating what they felt about the evidence of the accused.

After returning their verdicts in relation to the accused, the Foreman said, " the headman may be dealt with for giving false evidence ".

After sentencing the accused who were found guilty, the Commissioner said to the accused, " The jury have brought a rider against you that you should be dealt with for giving false evidence. Have you any cause to show why you should not be dealt with ".

The Commissioner having indicated that he was dealing with the appellant summarily, counsel for the appellant urged some matters in mitigation. The learned Commissioner again called upon the appellant saying : " Have you any cause to show ? " The appellant begged His Lordship's pardon and the learned Commissioner sentenced him to three months' rigorous imprisonment.

Held : (1) That the statements made by the learned Commissioner to the appellant and in his summing-up to the jury tend to support the view that he regarded the rider of the jury as equivalent to a verdict of guilty to a charge of perjury.

(2) That section 440 (1) of the Criminal Procedure Code does not require a finding by a jury as a condition precedent to the exercise by the Supreme Court of the summary power to sentence for giving false evidence.

(3) That under section 440 (1) aforesaid, it is for the Court to decide whether false evidence has been given, and if in Court's opinion it has, then the Supreme Court has power to sentence summarily, " as for a contempt of the Court ".

(4) That—

(*a*) as the observations made by the learned Commissioner to the jury in the course of his summing-up were not sufficient to leave the appellant in no doubt as to the matters on which, in the opinion of the Court, he had given false evidence ;

(*b*) as it was not suggested that the whole of the appellant's evidence was false ; and

(*c*) as the appellant was not informed by the learned Commissioner of the gist or substance of the accusation against him and accordingly was given no opportunity of explaining and possibly of correcting a misapprehension as to what had been, in fact, said or meant,

the sentence passed upon the appellant should be quashed.

Sections 122 *and* 123—*Accused not bound to make statement during investigation under Chapter XII.*

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Criminal Procedure Code, sections 178 *to* 181, 184—*Joinder of counts based on unlawful assembly and common intention in same indictment—Permissibility.*

Criminal Procedure Code, sections 152 (3), 180 (1), 180 (2)—*Joinder of charges—Unlawful assembly and common intention—Unlawful assembly—Does section* 146 *of the Penal Code create a specific offence* ?—*Penal Code, sections* 32, 146.

"*Stare Decisis,*" *the principle of—Decision arrived at "per incuriam"—Meaning thereof—Concession of counsel on a point of law.*

Six accused persons were charged, *inter alia,* as follows :—

(*a*) being members of an unlawful assembly—(punishable under section 140 of the Penal Code) ;

(2) being members of the said unlawful assembly, committing house-trespass by entering the house of one Ariyadasa—(punishable under section 434 read with section 146) ;

(3) being members of the said unlawful assembly, using force or violence—(punishable under section 144) ;

(4) being members of the said unlawful assembly, one or more members of which caused hurt to certain persons—(punishable under section 314 read with section 146) ;

(5) committing house-trespass—(punishable under section 434) ;

(6) wrongfully confining the said Ariyadasa—(punishable under section 333) ;

(7) wrongfully confining one Gomis—(punishable under section 333) ;

(8) voluntarily causing hurt to the said Ariyadasa—(punishable under section 314).

After trial, the 1st accused was acquitted and the other five accused were convicted on charges 1 to 7. The 2nd accused was further convicted on charge 8. The learned Magistrate, being also a District Judge, had assumed jurisdiction under section 152 (3) of the Criminal Procedure Code in the case of charge No. 3 which was not triable summarily.

On appeal, it was argued by counsel for the accused-appellants that :—

(*a*) Section 146 of the Penal Code created no offence and was merely a basis of criminal liability ;

(*b*) Consequently, the jointly together in one indictment of Charges 2, 3 and which were based on the existence of an unlawful assembly, with charges 5, 6, 7 and 8 which and were based on the existence of a common intention amounted to a fatal misjoinder, since what the law permitted was the joining together of different offences and not one and the same offence by different names ;

(*c*) There had been no proper assumption of jurisdiction by the Magistrate in terms of section 152 (3) of the Code.

Reliance was placed on the case of *Don Marthelis et al.* v. *The Queen,* (S.C. Nos. 5-10 of 1962 ; S.C.M. of 19.3.1963), where a Bench of two judges had held that charges based on the allegation of unlawful assembly could not be validly joined with charges based on common intention.

Held : (1) That section 146 of the Penal Code creates a specific offence, the punishment for which depends on the offence of which the offender is by that section made guilty.

(2) That sections 180 (1) and 180 (2) of the Criminal Procedure Code permits the joinder of charges based on the existence of an unlawful assembly with charges based on the existence of a common intention.

(3) That the decision of two judges in the case of *Don Marthelis et al.* v. *The Queen* (*supra*), had been arrived at *per incuriam* and was in any event inconsistent with the Court of Criminal Appeal decision in *The King* v. *Heen Baba,* 51 N.L.R. 265.

(4) That the decision whether jurisdiction had been properly assumed in terms of section 152 (3) must be judged on the facts and circumstances as known to the Magistrate at the time the question came to be decided by him and not by what may have happened at the trial at a point of time after he had decided that question. In the present case jurisdiction had been properly assumed in terms of the section and further, the reasons given by the learned Magistrate at the time he assumed jurisdiction had been vindicated by the events that accompanied the trial.

Per T. S. FERNANDO, J.—"It seems to me that a simple test for deciding whether what the prosecution alleges are two distinct and separate offences are in reality one and the same offence would be to consider whether the elements necessary to establish the one are the same as those necessary to establish the other. Judged by this simple test, it will be readily seen that what was alleged in charge No. 2 in this case was an offence different from that alleged in charge No. 5, and what was alleged in charge No. 4 was an offence different from that alleged in charge No. 8".

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Criminal Procedure Code, sections 178, 179, 180 *and* 184—*Joinder of charges—Several accused—Charges of unlawful assembly against some—Charges based on common intention against others—Joinder of these charges in one indictment—Is such joinder legal* ?—*Penal Code, sections* 140, 146 *and* 32.

Criminal Procedure Code, section 425—*Court of Criminal Appeal Ordinance, proviso to section* 5 (1)—*Applicability in such a case.*

Several accused were indicted in this case on 13 charges. Some of these charges were based on the allegation that they were members of an unlawful assembly and the remainder were on the basis of common intention.

On their being convicted, the accused appealed. Relying on the case of *Don Marthelis et al* v. *The Queen*, 64 C.L.W. 30, counsel for the appellants contended that the joinder of these two sets of charges in the same indictment, was illegal.

After analysing the various provisions of sections 178, 179, 180 and 184 of the Criminal Procedure Code and supporting his interpretation thereof with practical illustrations, His Lordship—

Held : That the joinder of the said charges in one indictment is not illegal.

Per H. N. G. FERNANDO, J.—" In a single count of an indictment charging five persons with the murder of *X*. the joinder of persons is authorised by section 184 of the Criminal Procedure Code because all five are *accused of jointly committing the same offence* in pursuance of a common intention. If in addition there is evidence that the same five were in the course of the same transaction members of an unlawful assembly, a second count may be added for the offence against section 140 of the Penal Code, for the reason that the joinder of persons is authorised by section 184 and the joinder of charges authorised by section 180 (the two sections can apply in combination, cf. section 178). For the same reason, *i.e.*, the application of sections 184 and 180 in combination, a third count for the distinct offence against section 146 read with section 296 of the Penal Code may be added against all five persons, for all are here jointly *accused of committing the same offence* (section 184), and *more offences than one were committed by the same persons in the course of the same transaction* (section 180 (1)). Indeed, a further application of section 184 would authorise a fourth count charging only one of the five with some *different offence* such as theft or indecent assault *committed in the same transaction* ".

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Court of Criminal Appeal, section 5*—Applicability to facts of present case.*

At the Kalutara Assizes the two accused elected to be tried by an English-speaking jury. After the jury were empanelled, the trial judge asked the members of the jury whether they were sufficiently conversant with Sinhala to understand well the questions put to witnesses and the answers given by them, it this were done in Sinhala. He also inquired whether they could understand the address of Counsel if this was in Sinhala. To both these questions the Foreman of the jury answered in the affirmative. The judge thereupon inquired from defence Counsel whether he could follow proceedings in Sinhala, and Counsel answered in the affirmative. The judge then stated that he (Counsel) would be free to put any question at any stage in English, and would also be able to follow the translation which the interpreter would make for the benefit of the stenographer.

The first witness gave his evidence in English, but the others gave their evidence in Sinhala. Though such evidence would necessarily be translated into English for the purposes of the record, it was not clear that this was done in such a way as to ensure that the jury heard the translation. Crown Counsel made his closing address in Sinhala, but it was not clear from the record whether Defence Counsel made his address in English or Sinhala. The summing-up by the learned Judge was in English. The first accused was found guilty of murder and sentenced to death, while the second accused was acquitted and discharged.

On appeal, the matter came up before five Judges of the Court of Criminal Appeal. Two judges held that the trial was irregular, that there had been a departure from well established rules of procedure, and that the conviction should be quashed and a new trial ordered. Two judges held that the trial was irregular, but that the appeal should be dismissed as there had been no substantial miscarriage of justice. One judge held that there had been no irregularity, and that, therefore, the appeal should be dismissed. The appeal was, therefore, dismissed by a majority of three to two.

Held : (1) That there had been a departure from the provisions of the Code with no certainty that such a departure did not operate to the disadvantage of the appellant and that, therefore, the case must be regarded as one in which there had been a miscarriage of justice necessitating the quashing of the conviction.

(2) That the provisions of the Criminal Procedure Code under which the appellant was tried contemplate that where there has been an election to be tried by an English-speaking jury, the trial will be conducted throughout in the English language.

(3) That while ordinarily where a conviction has to be quashed and the sentence set aside because of procedural irregularities a new trial would be directed, yet the discretion as to whether there should be a new trial after so great a lapse of time should be exercised by the Court of Criminal Appeal of Ceylon.

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Criminal Procedure Code, sections 171, 425*—Poisons, Opium and Drugs Ordinance* (*Cap.* 172), *sections* 32, 76*—Charge of possessing raw opium—Charge erroneously referring to possession without a licence from the Minister of Health, when it should be from the Director of Medical and Sanitary Services—Does such error make charge illegal ?—What facts should Appeal Court consider in determining whether there has been failure of justice ?*

Sentence, failure to appeal from—Does that debar Supreme Court from interfering with sentence—Criminal Procedure Code, section 347.

Where an accused was convicted on a charge of possessing raw opium without a licence from the

Minister of Health, when it should have stated without a licence from the Director of Medical and Sanitary Services—

Held : (1) That the error in the charge did not constitute an illegality.

(2) That in deciding whether there has, in fact, been a failure of justice, the Appeal Court is entitled to take the whole case into consideration and determine for itself whether there has been a failure of justice in the sense that a guilty man has been acquitted or an innocent man has been convicted.

(3) That the fact that neither the Attorney-General nor the accused has appealed against the sentence does not debar the Supreme Court from interfering with it.

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Criminal Procedure Code, sections 202, 165 (*F*), 179, 180, 217—*Trial on indictment before District Court—Misjoinder of charges—Withdrawal by prosecuting counsel of* 2*nd and* 3*rd charges in the indictment—Trial and conviction of accused on remaining charge an illegality and not a mere irregularity which can be cured.*

Criminal Procedure Code, section 202—*Term "indictment" in section* 202 *not synonymous with the term "charge".*

In a trial before the District Court on three counts of the indictment, the addition of the 2nd and 3rd counts was found to be a misjoinder of charges by the District Judge. Thereupon the Crown Counsel withdrew those counts and the accused was tried on the surviving first count of the indictment, found guilty and convicted.

Held : (1) That in view of the express provisions of section 202 of the Criminal Procedure Code, it was not permissible for prosecuting counsel to withdraw some of the charges in an indictment before a District Court. He could only withdraw the whole indictment, whereupon all proceedings should be stayed, and the accused discharged.

(2) That the trial of the accused on the surviving first count of the indictment not being warranted by the express provisions of section 202 of the Criminal Procedure Code was an illegality and not a mere irregularity in procedure that could be cured, and that the conviction must be quashed.

(3) That the term "indictment" in section 202 of the Criminal Procedure Code is not synonymous with the term "charge".

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Debt Conciliation Ordinance

Writs of "Certiorari" and Prohibition—Debt Conciliation Ordinance (Cap. 81) *amended by Act No.* 5 *of* 1959—*Conditional Transfer—Application by vendor for relief under sections* 19 *A and* 19 *B—Notice of application sent to purchaser without order from the Board and after expiry of period stipulated in agreement—Sale of property by purchaser despite notice—Validity of such sale—Is entertaining such application for relief and issue of notice a mere matter of form.*

The 7th respondent to this petition sold a land on 18th March, 1957, to the 8th defendant for Rs. 6,000/- subject to the condition that if this sum was repaid within three years from the date of sale together with interest at 15%, the 8th respondent was to retransfer the land.

The 7th respondent, on 15th February, 1960, made an application to the Debt Conciliation Board for relief in respect of the transaction under sections 19A and 19B of the Debt Conciliation Ordinance as amended by Act, No. 5 of 1959.

This application was received by the Board on the same day, *i.e.*, more than 30 days before the expiry of the said three years (as required by section 19A(1)).

The Secretary of the Board despatched on 7th April, 1960, a notice to the 8th respondent that an application had been made by the 7th respondent, but a copy of the application was not attached thereto. Notwithstanding the receipt to this notice on 10th April, 1960, the 8th respondent sold the land to the petitioner on 16th April, 1960.

The Board inquired into this application on 20th February, 1962, and made order declaring the said sale of 16th April, 1960, null and void in view of section 19 B (2) and the petitioner challenged the validity of this order in these proceedings for a writ of *certiorari* and Prohibition.

The order of the Board contains on the face of it an admission that the Board did not meet and apply its mind and cause the Secretary to send the notice.

Held : (1) That the application of the 7th respondent, not having been entertained by the Board, but action taken thereon only by the Secretary, the notice received by the 8th respondent was not a valid notice in terms of the Statute.

(2) That, therefore, the prohibition or alienation or other disposition of property imposed by section 19 B (1) does not attach to the property. Hence the sale of the petitioner is valid.

(3) The act of entertaining an application under section 19 A (1) is not a mere matter of form. It is in the nature of a judicial act. Section 49 only protects acts done by the Board and not acts done by the others.

SILVA *vs.* DEBT CONCILIATION BOARD 36

Declaratory Decree

See under—"QUIA TIMET" ACTIONS

Defamation

Defamation—"Animus injuriandi" an essential basis of the cause of action in the Roman-Dutch Law—Defences of justification and fair comment—How established.

On the First Cause of Action

The appellant who was from Kotte and was an old boy of Ananda Sastralaya, Kotte, was a teacher in that school from 1934 to 1955. For a period prior to July, 1953, he acted as Principal during the absence of the Principal. In June, 1953, Mr. Alagiyawanna, who was then in the Education Department was appointed Vice-Principal and after that date he acted as Principal. This appointment was deeply resented by the appellant. In the period that followed there appeared certain writings on the walls of the school in the form of " anti-Alagiyawanna " slogans. There was also failure in some cases to pay " facilities fees ". In March, 1955, the appellant was appointed Principal. On the 5th of December, 1955, and again on 23rd of December, 1955, and 3rd of January, 1956, the respondent newspaper published the following statements : (*a*) that the appellant who had during the term of office of Mr. Alagiyavanna, as Principal induced students not to pay facilities fees, had, when he himself was appointed Principal, enforced this payment ; (*b*) that when Mr. Alagiyawanna was Principal, the appellant had incited the students to write anti-Alagiyawanna slogans on the walls of the school. The Privy Council accepted the findings of the District Court that both these statements were true and,

Held : (1) That the affairs of the school were of such concern and interest that the publication of these statements was in the public interest or for the public benefit.

(2) That the application of these statements could not be regarded as unjustifiable resurrection of past events no longer qualifying to attract public interest.

(3) That if any part of statement : (*a*) was comment, it was fair, *bona fide* and in the public interest. It was fair and legitimate to say in Kotte that an assistant teacher at a school in Kotte who had requested children not to pay facilities fees had after becoming Principal enforced this payment.

On the Second Cause of Action

On the 12th of September, 1954, the appellant applied for permission to retire under a scheme which enabled teachers who were unable to give instructions in either Sinhala or Tamil to exercise an option to retire with compensation for loss of career. He stated that he did not consider himself competent to give instruction in Sinhala. His application was refused on the grounds that he had passed the S.S.C. Examination with Sinhala as a subject, that he had also passed the B.A. (Hons.) Indo-Aryan, offering Pali and Sanskrit, and that he was also the author of a text book in Botany produced in Sinhala. It was not, however, shown that the obtaining of a B.A. Degree in Indo-Aryan from the University of London involved the passing of an examination in Sinhala nor was it shown that someone who possessed a degree in Indo-Aryan was competent to give instruction through the medium of Sinhala. Further, in regard to the text book in Botany the evidence disclosed that it was made possible with the assistance of two friends. The appellant appealed from that refusal to the Minister of Finance who was Mr. Jayawardena. In February, 1956, Parliament was dissolved. During the elections that followed, the appellant was a supporter and a worker of the U.N.P. He was seen driving a car which carried on it a poster bearing a photograph of Mr. Jayawardena, the Minister of Finance, who was a member of the U.N.P. On or about the 5th of April, 1956, the elections had resulted in the defeat of the U.N.P. On the 7th of April, the Minister of Finance, Mr. Jayawardena, who had himself been defeated in the election, went to his office to discharge his duties as Minister until the 15th of April. There were some 145 appeals he had to consider before he relinquished office. He allowed the appeal of the appellant and sanctioned his retirement.

The District Judge accepted the evidence of Mr. Jayawardena that he did not bring his mind to bear on the question of the appellant's retirement but had acted on th advice of his officials. On the 8th of May, 1956, and the 11th May, 1956, the respondent newspaper published two items of news which said : (*a*) that the appellant who had a degree in Indo-Aryan had retired on full pension on the ground of inability to teach in Sinhala ; (*b*) that a Sinhala book on Botany written by him had been accepted by the Educational Publications Board ; (*c*) that the appellant worked hard for a certain political party during the elections and that it would not be difficult for the Education and the Finance Ministers of the new government to know how he could have retired during the time of the election. The statement that the appellant had retired " with full pay " was a misstatement of fact, and so was the statement that the text book on Botany was accepted by the Educational Publications Board. In fact, the appellant did not retire " with full pay " nor was his book accepted by the Educational Publications Board.

Held : (1) That these two news items did suggest that the appellant had retired by falsely pretending that he could not teach in Sinhala, and that he had been able to retire by some improper means to which he had been a party.

(2) That in so far as the words contained a statement of facts the respondent had failed to justify them.

(3) That in so far as the words contained comment they were not fair because material facts were not truly stated, and there was no adequate foundation for the serious and damaging suggestions made in those two news items.

Per LORD MORRIS.—" The law which must be applied in approaching the issues which arise in this appeal is the law of defamation in Roman-Dutch Law as applied in Ceylon. The existence of *animus injuriandi* is, therefore, an essential basis of the cause of action. As Basnayake, C.J., pointed out in his judgment, defamation is a species of *injuria* and *injuria litteris* is committed when a person has assailed the reputation of another by publishing to a third person matter intended to bring him into contempt, ridicule or hatred *animo injuriandi* ; and *animus injuriandi* being a state of mind has in the generality of cases to be inferred from the words and the occasion on which and the context and the circumstances in which they are used. If the existence of *animus injuriandi* is shown or can be presumed to exist, the defence may seek to negative it by raising a plea of justification. In order to establish that plea it is not enough to

show that the words complained of are true : it must be shown that their publication was in the public interest or for the public benefit. A further defence that may be raised is that of fair comment. This necessitates establishing that the facts upon which the comment is based are true, that the comment is in reality comment and is fair and *bona fide*, and that the comment is made on a matter of public interest ".

Delict

Employees' Provident Fund Act

Employees' Provident Fund Act, No. 15 *of* 1958—*Accused carrying on business of manufacturing tobacco or tobacco products—A covered employment within the meaning of section* 8 (1) *read with regulation* 2 (1) *of Regulations made under the Act—Accused's failure to pay as employer to the Employees' Provident Fund from the earnings of the employees contributions to the Fund—Contravention of section* 15 *of the Act—Acquittal of accused on the ground that the prosecution failed to prove that " cigars " made out of tobacco—Appeal from acquittal.*

The appellant was acquitted of three charges under sections 34 and 37 of the Employees' Provident Fund Act, No. 15 of 1958, in which he was accused of contravening the provisions of section 15 of the Act by failure to pay to the Employees' Provident Fund certain contributions in respect of three persons employed by him in his cigar factory.

Paragraph 10 of the Schedule in a *Gazette Extraordinary* enumerated the business of manufacturing tobacco or tobacco products as one of the covered employments to which the Act is applicable.

After the close of the prosecution case the learned Magistrate acquitted the accused on the ground that the prosecution failed to prove that the business carried on by the accused was the manufacturing of tobacco or tobacco products holding,

(*a*) that there was no reference to tobacco in the oral evidence led for the prosecution ;

(*b*) that there was no reference to tobacco in the declaration produced by the prosecution and which had been furnished by the accused under regulation 8 of the Regulations of 29th October, 1958, giving particulars of employees in the accused's cigar factory ;

(*c*) that there are cigars in the market which are not made of tobacco.

The complainant appealed with the sanction of the Attorney-General.

Held : That the meaning of the English word " cigar " as given in the Oxford Dictionary is a roll of tobacco leaf for smoking, and the furnishing of the particulars of his cigar industry by the accused prior to the date material to the charge as required by regulation 8 of the Regulations of 29th October, 1958, therefore, established the case for the prosecution.

Estate Labour (Indian) Ordinance

Estate Labour (Indian) Ordinance (Cap. 133), *section* 23—*Meaning of term " quits " therein—Whether applicable only to case where labourer voluntarily quits employer's services.*

Held : That under section 23 of the Estate Labour Ordinance an employer who lawfully terminates the contract of service of a labourer may terminate the contract of service of his spouse at the same time. The application of this section is not confined only to the case in which labourer voluntarily quits the services of an employer.

Per BASNAYAKE, C.J.—" The word ' quits ' occurs not only in section 23 but also in sections 22 and 25 (3), and neither in section 23 nor in the other section does it admit of the restricted meaning given to it in the case referred to above. The word ' quits ' is not a term of art and given the ordinary meaning that is appropriate to the context of section 23 it means ' to leave '. A labourer lawfully quits the service of his employer when he leaves after his services come to an end either when he or the employer in the exercise of the right to terminate the contract of service lawfully terminates it. Whether the employer lawfully terminates the contract of service or the labourer does so, the statute imposes on the employer the duty under pain of punishment of determining the contract of service of his spouse where the spouse is also a labourer under a contract of service with that employer and no application is made under the proviso to section 23 (1). That provision is designed for the benefit of the spouse of a labourer. It prevents the employer from discharging the husband without at the same time releasing the wife ".

Evidence

Hearsay evidence admitted without objection—Effect of such evidence.

Evidence Ordinance

Sections 155, 8 (2), 9—*Evidence illegally admitted in rebuttal—Can witness be contradicted by omission in earlier statement—Such evidence referred to in summing-up—Possible adverse effect on jury—Alteration of verdict and sentence..*

Criminal Procedure Code, sections 122, 123—*Accused not bound to make statement during investigation under Chapter XII of Code—Whether officer inquiring can examine accused.*

Evidence was given by the accused of the circumstances in which he stabbed the deceased, to show that he was exercising his right of private defence.

Evidence was then led in rebuttal by the Crown under section 155 of the Evidence Ordinance, to show that none of those circumstances were recorded in a police statement made by the accused soon after the incident. In the summing-up, the attention of the jury was focussed on this omission in the police statement.

Held : (1) That section 155 of the Evidence Ordinance did not permit the admission of a statement in rebuttal to contradict the accused by reason of the omission therein of facts deposed to in evidence.

(2) That the evidence led in rebuttal could not be considered relevant even under section 8 (2) or section 9 of the Evidence Ordinance.

(3) That, in any event, an accused person was not bound to make a statement in the course of an investigation under Chapter XII of the Criminal Procedure Code.

Held further : That the forcible direction as to the effect of this evidence illegally admitted, could have prejudiced the mind of the jury against the defence.

Section 114—*Attention of jury to be invited to presumption drawn thereunder.*

Section 165—*Judge's power to question witnesses and parties.*

Fideicommissum

" Fideicommissum " valid for four generations—Fideicommissarie claiming shares—Another fideicommissary as 13th defendant claiming entirety on prescriptive title—Admission by parties that 13th defendant possessed and collected rents since 1916—*Failure of 13th defendant to give evidence—Scope and meaning of such admission and evidence—Prescription Ordinance, sections* 3 *and* 13.

The plaintiff claimed that she was entitled to a share of a property under a deed of 1872 which she alleged created an effective *fidei commissum* operative for four generations. The plaintiff was a great-great-grand-daughter of the grantor's wife and there were numerous other parties to the proceedings.

The contesting 13th defendant was a grandson of the grantor's wife, his father having been one of three children and her only son. In addition to the question concerning *fidei commissum*, the 13th defendant claimed to have acquired an exclusive title to the entirety of the property by prescriptive possession. This claim was resisted by the plaintiff and all other parties relying particularly on the proviso to section 3 and also on section 13 of the Prescription Ordinance.

In the course of framing issues an admission was made by the counsel for plaintiff in these terms : " that the 13th defendant's father has been in possession from prior to 1916 and that the 13th defendant came into possession in 1961 ". That this admission was accepted by all the parties was clear from the judgments of the District Court and the Supreme Court.

The only material evidence on this point was an admission in plaintiff's evidence that from 1916 the 13th defendant collected the rents and that given by the plaintiff's brother who stated in cross-examination that " the 13th defendant is occupying the premises ", and " He has rented the use and has collected the rent ". The 13th defendant did not give evidence.

The learned District Judge held : (*a*) that the *fidei commissum* had been fully established ; (*b*) that the claim of the 13th defendant failed because he had not discharged the onus the learned Judge thought lay on him of proving as regards each share in the *fidei commissum* property, what were the exact dates when the successive interests therein determined and when any disability came to an end.

The 13th defendant appealed to the Supreme Court. The main argument in the Supreme Court was whether the District Court was correct in his view that the burden of proving the several dates above referred to was on the 13th defendant. He succeeded on this question.

Thereupon the scope and meaning of the admission and evidence above quoted became vital to the conclusion of the appeal.

In the Supreme Court, the Chief Justice drew the inference that the admission and evidence above stated justified the conclusion that the 13th defendant acquired a prescriptive title within the meaning of the Prescription Ordinance, but the majority of the Supreme Court did not share this view and held that the 13th defendant had not proved such possession as required by section 3 of the Prescription Ordinance. They drew forcible attention to the fact that the 13th defendant failed to give evidence and state the amount of rents received or outgoings discharged or to produce any document consistent with his claim.

Held : That since both sides before the Supreme Court were content to rest upon the ordinary meaning and inferences to be drawn from the admission and the evidence above-quoted. Their Lordships were unable to conclude that the majority of the Supreme Court were not justified in coming to the conclusion they did.

Their Lordships expressed the opinion that the question involved was one very much on the borderline and stated the reasons why they were not ordering a re-trial.

Husband and Wife

Husband effecting improvements on wife's property—Rights to claim compensation from heirs of deceased wife.

Application by ex-wife for Maintenance.

Industrial Disputes Act

Industrial Disputes Act, section 33—Award made in pursuance of reference under section 4 (2)—Compensation awarded to workmen—Whether such order can be made without decision as to reinstatement—Order for compensation to be alternative to reinstatement.

Held : That the Industrial Court had no power to make an order for the payment of compensation unless there is a decision as to reinstatement. The decision as to payment of compensation to a workman must be an alternative to a decision as to his reinstatement.

Interpretation of Statutes

" *Ejusdem generis* " rule.

Application of " noscuntur a sociis " rule.

Judge

Judge's power to call for witnesses.

Questions by the trial Judge.

Landlord and Tenant

Landlord and tenant—Action for ejectment of tenant's son in occupation of premises after father's death—Defendant pleading that he was tenant on legal grounds—Rejection of defendant's pleas—Appeal—Point raised in appeal that as plaintiff avers that defendant is a trespasser plaintiff can succeed only on proof of title—Having regard to value of premises, jurisdiction of Court of Requests questioned—Can such plea succeed.

Courts Ordinance, section 75—Jurisdiction of Court of Requests—What is the matter in dispute.

Plaintiff sued the defendant for ejectment alleging that the premises in question had been let to the father of the defendant, that the father had died on 7th March, 1961, and that the defendant continued in occupation claiming to be the tenant of the plaintiff. The defendant in his answer stated : (*a*) that he had been a partner with his father in the business carried on in the premises and was *qua* partner a tenant ; (*b*) that under section 18 of the Rent Restriction Act he had become tenant after his father's death.

After trial the learned Commissioner rejected both these pleas and gave judgment for the plaintiff.

In appeal it was contended on behalf of the appellant that if the defendant was, as the plaintiff averred not a tenant, but a trespasser, the plaintiff could succeed only on proof of his title, which could not be proved in the Court of Requests having regard to the value of the premises.

Held : That as the defendant's answer admitted the title of the plaintiff, the only question in dispute was the allegation of tenancy. Under section 75 of the Courts Ordinance the test of the monetary jurisdiction of the Court of Requests depends on whether there is a *dispute* as to title or not.

Monthly tenancy—When rent in arrears—No stipulation in tenancy that rent should be paid in advance—Rent payble at the end of month—Agreement to accept rent three months behind time—Agreement not pleaded in answer—No issue raised regarding existence of agreement.

The plaintiff sued the defendant on the basis that the latter was his monthly tenant and was in arrears of rent. The defendant, in her answer, admitted being a tenant on a monthly tenancy, but contended that rent had been tendered every month to the plaintiff who had refused to accept the rent so tendered. There was no stipulation that the rent should be paid in advance. The learned Commissioner held that there was an agreement between the plaintiff and defendant to accept rent three months behind time.

Held : (1) That, in the case of a monthly tenancy, where there is no stipulation that the rent should be paid in advance, the rent must be paid at the end of the month.

(2) That, inasmuch as the agreement found to exist by the learned Commissioner had neither been expressly pleaded in the answer, nor an issue raised in regard to its existence, no inference adverse to the plaintiff should have been drawn on account of his failure to produce any written notice given to the defendant that rent will not be accepted unless paid at the end of the month in respect of which it was due.

Legislative Enactments of Ceylon

Legislative Enactments of Ceylon (1956 *Ed.*)—*Revised Edition of Legislative Enactments Act, section* 12 (3)—*Charge under the* 1938 *Edition for criminal offence—Later plaint amended referring to the relevant sections as numbered in* 1956 *Edition—Acquittal of accused though charge proved.*

The accused was originally charged under the 1938 edition of the Legislative Enactments for a criminal offence. An amended plaint was filed after the 1956 edition of the Legislative Enactments had come into force. The amended plaint charged him with the same offence but referred to sections as numbered in the 1956 edition. The Magistrate found the charge proved but acquitted the accused on a point of law, namely, that the amended plaint charged the accused of an offence he had not committed.

Held : (1) That this was a wrong decision of law as section 12 (3) of Chapter I of the 1956 edition of the Legislative Enactments provided that the 1956

edition was the sole authentic edition of the legislative enactments. It is not a question of alteration of the first charge. The offence must, by reason of that section, be deemed to have always existed.

(2) That the accused had been correctly charged.

(3) That there was no prejudice caused to the accused.

(4) That the acquittal of the accused should be set aside and a conviction entered.

JOSLIN SILVA *vs.* INSPECTOR OF POLICE, ALUTGAMA.. 54

Lunatic

Alienation of property by lunatic during lucid interval—Is such alienation valid.

See under—CONTRACT 17

Maintenance Ordinance

Maintenance Ordinance, section 2—Application by an ex-wife who had already obtained decree for divorce against her husband—Can she maintain claim against such husband—Does such an ex-wife come within the meaning of the word " wife " in section 2.

Held : (1) That an application for maintenance made under section 2 of the Maintenance Ordinance by a married woman against her ex-husband after a decree for dissolution of marriage had been entered by a competent Court, could not be entertained.

(2) That the word " wife " in section 2 of the Maintenance Ordinance could not be given an extended meaning so as to include an ex-wife who, as a result of a decree of a competent Court, had ceased to be the wife of the respondent.

MIHIRIGAMAGE *vs.* BULATHSINHALA 90

Maintenance Ordinance, sections 2, 3, 4—Wife's application for maintenance—Husband's offer to take her back—Refusal on ground of husband's adultery—Offer must be made " bona fide "—Quantum of maintenance—Whether wife's income can be considered.

Questions by trial Judge—Whether Judge to take position of umpire only.

Held : (1) That when an applicant for maintenance refuses under section 3, an offer by her husband to live with him, on the ground of his living in adultery, it must be shown on a balance of probability that he was living in adultery at the time he made his offer.

(2) That the " offer " referred to in section 3 should be a *bona fide* offer and even where adultery is not proved, if it appears that the husband's invitation to his wife has not been made in good faith, the former cannot resist a claim for maintenance.

Held further : That the income of the wife should not be taken into consideration when the quantum of maintenance is determined.

Per SRI SKANDA RAJAH, J.—" Before I part with this case, I wish to refer to a matter which transpired on the first day of the argument, namely, the submission that the Magistrate had ' descended into the arena '. Reference was made to para G of the petition of appeal and Kirihamy's evidence in re-examination regarding the Magistrate forcing him to speak the truth. At that stage of the argument I intervened and said that a Judge is not bound to take the position of an umpire. This view which I have always taken is supported by the following passage in the judgment of Sir Anton Bertram, C.J., with whom another eminent Judge, Justice Garvin, agreed : S.C. 441, Negombo, No. 15956, S.C. Minutes, 2nd July, 1924 :—

> ' It is a great pity, I think, that Judges, when they see two sides fencing with one another and manouevring for position, should conceive themselves merely as umpires in a game of strategy and should not themselves determine that the truth must be ascertained and themselves call witnesses, who for strategic reasons or through misconception are withheld by either party '."

SATHASIVAM *vs.* MANIKARATNAM 107

Minors

A minor who is a defendant and on attaining majority does not bring that fact to the notice of Court and ask that his " guardian-ad-litem " be released from the case is bound by all the orders of the Court.

DAYAWATHIE *vs.* DE SILVA AND OTHERS 65

See under—CIVIL PROCEDURE CODE.

Minor appearing without " guardian-ad-litem " in partition action—Interlocutory decree and order entering scheme of partition entered thereafter—Does such illegality vitiate proceedings—Are they void or only voidable at minors' instance—Can a party other than minor complain of such illegality.

Service of summons personally on minor illegal—Does this vitiate all subsequent proceedings.

PERERA *vs.* DON ARON SINGHO 13

See under—PARTITION.

Minors—Whether deed of transfer executed by minor void or voidable—Is ratification by minor necessary to pass title.

Held : (1) That a deed of transfer executed by a minor is voidable and not void. Such a deed would confer title on the vendee without any ratification by the minor until such time as the minor took steps to have it set aside.

(2) That there was no conflict of decisions on this point.

(3) That in the present case, the 2nd defendant could not have acquired title to the land by prescription as he had been admittedly possessing on behalf

of his minor sons who had now transferred their shares to the plaintiff.

NORIS APPUHAMY *vs.* NERIS SINGHO AND ANOTHER.. 95

Misdirection

In relation to defence of provocation in a charge for murder.

See under—CRIMINAL LAW 1

Motor Traffic Act

Motor Traffic Act, as amended by Act, No. 63 of 1961, sections 5, 235, 240—Charge under section 180 (2) for carrying passengers in excess of the number permitted in a private car—Test for determining whether particular vehicle is a private car—Is the Magistrate entitled to look outside the certificate of registration.

Held : That in a charge under section 180 of the Motor Traffic Act as amended by Act, No. 63 of 1961, for carrying more than seven persons in a vehicle registered as a private car, it is not permissible for a Magistrate to look outside the certificate of registration for the purpose of determining whether or not the particular vehicle is a private car.

KUMARATNAM *vs.* SELLIAH 49

Municipal Councils Ordinance

Municipal Councils Ordinance, No. 29 of 1947, section 148 (now 147)—Licensing of offensive and dangerous trades or businesses—By-laws made for the purpose—Charge under such by-law for storing of furniture in premises within Municipality—Accused a dealer in furniture carrying on that business at the premises in question with furniture bought from suppliers—Stocks held in reserve to replace articles sold.

Interpretation of Statutes—Application of "noscuntur a sociis" rule—Meaning and content of expression "trade or business" in section 147—What was prohibited by this section—Meaning of words "the following trades or business" in the relevant by-law What is prohibited by the by-law—Not storing of furniture "per se" but storing of furniture for others for gain—Can conviction be sustained.

The appellant was charged with using certain premises in Colombo for the business—

(*a*) of storing of furniture ;

(*b*) of manufacture of furniture ;

(*c*) of manufacture and storing of furniture, without a licence from the Commissioner, Municipal Council, Colombo, in contravention of section 148 (1) (now 147 (1)) of the Municipal Councils Ordinance, No. 29 of 1947, read with the by-laws made thereunder and published in *Gazette*, No. 10697 of 30th July, 1954.

The relevant by-law reads as follows :—

"The following trades or businesses are hereby declared to be offensive trades or businesses for the purposes of section 148 (now 147) of the Municipal Councils Ordinance, No. 29 of 1949."

The 39th item in the list of trades or businesses appended to the above by-law reads : "Manufacture or storing of furniture or manufacture and storing of furniture."

The appellant had been a dealer in furniture carrying on that business at the premises in question for 14 years. He did not make furniture but bought from various suppliers. His business premises consisted of a show-room in which the furniture was displayed, and as they were sold, they were replaced from stocks held in reserve in a room behind.

The learned Magistrate acquitted the appellant on charges (*b*) and (*c*), but convicted him on (*a*), following the decision in *David* v. *Municipal Sanitary Inspector*, 59 N.L.R. 81, although he was inclined to follow the decisions in *Gunasekere* v. *Municipal Revenue Inspector*, 53 N.L.R. 229, and *De Silva* v. *Kurunegala Co-operative Stores, Ltd.*, 59 N.L.R. 430.

In view of these conflicting judgments this appeal was referred to a Bench of three Judges.

Held : (1) That applying the well-known rule of interpretation that the meaning of a word in a particular context has to be determined by reference to that context, especially the words associated with it (*noscuntur a sociis*), the words "trade or business" in section 147 must be understood in their cognate sense. The word "business" is coloured by the word "trade". The context, therefore, should be regarded as excluding all other meanings of the word "business", except those that are compatible with its associate trade.

(2) That the Council has no power to declare an activity which is not a trade or business within the meaning of section 147 to be an offensive or dangerous trade or business.

(3) That the word "storing" in the by-law signifies stocking for some length of time and not stocking for the day to day needs of a retail business.

(4) That the prohibition in the by-law does not apply to storing of furniture *per se*. It applies only to the storing of furniture of others for gain. Hence the conviction of the appellant could not be sustained.

Per BASNAYAKE, C.J.—"But the judgments of the Court of Appeal emphasize the fact that in deciding whether a particular activity is a business or not you have to examine its object and scope and consider what is the substance of the transaction, and the mere fact that gain results from a particular arrangement or activity does not make that arrangement or activity a business. Those judgments also emphasize the importance of the principle that in interpreting words in a given context importance must be attached to the sense in which they are used in that context".

DON ALBERT *vs.* MUNICIPAL REVENUE INSPECTOR.. 75

Murder

Provocation, defence of—Effect of such defence—Elements required for such defence.

Offensive and Dangerous Trades

Partition

Partition action—Minor appearing without guardian-ad-litem in such action—Interlocutory decree and order accepting scheme of partition entered thereafter—Does such illegality vitiate proceedings—Are they void or only voidable at minor's instance—Can a party other than the minor complain of such illegality.

Minors—Service of summons personally on minor illegal—Whether such illegality vitiates all subsequent proceedings.

This was an appeal against an order of the learned trial Judge in a partition action, accepting a scheme of partition. It was brought to the notice of Court after interlocutory decree had been entered and after the order appealed from was made, that the 10th and 11th defendants were minors and had not been represented by a *guardian-ad-litem*. Later the birth certificate of one of them (the 11th defendant) was produced as proof of his being a minor. Summons had been served personally on the 11th defendant.

It was submitted on behalf of the appellant (the 20th defendant) that the order appealed from was null and void as no *guardian-ad-litem* had been appointed to represent the 10th and 11th defendants in the action and there had been no service of summons on them according to law. Counsel for the respondent submitted that this order was not void but only voidable and then only at the instance of the minor concerned and not of any other party to the action. He further contended that there was no evidence of any prejudice caused to the 11th defendant by the order appealed from.

Held : (1) That the order appealed from should be set aside inasmuch as it had been made after an inquiry at which a minor had not been represented by a *guardian-ad-litem*. Service of summons personally on the minor, as in the present case, was ineffective and this was an illegality which invalidated the order appealed from. The minor had an interest in the preparation of the scheme of partition but had had no opportunity to state his objections, if any, through a properly appointed representative before the order appealed from was made.

(2) That the appellant being a party to this action was entitled to have the order set aside even though he was not the minor concerned. Since the decree in a partition action is intended to bind everybody, whether a party to the action or not, it was necessary for every party to the action to be vigilant in order to prevent or remove any illegality in the proceedings that might affect the validity of the decree.

Held further : (3) That this illegality which invalidated the order appealed from, also invalidated all proceedings subsequent to the order for issue of summons, but those proceedings could not be set aside as the present appeal was not an appeal from the interlocutory decree.

Penal Code

Section 188.

Penal Code, sections 32, 46—*Joinder of charges of unlawful assembly and common intention—Whether such joinder valid ?*

Penal Code, section 488—*Charge of disorderly behaviour while intoxicated—Intoxication not proved by medical evidence—Such proof vital for conviction.*

Held : Where a state of intoxication is an essential element of an offence, such intoxication must be proved by medical evidence, in order to establish the offence.

Sections 478 *B and* 478 *C—Court of Criminal Appeal—Accused convicted on charges relating to counterfeit notes—Hearsay evidence admitted without objection—Effect of such evidence—Failure to call material witnesses for prosecution though available—Evidence Ordinance, section* 114—*Attention of jury to be invited to presumption drawn thereunder—Self-contradictory evidence of a material witness.*

Criminal Procedure Code, section 122—*Evidence led in contravention of—Failure on the part of the trial judge to invite attention of jury to such infirmities.*

Judge's power to question witnesses and parties—Limitation to section 165 *of the Evidence Ordinance.*

Held : (1) That even though no objection is taken to the admission of hearsay evidence, such admission is illegal.

(2) (*a*) That the failure of the prosecution to call James Appuhamy a material witness, not only rendered the evidence of what he had said to the witness, Strong, inadmissible, but also seriously affected the rest of Strong's evidence.

(*b*) That such failure entitled the defence to ask the jury not only to reject Strong's evidence about James Appuhamy, but also to presume that if the latter had, in fact, been called his evidence would have been unfavourable to the prosecution.

(3) That in the present case the prosecution had failed to establish that the accused knew or had reason to believe that the note P 1 was counterfeit and that he intended to use it as genuine. For this purpose it had relied only on the evidence of witness Selvadurai, who proved himself to be an unreliable witness.

(4) That the learned trial Judge should have drawn the attention of the jury to the fact that Inspector Selvadurai (the Police officer on whose evidence the prosecution relied to prove the accused's knowledge that the notes were counterfeit) had contradicted himself on material points and that his evidence should be regarded as unreliable.

(5) That the failure of the prosecution to call the other police officer who was said to have been with Inspector Selvadurai when the accused's table was searched and whose name was on the back of the indictment—

(*a*) cast a further doubt on the veracity of Inspector Selvadurai especially as there were other witnesses who gave evidence to the effect that *only* Inspector Selvadurai and the accused were present when the table was searched ;

(*b*) gave rise to the presumption under section 114 of the Evidence Ordinance that the evidence of this witness would, if he had been called, been unfavourable to the prosecution. *The attention of the jury should have been drawn to this presumption.*

(6) That the words " in order to discover or to obtain proper proof or relevant facts " in section 165 of the Evidence Ordinance place a limitation on the powers of a judge to ask any question he pleases in any form of any witness or of the parties to a case.

Per BASNAYAKE, C.J.—" In the course of the trial the learned Commissioner used the information book in contravention of the provisons of section 122 (3) of the Criminal Procedure Code and permitted oral evidence to be given of the contents of other documents without the documents themselves being produced. Evidence of statements made by witnesses examined in the course of the investigation under Chapter XII of the Criminal Procedure Code was given by Selvadurai in contravention of the prohibition in section 122 (3). The learned Commissioner has in his summing-up failed to draw the attention of the jury to the many infirmities in the prosecution case and to put before them the points made by the defence."

Sections 140, 146 *and* 32.

Poisons, Opium & Dangerous Drugs Ordinance

Charge erroneously referring to licence from Minister instead of Director of Medical and Sanitary Services—Legality.

Prescription

Prescription Ordinance, sections 3 *and* 13.

Privy Council Decisions

Prohibition

Quia Timet Actions

" *Quia timet* " *action—Person possessing a contingent interest in land—His right to a declaratory decree protecting such interest before it has vested in him.*

R. was the grantee on a deed which conveyed an undivided interest in a land. The plaintiffs who were children of *R.*, alleged that the deed created a *fidei commissum* which would vest the title to the land in them after *R's.* death. The land was partitioned and the decree in the partition action gave *R.* a divided lot in lieu of his undivided interest, but did not refer to the alleged *fidei commissum.* The rights of *R.* in the divided lot were sold in execution and from the purchaser it devolved on the defendants who commenced to build on it. The plaintiffs while *R.* was still living sued the defendants : (1) for a declaration that the deed created a *fidei commisum* in their favour ; (2) for an order to prevent the defendants from erecting buildings on the said lot.

The Supreme Court did not consider it necessary to decide whether the deed created a *fidei commissum,* and if so, whether the defendants were entitled to claim compensation for improvements as *bona fide* possessors when the rights of the plaintiffs as *fidei commissarii* mature.

Held : That even if the defendants' right to the land was that of fiduciaries, there being no dispute that

this was buildable land, the defendants were entitled to erect buildings and otherwise improve the land for the full enjoyment of that right.

(2) That as there was no present risk of loss or impairment of the interest of the plaintiffs when the time arrived for its enlargement into a vested right, their claim was premature and they could not claim the protection of a declaratory decree.

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Registration of Documents Ordinance

Registration of Documents Ordinance, sections 12, 13 *and* 14—*Registration of Documents Regulations, regulations* 12, 13 *and* 14—*Registration in proper folio—What constitutes proper folio—Proviso to section* 14 (1)—*Circumstances which justify the application of the proviso—Competition between a duly registered deed and one not duly registered.*

The main dispute in this case was with regard to the Southern 1/3rd of a land called Kellegchenawatta, between the 22nd defendant, on the one hand, and the 24th, 27th and 28th defendants, on the other. The 22nd defendant claimed title through a deed No. 27702, dated the 8th September 1937, (22 D 4), while the 24th, 27th and 28th defendants in their joint answer claimed the benefit of prior registration for their deed No. 484 of the 21st October, 1940, (27 D 14), as against 22 D 4. The trial judge held that 27 D 14 prevailed over 22 D 4 by prior registration, but held in favour of the 22nd defendant on the question of prescription. The folio in which the first registered instrument affecting the land which was the subject-matter of this action was registered was B 49, folio 5. That registration was continued in B 71, folio 6, and B 90, folio 106.

Deed 22 D 4 was registered in B 211/276, which did not invite reference to any other registration. It was not contended that this registration was in the wrong folio. Deed 27 D 14 was registered in B 82, folio 217, which had a remark to the following effect :—" *See* B 100/79. Entire land registered in B 71/6 ". B 82, folio 217, however, was not a continuation of B 49, folio 5, which was the folio in which the subject-matter of the action was first registered. It was argued, however, that 27 D 14 was properly registered in a new folio in terms of the proviso to section 14 (1) of the Registration of Documents Ordinance.

Held : (1) That the deed 27 D 14 had not been duly registered in terms of the Registration of Documents Ordinance.

(2) That before a deed could be registered in a new folio under the proviso to section 14 (1), entry in the proper folio according to the normal practice must not be feasible, or special circumstances must exist. That provision did not vest in the Registrar an arbitrary power to enter in a new folio an instrument which could and should be entered in the folio in which the first registered instrument affecting the same land was registered, or in a continuation thereof ; and that no special facts or circumstances existed with reference to 27 D 14 necessitating the application of the proviso.

(3) That, therefore, in the circumstances the deed 22 D 4 was not void as against 27 D 14.

KARUNANAYAKE *vs.* GUNASEKARA AND ANOTHER .. 41

Rent Restriction Act

Rent Restriction (Amendment) Act, No. 10 *of* 1961—*Scope of section* 13—*Action pending on day immediately preceding the date of commencement of Amending Act deemed null and void—Whether action pending.*

By virtue of section 13 (3) of Act, No. 10 of 1961, where an action for ejectment has been instituted after the 20th July, 1960, on grounds other than those under section 13 (1) of Amending Ordinance No. 10 of 1961, and it is pending on the day immediately preceding the date of commencement of the Amending Act, such action is null and void.

Held : That an appeal from a decree for ejectment is deemed to be a continuation of the original action, and if the appeal is " pending " at the relevant date the whole action is deemed to be pending and is, therefore, null and void under section 13 (3) of the Amending Act.

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Revision

Power of Supreme Court to act in revision and reverse exercise of a Magistrate's discretion in proper cases.

See under—CRIMINAL PROCEDURE CODE 11

When does remedy by way of revision or restitution lie ?

See under—CIVIL PROCEDURE CODE

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Roman Dutch Law

Application of, to lunatic's power to contract.

See under—CONTRACT 17

of Defamation.

See under—DEFAMATION.

Sale of Goods Ordinance

Sale of Goods Ordinance, section 24 (2).

Sentence

Sentence, severity of—Conviction of 19*-year-old accused under section* 315 *of the Penal Code.*

The accused-appellant, aged 19, of previous good character, had, acting under provocation, caused hurt with a pen knife. He was sentenced to six months' rigorous imprisonment, and in addition, under the Knives Ordinance, to receive six strokes with a rattan.

Held : That the sentence was far too severe. The Supreme Court deleted the sentence of the Magistrate and acting under section 325 of the Criminal Procedure Code, conditionally discharged the accused, under a bond in a sum of Rs. 250/- with two sureties, to be of good behaviour for one year.

Sentence—Failure to appeal from sentence—Does this debar Supreme Court from interfering.

Stare Decisis

The principle of—Decision arrived at "per incuriam".

Summons

Service of summons on minor personally illegal.

Supreme Court

Failure to appeal from sentence—Does it debar Supreme Court from interfering with sentence.

Vagrants Ordinance

Vagrants Ordinance (*Cap.* 32)—*Charge under section* 4 (*c*) *for wilfully exposing person in indecent manner—Meaning the word "elsewhere" in section* 4 (*c*)—*Whether "ejusdem generis" rule applies.*

Held : That the words "street, road, highway, public place, or elsewhere" in the context of section 4 (*c*) do not belong to the same genus. Therefore, the *ejusdem generis* principle of interpretation is inapplicable and it means any place other than a public place.

Village Councils Ordinance

Village Councils Ordinance, as amended by Act, No. 60 *of* 1961, *section* 17—*Notice of first meeting—Mode of service—Whether mandatory or directory.*

Section 17 (1) of the Village Councils Ordinance as amended by Act, No. 60 of 1961, requires the first meeting of the Village Council to be convened by notice and provides as follows :—

"Such notice shall, at least, five days before the date fixed for the meeting—

(*a*) be published in the *Gazette* and in one or more Sinhala newspapers circulating in Ceylon, if the language in which proceedings are conducted in that Council is Sinhala, or in one or more newspapers in Sinhala and Tamil circulating in Ceylon, if the language in which proceedings are conducted in that Council is Tamil ; and

(*b*) be despatched by registered post to each elected member of that council."

Section 17 (2) requires a notice under section 17 (1) to "specify the date, time and place of the meeting".

Counsel for the petitioner submitted that in the present case—

(*a*) It was discovered after notice had been duly published in accordance with section 17 (1) (*a*) that it did not correctly describe the place of the meeting. An amended notice was then sent to the members, but was not published in the *Gazette* or in the newspapers.

(*b*) The notice was not despatched by registered post as required by section 17 (1) (*b*), but was served personally on the members of the Council.

Held : That the provisions of section 17 relating to the service of the notice are mandatory. Therefore, since the notice was served otherwise than in the manner prescribed by law, the said meeting was not legally convened.

Per ABEYESUNDERE, J. :—"Where the law has prescribed the mode of doing an act, a public officer whose legal duty it is to do that act has no right to substitute for that mode another mode of doing that act. Such substitution is an illegality and not an

Privy Council Appeal, No. 8 of 1962.

Present : **Lord Morris of Borth-Y-Gest, Lord Guest, Lord Devlin.**

LEE CHUN-CHUEN *alias* LEE WING-CHEUK *vs.* THE QUEEN

From
THE SUPREME COURT OF HONG KONG

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

DELIVERED ON : 30TH JULY, 1962.

Murder—Provocation, defence of—Effect of such defence—Whether it negatives intention—Elements required for such defence.

Misdirection in relation to such defence—Whether it occasioned a miscarriage of justice.

The accused in this case, who was charged with murder, raised, *inter alia*, the defence of provocation. The trial judge, on this question, directed the jury that if the provocation caused in the mind of the accused an actual intention to kill or cause grievous bodily harm, then the killing would be murder. The question canvassed before the Judicial Committee was whether this was such a misdirection as to vitiate the conviction of the accused. In the Appellate Court below, it had been held that this was a misdirection, but that it had not occasioned a miscarriage of justice, and the conviction had been affirmed by reason of the application of the proviso to section 82 of the Criminal Procedure Ordinance of Hongkong, which was in the same terms as the proviso in section 4 (1) of the Criminal Appeal Act, 1907, of England.

Held : (1) That this was a misdirection. The defence of provocation may arise where a person does intend to kill or inflict grievous bodily harm but where his intention to do so arises from sudden passion involving loss of self-control by reason of provocation. The effect of the direction in this case was in effect to deprive the accused of the benefit of the defence of provocation.

(2) That in deciding that the misdirection had not occasioned a miscarriage of justice, the Appellate Court below had either misunderstood or misapplied the proviso to section 82.

(3) That, nevertheless, on a consideration of the matter afresh, and the application of the proper principles, the misdirection had not resulted in a miscarriage of justice.

The principles governing the application of the proviso discussed.

Cases referred to : *Holmes* v. *D.P.P.*, (1946) A.C. 588 ; (1946) 2 A.E.R. 124
K. D. J. Perera v. *The King*, 53 N.L.R. 193.
Attorney-General of Ceylon v. *Perera*, (1953) A.C. 200; 54 N.L.R. 265 ; XLVIII C.L.W. 42 ; (1953) 2 W.L.R. 238.
Bullard v. *The Queen*, (1957) A.C. 635; (1957) 3 W.L.R. 656 ; 42 Cr. App. Reps. 1.
Dharmasena v. *The King*, (1951) A.C. 1 ; 51 N.L.R. 481 ; 66 T.L.R. 365.
Mancini v. *D.P.P.*, (1942) A.C. 1 ; (1941) 3 A.E.R. 272
R. v. *Hopper*, (1915) 2 K.B. 431 ; 113 L.T. 381 ; 3 T.L.R. 360 ; 84 L.J.K.B. 1371.
R. v. *Kwaku Mensah*, (1946) A.C. 83.
R. v. *Porritt*, (1961) 3 A.E.R. 463 ; 45 Cr. App. Reps. 368 ; (1961) 1 W.L.R. 1372.

Per The Judicial Committee.—(*a*) " Provocation in law consists mainly of three elements—the act of provocation, the loss of self-control, both actual and reasonable, and the retaliation proportionate to the provocation. The defence cannot require the issue to be left to the jury unless there has been produced a credible narrative of events suggesting the presence of these three elements. They are not detached. Their relationship to each other—particularly in point of time, whether there was time for passion to cool—is of the first importance. The point that Their Lordships wish to emphasize is that provocation in law means something more than a provocative incident. That is only one of the constituent elements ".

(*b*) " Their Lordships agree that failure by the accused to testify to loss of self-control is not fatal to his case . . . . . But this does not mean that the law dispenses with evidence of any material showing loss of self-control. It means no more han that loss of self-control can be shown by inference instead of by direct evidence. The facts can speak for themselves,

and, if they suggest a possible loss of self-control, a jury would be entitled to disregard even an express denial of loss of temper, especially when the nature of the main defence would account for the falsehood. An accused is not to be convicted because he has lied."

The cases of K. D. J. Perera *vs.* The King, 53 N.L.R. 193 and Attorney-General of Ceylon *vs.* K. D. J. Perera, (1953) A.C. 200 referred to and discussed.

[**Editorial Note :** The proviso to section 4 (1) of the Criminal Appeal Act, 1907, is in the same terms as the proviso to section 5 (1) of our Court of Criminal Appeal Ordinance (Cap. 7, Revised Legslative Enactments)].

Dingle Foot, Q.C., with *Miss K. Diana Phillips* and *John A. Baker*, for the appellants.

J. G. Le Quesne with *Mervyn Heald*, for the Crown.

LORD DEVLIN

On 18th September, 1961, the appellant, having been tried for murder by a judge and jury sitting in the Supreme Court of Hong Kong in its criminal jurisdiction, was convicted and sentenced to death. He appealed to the Supreme Court in its appellate jurisdiction and on 1st December, 1961, his appeal was dismissed. The Supreme Court considered that the learned judge had misdirected the jury in law but, concluding nevertheless that no substantial miscarriage of justice had actually occurred, they applied the proviso in section 82 of the Criminal Procedure Ordinance, which is in the same terms as the proviso in section 4 (1) of the Criminal Appeal Act, 1907, in England. On 30th July, 1962, the Board announced that they would humbly advise Her Majesty that the appellant's appeal from the judgment of the Supreme Court should be dismissed and Their Lordships now give their reasons for their decision.

On 15th May, 1961, about 5 p.m. Tsang Kan Kong, a Chinaman, aged about 50, and of medium build, was found lying in a pool of blood by the side of a road. There was beside him a hammer weighing five pounds which might have caused the severe wounds which he had sustained. He died about 9.30 p.m. on the same day, the cause of death being shock and haemorrhage from head injuries and rupture of the spleen and kidney.

The dead man was the accused's father-in-law. Two letters written by the accused were found, one to a brother-in-law but found among the deceased's belongings and the other produced by an uncle, which pointed to the accused as the killer. The evidence showed that the two men, the accused and the deceased, had come to Kowloon four or five years before and set up in business together. They had parted and were on bad terms because the deceased had (or the accused believed that he had) written to his daughter, the accused's wife, saying that the accused was dead and telling her to marry again. The first of the two letters had been written on 21st August, 1960, and in it the accused charged the deceased with this malicious invention and threatened to kill him. The other letter was written two days after the killing and referred in rather an obscure way to revenge.

The accused had disappeared. He was found and arrested on 6th June, 1961. In a statement in his own writing (but which he said was prepared for him to copy) in a police officer's notebook he referred to his disagreement with the deceased and said that he stole an iron hammer to strike him to death and then jumped into the sea and was rescued by a boatman. Later at the police station he signed a statement in which he elaborated on his grievance against the deceased. He said that he lay in wait for the deceased and hit him with the iron hammer which he had picked up twenty days before and that he had attempted to commit suicide by jumping into the water.

When he gave evidence at his trial he told a different story which in brief is as follows. He met the deceased by chance. The deceased, apparently thinking that he was going to be attacked, struck the accused on the chest and knocked him down. When he got up, the deceased rushed at him. Then they fought each other for about half-an-hour, chiefly by throwing stones from a heap that was admittedly by the roadside. The deceased started the stone-throwing with a stone that landed on the accused's leg and injured it. Finally, the accused said the deceased picked up a big piece of stone and chased after him. He threw the stone and it rolled along the road. Then the accused saw a hammer and he picked it up and threw it at the deceased. The deceased fell down and did not get up and the accused was scared and ran away.

This story does not throw much light on how the deceased came by his grave injuries. The medical evidence about them was unchallenged and they can be summarised as follows. There were two fractures and an oval depression of the skull and laceration of the brain, the fracture above the left eye being a very serious one. There were also fractures of the breast-bone and three ribs and the deceased's spleen and kidney were both ruptured. The main injuries must have been caused by at least three blows of considerable strength.

It was not suggested that the accused did not inflict all these injuries and so it was hardly possible to argue that he had not intended to cause at least grievous bodily harm. Self-defence and provocation were, therefore, the matters chiefly stressed by the defence, the accused's story being obviously much more consistent with the former. Both issues were left to the jury but they found the accused guilty of murder with a recommendation to mercy.

The accused appealed on a number of grounds which were rejected by the Supreme Court and are not now relied upon. But the Court perceived a serious misdirection by the trial judge on the law of provocation. Before the Board the Crown has not contended that there was not a misdirection. Nevertheless Their Lordships think that they should state what in their opinion is the law on the point since, as was noted in the judgment of the Supreme Court, there is at present some uncertainty owing to an apparent conflict of authority.

The learned judge directed the jury that if the provocation caused in the mind of the accused an actual intention to kill or cause grievous bodily harm, then the killing would be murder. The judge may well have had in mind a passage in Archbold's Criminal Pleading Evidence and Practice, 34th Edn. (1959), para. 2503, to that effect which is supported by a dictum in the speech of Viscount Simon in *Holmes* v. *D.P.P.*, (1946) A.C. 588. The decision of the House of Lords in that case was that on the facts the trial judge was right in withholding from the jury the issue of provocation since the only material put forward by the defence consisted of provocative words. In the course of his speech Lord Simon laid down the law about the constituents of provocation and the functions of judge and jury in relation to it in terms that have been widely adopted and to which Their Lordships will later refer. But he included at 598 the following passage :—" The whole doctrine relating to provocation depends on the fact that it causes, or may cause, a sudden and temporary loss of self-control whereby malice, which is the formation of an intention to kill or to inflict grievous bodily harm, is negativated. Consequently, where the provocation inspires an actual intention to kill (such as Holmes admitted in the present case), or to inflict grievous bodily harm, the doctrine that provocation may reduce murder to manslaughter seldom applies ".

It is plain that Viscount Simon must have meant the word " actual " to have a limiting effect and that he had in mind some particular category of intention. He cannot have meant that any sort of intention to kill or cause grievous bodily harm was generally incompatible with manslaughter because that would eliminate provocation as a line of defence. In the present case, for example, earlier in his summing-up the judge properly directed the jury that they could not find murder unless there was an intent to kill or cause grievous bodily harm. By telling them that if that intent was present, they could not find manslaughter, he was telling them that they must find murder or nothing and so in effect excluding the issue of provocation.

In *K. D. J. Perera* v. *The King*, 53 Ceylon N.L.R. 193, the Court of Criminal Appeal in Ceylon had to consider provocation in relation to section 294 of the Ceylon Penal Code. They came to the conclusion that there were certain differences between the Code and the law of England, one of them (which was not essential to their decision but which they gave by way of illustration) relating to the intention to kill. On this point they quoted at 199 the passage from Lord Simon's speech to which Their Lordships have referred and continued as follows :—

> " The principle underlying the English law, therefore, is clear and unambiguous that the provocation given must be such as to deprive the accused person of his self-control to such an extent that he causes death without forming or having an intention to kill. It is then and then only that the offence is one of manslaughter and not of murder . . . This is one of the fundamental differences between our law and that of England."

When the case came up before the Board, Their Lordships thought it desirable to say that this was not a correct statement of the law of England. Giving the opinion of the Board in (1953) A.C. 200, at p. 206, Lord Goddard said :— " The defence of provocation may arise where

a person does not intend to kill or inflict grievous bodily harm but his intention to do so arises from sudden passion involving loss of self-control by reason of provocation."

Their Lordships think it right to reaffirm the law as stated by Lord Goddard and to do so with special reference to Lord Simon's dictum, to which Lord Goddard did not advert. Lord Goddard's statement can be reconciled with the dictum only if the word "actual" in the dictum is treated as the distinguishing feature. Their Lordships do not think it necessary to interpret the dictum any further than to say that it cannot be read as meaning that the proof of any sort of intent to kill negatives provocation. Lord Simon was evidently concerning himself with the theoretical relationship of provocation to malice and in particular with the notion that where there is malice there is murder; and he may have had it in mind that actual intent in the sense of premeditation must generally negative provocation. Their Lordships do not think that this part of his speech can safely be taken as a basis for a direction to a jury, since even with the most careful explanation it is liable to be misunderstood. Where, as in the present case, the substance of it was given to the jury without any explanation, Their Lordships agree with the Supreme Court that it amounts to a serious misdirection in law. It is only fair to the trial Judge to say that *Attorney-General of Ceylon* v. *Perera* is not referred to in the edition of Archbold which was then current, though it was thereafter noted in the supplement.

Since the correctness of the Supreme Court's decision was not challenged on this point, the whole argument before the Board has been upon the Court's application of the proviso. Their grounds for applying it were stated by Hogan, C.J., as follows. He referred to an earlier case in which the Supreme Court had fully considered the application of the proviso and continued :— "Adopting the view therein expressed that we should determine whether if properly directed, the jury acting reasonably would certainly have come to the same conclusion, we are of opinion that, having regard to the letter written by the accused to his brother-in-law some months prior to the killing, the letter written to his uncle and his conduct after the killing, together with the nature of the injuries inflicted on the deceased from which he died, no jury, acting reasonably, could properly have found manslaughter rather than murder".

As Their Lordships have said, the effect of the misdirection in the circumstances of this case was to tell the jury that they must find murder or nothing and so the result was the same as if the issue of provocation had been expressly withdrawn from them. When that is done, a conviction for murder cannot be upheld if there is any evidence on which a verdict of manslaughter could be given; *Bullard* v. *The Queen*, (1957) A.C. 635.

The Supreme Court did not approach the matter by considering in terms whether the issue of provocation need have been left to the jury at all but it is agreed that the test which they formulated and applied comes to the same thing. If there was some material on which a jury acting reasonably could have found manslaughter, it cannot be said with certainty that they would have found murder. It is not, of course, for the defence to make a *prima facie* case of provocation. It is for the prosecution to prove that the killing was unprovoked. All that the defence need do is to point to material which could induce a reasonable doubt. The classic statement of this aspect of law was made by Viscount Simon in *Holmes* v. *D.P.P.* as follows. "If there is no sufficient material, even on a view of the evidence most favourable to the accused, for a jury (which means a reasonable jury) to form the view that a reasonable person so provoked could be driven, through transport of passion and loss of self-control, to the degree and method and continuance of violence which produces the death, it is the duty of the judge as a matter of law to direct the jury that the evidence does not support a verdict of man-slaughter. If, on the other hand, the case is one in which the view might fairly be taken (*a*) that a reasonable person, in consequence of the provocation received, might be so rendered subject to passion or loss of control as to be led to use the violence with fatal results, and (*b*) that the accused was, in fact, acting under the stress of such provocation, then it is for the jury to determine whether on its view of the facts manslaughter or murder is the appropriate verdict."

This is the right test to apply both when the trial judge is considering whether or not to leave provocation to the jury and when an appellate Court is considering whether or not it was properly withdrawn from a jury. But Their Lordships must observe that there is a practical difference between the approach of a trial judge and that of an Appellate Court. A judge is naturally very reluctant to withdraw from a jury any issue

that should properly be left to them and he is, therefore, likely to tilt the balance in favour of the defence. An Appellate Court must apply the test with as much exactitude as the circumstances permit. Their Lordships are not, therefore, much influenced by the fact that there was no suggestion at the trial that this issue should be withdrawn from the jury. Counsel may well consider that if the question is open to any serious or prolonged argument, a judge is likely to say that it is better to take the verdict of the jury.

The appellant's criticism of the Supreme Court's judgment is that while they doubtless intended to consider the matter in this way, their enumeration of the relevant factors shows that they could not have correctly appreciated the nature of the test they sought to apply. With this criticism Their Lordships respectfully agree. Three out of the four factors mentioned by the Court, that is to say, the two letters and his conduct after the killing, are such as might carry great weight with the jury but they do not elucidate the question for the judge. He must approach the issue " on a view of the evidence most favourable to the accused ". The truth of an accused's story is always a jury question provided that it is credible, that is, unless there are clear and unchallengeable facts with which it cannot possibly be reconciled. Their Lordships will not examine in detail the effect of the three factors ; it is sufficient to say that at the trial there were advanced denials and explanations which, while in some respects unconvincing, were not incredible. The duty of an appellate Court in the present case is to assume that the accused's evidence, in so far as it can be reconciled with the unchallenged evidence of the injuries inflicted, is substantially true and to ask themselves whether it disclosed some material suggesting provocation. The three factors tend to show that that assumption is not well-founded but are irrelevant to the true question for the Court.

Ought the Board, because in this respect it takes a different view of the problem from that taken by the Supreme Court, to entertain this appeal ? Their Lordships have heard much argument and considered several authorities about the principles on which in such a case the Board ought to act. The authorities show that the difference between the principles which guide the Board and those which should guide an ordinary appellate Court in this type of case are not very profound. This is doubtless because a misapplication of the proviso must of its very nature cause " a substantial miscarriage of justice " and thus there inevitably arises the sort of matter with which the Board concerns itself. Nevertheless Their Lordships must, as was said by Lord Porter in *Dharmasena* v. *The King*, (1951) A.C. 1, at p. 8, " bear in mind that they are not themselves a Court of Criminal Appeal ". Their Lordships apprehend that the Board will not put itself in the position of the first appellate Court and review every exercise of the proviso as a matter, of course. If the relevant factors have been considered and weighed by that Court, the Board will not repeat the process in order to adjust the balance according to its own ideas. But if the process employed by that Court is defective in that it has made a wrong approach to the problem or considered irrelevant factors or given them a weight that is gravely out of proportion to their true value, the Board will disregard the finding of the appellate Court and approach the matter anew. That is what Their Lordships must do in this case since they are satisfied that the Supreme Court either misunderstood or misapplied the correct test. Their Lordships will, therefore, now enquire into whether there was sufficient material to go to the jury on the issue of provocation.

Provocation in law consists mainly of three elements—the act of provocation, the loss of self-control, both actual and reasonable, and the retaliation proportionate to the provocation. The defence cannot require the issue to be left to the jury unless there has been produced a credible narrative of events suggesting the presence of these three elements. They are not detached. Their relationship to each other—particularly in point of time, whether there was time for passion to cool—is of the first importance. The point that Their Lordships wish to emphasize is that provocation in law means something more than a provocative incident. That is only one of the constituent elements. The appellant's submission that if there is evidence of an act of provocation, that of itself raises a jury question, is not correct. It cannot stand with the statement of the law which Their Lordships have quoted from *Holmes* v. *D.P.P.* In *Mancini* v. *D.P.P.*, (1942) A.C. 1, the House of Lords proceeded on the basis that there was an act of provocation—the aiming of a blow with the fist—but held that it was right not to leave the issue to the jury because the use of a dagger in reply was disproportionate.

The main act of provocation relied upon was the throwing of the stone which struck the accused on the leg. When he was examined twenty days later he was found to have a laceration about an

inch long on the right leg. There were no other marks of injury on the accused and he did not state that he had received any other wound. In Their Lordships' opinion there was no act other than the one which caused the leg injury that could possibly provoke a reasonable man into losing his self-control to the extent of retaliating by battering the deceased almost to death, either with stones or with a hammer. Can it be said that this savage retaliation was proportionate to this single provocative act ? Before that question is answered it is natural to enquire how the loss of self-control occurred and how quickly the retaliation followed on the act.

It is at this point that the case suggested by the appellant breaks down. There is no direct evidence of actual loss of self-control. In his examination-in-chief the accused did not testify at all about his state of mind during the struggle. In cross-examination he was twice asked the specific question and in reply said that he was angry, but not very angry ; the whole tenor of his evidence was that he was throughout trying to break off the fight and that is inconsistent even with loss of temper.

Their Lordships agree that the failure by the accused to testify to loss of self-control is not fatal to his case. *R.* v. *Hopper*, (1915) 2 K.B. 431 ; *R.* v. *Kwaku Mensah*, (1946) A.C. 83 ; *R.* v. *Bullard* (*supra*) and *R.* v. *Porritt*, (1961) 3 A.E.R. 463 were cited as authorities for that. These were all cases in which, as in the present case, the accused was putting forward accident or self-defence as well as provocation. The admission of loss of self-control is bound to weaken, if not to destroy, the alternative defence and the law does not place the accused in a fatal dilemma. But this does not mean that the law dispenses with evidence of any material showing loss of self-control. It means no more than that loss of self-control can be shown by inference instead of by direct evidence. The facts can speak for themselves and, if they suggest a possible loss of self-control, a jury would be entitled to disregard even an express denial of loss of temper, especially when the nature of the main defence would account for the falsehood. An accused is not to be convicted because he has lied.

Their Lordships have carefully examined the four cases cited and are satisfied that in each of them there was in the narrative of events on which the jury might reasonably have acted material that showed a possible loss of self-control connecting the provocation and the retaliation. In all these cases there was, besides the accused's story, other evidence of the struggle on which a jury could act. A jury may reject, as well as an accused's denial of loss of self-control, a part or the whole of his account of events. What is essential is that there should be produced, either from as much of the accused's evidence as is acceptable or from the evidence of other witnesses or from a reasonable combination of both, a credible narrative of events disclosing material that suggests provocation in law. If no such narrative is obtainable from the evidence, the jury cannot be invited to construct one. Simon, L.C., said in *Mancini* v. *D.P.P.* (*supra*), at page 12 :— " It is not the duty of the Judge to invite the jury to speculate as to provocative incidents of which there is no evidence and which cannot be reasonably inferred from the evidence. The duty of the jury to give the accused the benefit of the doubt is a duty which they should discharge having regard to the material before them, for it is upon the evidence, and the evidence alone, that the prisoner is being tried, and it would only lead to confusion and possible injustice if either Judge or jury went outside it ". This warning which Simon, L.C., applied to provocative incidents applies equally to loss of self-control and to the other elements which constitute provocation in law.

In the case before the Board the only evidence of the nature of the struggle was the accused's own story and the unchallenged evidence of the injuries inflicted on the deceased. Can it be said on this material that there was a moment of time when, as a result of the single provocative act, the accused might reasonably be supposed to have lost his self-control ? In the absence of direct evidence the only point of time at which in Their Lordships' opinion a loss of self-control might possibly be inferred is immediately after the provocative act. But not only is there no evidence that the injuries were then inflicted, the evidence makes it impossible to suppose that they were. The evidence is that the struggle continued thereafter for some time and that at the end of it, just before the accused threw the hammer, the deceased had picked up a big piece of stone and was chasing the accused. He could not possibly have been doing that if he had by then received any appreciable part of the grave injuries from which he died—the fractures of the skull and of the breast-bone and ribs, the ruptured spleen and ruptured kidney.

It is, of course, conceivable that the hammering followed immediately upon the provocative act and that the whole of the rest of the story was made up by the accused to support the case of self-defence. The defence could on the issue of provocation invite the jury to reject the whole of the accused's account of what followed on the provocative act if the evidence left them with anything to put in its place. But it does not ; and it is not permissible to imagine a more plausible account of how the injuries might have been inflicted and to invite the jury to act upon that. Again it is imaginable that the accused lost his self-control right at the very end and inflicted the gravest of the injuries then. If he had said that he had then lost his self-control, it might have been proper to have invited the jury to infer (rejecting his statement that all he did was to throw the hammer once) that that was how the injuries occurred and to say that the loss of self-control and the retaliation followed reasonably on the provocative act sometime before. Their Lordships gravely doubt whether that would have been a proper case to go to the jury, having regard to the slightness of the provocation and to the interval of time ; it might perhaps depend on whether the accused gave a plausible enough account of a gradual loss of self-control to which other incidents besides the original injury contributed. But all this is speculation. The material produced is evidence of a provocative incident and of nothing more and that is not enough.

In Their Lordships' opinion, the misdirection upon the law of provocation could not have caused any miscarriage of justice because there was no sufficient material on this issue to go to the jury. Accordingly, and for this reason, they have humbly advised Her Majesty to dismiss the appeal.

Appeal dismissed.

Privy Council Appeal, No. 53 *of* 1961.

Present : **Viscount Radcliffe, Lord Evershed, Lord Devlin, Lord Pearce, Sir Terence Donovan.**

HUSSAIMA, WIFE OF YOOSUF JALLALDEEN, AND OTHERS

vs.

A. L. UMMU ZANEERA *alias* SHAMSUNNAHAR AND OTHERS

From

THE SUPREME COURT OF CEYLON

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

Delivered on : 9th May, 1963.

Fideicommissum valid for four generations—Fideicommissaries claiming shares—Another fideicommissary as 13*th defendant claiming entirety on prescriptive title—Admission by parties that* 13*th defendant possessed and collected rents since* 1916*—Failure of* 13*th defendant to give evidence—Scope and meaning of such admission and evidence—Prescription Ordinance, sections* 3 *and* 13.

The plaintiff claimed that she was entitled to a share of a property under a deed of 1872 which she alleged created an effective *fidei commissum* operative for four generations. The plaintiff was a great-great-granddaughter of the grantor's wife and there were numerous other parties to the proceedings.

The contesting 13th defendant was a grandson of the grantor's wife, his father having been one of three children and her only son. In addition to the question concerning *fidei commissum*, the 13th defendant claimed to have acquired an exclusive title to the entirety of the property by prescriptive possession. This claim was resisted by the plaintiff and all other parties relying particularly on the proviso to section 3 and also on section 13 of the Prescription Ordinance.

In the course of framing issues an admission was made by the counsel for plaintiff in these terms: " that the 13th defendant's father has been in possession from prior to 1916 and that the 13th defendant came into possession in 1916 ". That this admission was accepted by all the parties was clear from the judgments of the District Court and the Supreme Court.

The only material evidence on this point was an admission in plaintiff's evidence that from 1916 the 13th defendant collected the rents and that given by the plaintiff's brother who stated in cross-examination that " the 13th defendant is

occupying the premises ", and " He has rented the use and has collected the entire rent ". The 13th defendant did not give evidence.

The learned District Judge held : (*a*) that the *fidei commissum* had been fully established ; (*b*) that the claim of the 13th defendant failed because he had not discharged the onus the learned Judge thought lay on him of proving as regards each share in the *fidei commissum* property, what were the exact dates when the successive interests therein determined and when any disability came to an end.

The 13th defendant appealed to the Supreme Court. The main argument in the Supreme Court was whether the District Court was correct in his view that the burden of proving the several dates above referred to was on the 13th defendant. He succeeded on this question.

Thereupon the scope and meaning of the admission and evidence above quoted became vital to the conclusion of the appeal.

In the Supreme Court, the Chief Justice drew the inference that the admission and evidence above stated justified the conclusion that the 13th defendant acquired a prescriptive title within the meaning of the Prescription Ordinance, but the majority of the Supreme Court did not share this view and held that the 13th defendant had not proved such possession as required by section 3 of the Prescription Ordinance. They drew forcible attention to the fact that the 13th defendant failed to give evidence and state the amount of rents received or outgoings discharged or to produce any document consistent with his claim.

Held : That since both sides before the Supreme Court were content to rest upon the ordinary meaning and inferences to be drawn from the admission and the evidence above-quoted, Their Lordships were unable to conclude that the majority of the Supreme Court were not justified in coming to the conclusion they did.

Their Lordships expressed the opinion that the question involved was one very much on the borderline and stated the reasons why they were not ordering a re-trial.

Cases referred to : *Tillekeratne et. al.* v. *Bastian et al.* (1918) 21 N.L.R. 12
Doe d. Fisher v. *Prosser*, 1 Cowp. 217

The judgement of the Supreme Court is reported in LVIII C.L.W. 17.

Hanan Ismail for the appellants.

M. Markhani with *John Baker*, for the 5th-8th defendants-respondents.

LORD EVERSHED

In Their Lordships' opinion this appeal is one of considerable difficulty and the question involved very much upon the borderline ; but after careful consideration of the arguments submitted to Their Lordships by learned counsel Their Lordships have come to the conclusion, not, for reasons later appearing, without some regret, that they should humbly advise Her Majesty to dismiss the appeal.

The appeal arises out of proceedings for partition begun nearly ten years ago. The claim of the plaintiff, who has since died, was that she was entitled to a share of certain property in the business of Pettah, Colombo, by virtue of a Deed executed by one Ibrahim Lebbe Mohammadu Lebbe on the 16th July, 1872. The main question at the trial was whether the Deed created an effective *fidei commissum* and if so whether such *fidei commissum* continued in operation after the death of the grantor's wife in favour of her descendants for four generations. The plaintiff was a great-great-granddaughter of the grantor's wife and, as might be expected, there were numerous other parties to the proceedings. The 13th defendant was a grandson of the grantor's wife, his father having been one of her three children and her only son. The 13th defendant has died since the trial and the appellants before the Board are his four children, who were substituted in the proceedings for the 13th defendant before the case came to be heard by the Supreme Court of Ceylon. In addition to the question concerning the *fidei commissum* the 13th defendant before and at the trial claimed to have acquired an exclusive title to the entirety of the property by prescriptive possession pursuant to section 3 of the Ceylon Prescription Ordinance, No. 72 of 1871. This claim was resisted by the plaintiff and all the other defendants who particularly relied on the proviso to section 3 and also on section 13 of the Ordinance. The proviso and section referred to are set out in the judgment of the Chief Justice of Ceylon. For present purposes the relevance of these terms of the Ordinance is that if the *fidei commissum* be established and there was consequently a series of successive interests in the property corresponding in substance to successive beneficial interests

under an English Trust then the period of the prescription (unless it has then run its full course) starts afresh on each transmission of interest and moreover does not run against a beneficiary becoming entitled so long as he or she is under a disability, such as infancy.

These being the issues raised in the action, it appears from the record of the proceedings that when in due course the issues involved came to be framed an admission was made by counsel for the plaintiff. The admission was "that the 13th defendant's father has been in possession from prior to 1916 and that the 13th defendant came into possession in 1916". When, after the evidence had been called, counsel made their final addresses it was stated by the learned counsel for the 13th defendant that "on the first day the case came up for trial all the parties agreed to the admission made by" counsel for the plaintiff. There was some discussion before Their Lordships whether in truth all the parties had so agreed, but it appears reasonably clear from the judgment of the District Judge and the judgments of the Supreme Court that the admission was regarded as having been accepted by all the parties other than the 13th defendant.

In the meantime the evidence had been given but, in fact, only two witnesses were called. On the plaintiff's part, her brother, the second defendant, gave evidence in support of the claim of *fidei commissum*. In cross-examination on behalf of the 13th defendant the following two questions and answers were recorded :—

Q. "You know who is occupying these premises?
A. . . . the 13th defendant is occupying these premises.
Q. Has he not rented the use to anybody?
A. He has rented the use and has collected the entire rent."

The only other witness called was the 11th defendant, whose evidence was immaterial upon the question before the Board.

The 13th defendant did not himself give any evidence. At the end of the record of the plaintiff's evidence there is also again recorded the plaintiff's admission "that from 1916 the 13th defendant collected the rents".

Their Lordships have referred to the precise terms of the admission and of the two questions and answers given in evidence because, as things have fallen out, it is upon the proper inference to be drawn therefrom that the decision of this appeal must rest. As Their Lordships will later notice, the Chief Justice in the Supreme Court (before which the 13th defendant's appeal came in 1959) drew the inference that the admission and evidence quoted justified the conclusion that from 1916 the 13th defendant had, in fact, enjoyed undisturbed and adverse possession of the property within the meaning of the Prescription Ordinance. The majority of the Supreme Court, however, did not share the Chief Justice's view and held that the 13th defendant had not proved such possession as section 3 of the Prescription Ordinance required.

Their Lordships think it most unfortunate, as things have turned out, that the exact extent and meaning of the admission by counsel was not clarified either at the time when it was made or later when the case was before the District Judge, and not the less so since it was first made, as previously stated, when the issues in the case were being formulated. The relevant issues so formulated were, in fact, those numbered 3 (*b*) and 4 and were to the effect—Had the 13th defendant been in exclusive possession and acquired a prescriptive title to the entirety of the property or to the shares therein of the plaintiff and the other several defendants ? The learned District Judge could undoubtedly have caused the scope of the admission to be made clear but unfortunately did not do so, and having regard to the view which the learned District Judge took it may fairly be said that it was not necessary for his decision that he should.

As already stated, the main question was that relating to the alleged *fidei commissum* in 1872 and, as regards the claim of the 13th defendant, the extent of the admission was in the event immaterial because, in the view of the District Judge as expressed in his judgment in February, 1956, it was having regard to the terms of the proviso to section 3 of the Ordinance for the 13th defendant to prove as regards each share in the trust property what were the exact dates when the successive interests therein determined and when any disability came to an end. The District Judge held that the *fidei commissum* had been validly established but he also held that the claim of the 13th defendant wholly failed because he had not at all discharged the onus which the learned Judge thought lay upon him of proving the several dates above mentioned.

The 13th defendant then appealed to the Supreme Court of Ceylon. He accepted the

District Judge's finding of the creation of a *fidei commissum* and its extent and he accepted also that, having regard to their ages, he could not succeed against the plaintiff or the first or second defendant. The main argument before the Supreme Court was whether the District Judge had been right in the view taken by him as regards the burden of proving the several dates above mentioned. Upon this point the 13th defendant succeeded. Thereupon, and for the first time, the scope and meaning of the admission and the two questions and answers earlier quoted became vital to the conclusion of the appeal. It was, however, made quite clear before Their Lordships that neither side then asked for a retrial or for any order designed to obtain further clarification of the admission and evidence. Each side was content to rest upon the terms of the admission and of the answers given by the second defendant as they were recorded, and the argument, therefore, was as regards the proper inference to be drawn therefrom.

The judgments of the learned Judges in the Supreme Court contain a careful review of authorities both English and Ceylonese upon the proper application of the relevant terms of the Prescription Ordinance in the case of one claiming a prescriptive title whose occupation of the property in question was or should be originally attributed to his interest as co-owner ; particularly of the judgment of Lord Mansfield in the English case of *Doe d Fisher* v. *Prosser*, 1 Cowp. 217, and the judgment of Bertram, C.J., in the Ceylonese case of *Tillekeratne et al.* v. *Bastian et al.*, 21 Ceylon N.L.R. 12. Their Lordships are content to accept the principles applicable as they were expounded in the Supreme Court. Nor, indeed, were the principles really in dispute before Their Lordships. The question, and the very difficult question, has been of their application. In the circumstances Their Lordships are content to found themselves for present purposes upon two passages in the judgment of Bertram, C.J., at pp. 23 and 24 of the latter of the cases above mentioned : " It may be taken, therefore, that . . . it is open to the Court, from lapse of time in conjunction with the circumstances of the case, to presume that a possession originally that of a co-owner has since become adverse ". " It is, in short, a question of fact wherever long continued exclusive possession by one co-owner is proved to have existed whether it is not just and reasonable in all the circumstances of the case that the parties should be treated as though it had been proved that that separate and exclusive possession had become adverse at some date more than ten years before action brought." As already observed, the learned Chief Justice in the present case felt able to draw from the admission and the questions and answers of the second defendant the requisite inference in favour of the 13th defendant. In the course of his judgment he said : " It would appear, therefore, that on the facts of the instant case the co-owners cannot claim the benefit of the appellant's possession as he had possession not on their behalf but for himself without giving them their share of the rent ". And again : " There is no evidence that till the time of this action in September, 1953, anyone has ever questioned the appellant's right to take the rent during these 37 years ". In other words, it was the view of the learned Chief Justice that in the absence of any other evidence on either side than that quoted, the proper inference to be drawn from such evidence and the admission was that the 13th defendant not only received and collected the rents but applied them for his own purposes without any accounting to any other members of the family. As Their Lordships have also stated, De Silva and Fernando, JJ., were unable to accept the conclusion which had appealed to the Chief Justice. In each of their respective judgments forcible attention was drawn to the fact that the 13th defendant (on whom by the terms of section 3 of the Ordinance the onus of proof lay) had forborne to give evidence himself and to the absence of any evidence regarding such matters as the amount of the rents received or outgoings discharged or to the existence of any document or writing executed by the 13th defendant consistent with his claim to be exclusive owner of the property. Mr. Ismail for the appellant, stressed, naturally enough, the great length of time during which, on any view, according to the admission and evidence, the 13th defendant and his father had clearly, in fact, been in receipt of and collected the rents : and if (as he said) the 13th defendant had failed to give negative evidence that he had never accounted to any other members of the family, there had been on the other side no positive evidence from or on the part of any one of the other parties that he or she or any other members of the family had at any time received anything from the property or made any claim in respect thereof. Mr. Ismail also criticised (in Their Lordships' opinion justly) the view of the majority of the Supreme Court that if the admission of counsel had been meant to have the scope and meaning for which the appellants contended there would have been no point in going on with the trial. Such a view, as Their

Lordships venture to think, loses sight of the fact that at the trial the relevant question which the District Judge had to decide was concerned with the dates of the coming into existence of the successive interests in the property, having regard to the terms of the Prescription Ordinance which prevent time running against persons under a disability and which require or may require time to begin to run again whenever a new interest comes into existence.

Their Lordships have been very conscious of the force of Mr. Ismail's contentions, but since, as already stated, both sides before the Supreme Court were content to rest upon the ordinary meaning and inferences to be drawn from the admission and the second defendant's two answers, they have felt unable to conclude that the majority of the Supreme Court were not justified in refusing to draw from the admission and the answers such an extended scope and meaning as the appellant's case inevitably requires. After all the language of the admission and evidence upon the face of it and according to its ordinary sense was limited to the actual receipt or collection of the rents and was silent as to their application. Their Lordships have noted also the point made by De Silva, J., that of this Muslim family the 13th defendant was the son of the only son of the original grantor's wife. Such facts unsupplemented, fall short of proving anything that amounted to an adverse title.

Their Lordships repeat, none-the-less, that they have felt some regret at reaching a conclusion based as it is upon the inference proper to be drawn from such meagre premises as the recorded admission by counsel and the two short answers given by the second defendant in cross-examination—particularly since Their Lordships cannot help feeling that the true facts might at the time of the trial have been so easily discovered. Their Lordships were, therefore, disposed at one stage to think that in the interests of justice a new trial should be ordered. On the whole, however, Their Lordships have decided against such an Order. In reaching their final conclusion Their Lordships have attached weight to these considerations : first that, before the Supreme Court, both sides were content deliberately to take their stand upon the admission and evidence as they stood : second, that the 13th defendant is now dead ; third, that it is now ten years since this litigation began and if the matter were reopened upon a fresh trial, the value of the property, situated though it is in a business quarter of Colombo, appears on the material before Their Lordships not to be very great and to be, therefore, somewhat disproportionate to the costs that would or might be incurred in addition to those incurred already ; and finally, Their Lordships have in mind that the appellants are in any case entitled to a one-third interest in the property (to which should be added the sum of Rs. 1,000/- which is conceded to be payable to them out of the proceeds of sale of the property by way of recoupment of moneys spent by the 13th defendant upon drainage works) and have conceded before the Board (as they did before the Supreme Court) that their claim cannot be sustained in respect of one-fourth of another one-third share in the property.

In all the circumstances, therefore, Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the respondents' costs before the Board.

Appeal dismissed.

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

PERERA *vs.* TUCKER & CO., LTD.*

S.C. No. 424 *of* 1961—*Jt. M.C. Colombo,* 18950.
(*with Application in Revision, No.* 184 *of* 1961.)

Argued on : 4th October, 1961.
Decided on : 24th October, 1961.

Criminal Procedure Code, section 413—*Magistrate's power to make order for disposal of property in regard to which offence committed—Power not exercisable where offender not convicted—Property not to re-vest in original owner even by virtue of conviction where obtained by wrongful means not amounting to theft—Sale of Goods Ordinance, section* 24 (2)—*Power of Supreme Court to act in revision and reverse exercise of a Magistrate's discretion in proper case.*

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

Held : (1) That although a Magistrate is, by section 413 of the Criminal Procedure Code, vested with a judicial discretion in making an order for the restoration of property regarding which an offence has been committed, the Supreme Court would in a proper case exercise its powers of revision so as to reverse the exercise of such discretion.

(2) That where a Magistrate holds that an offence which was the subject-matter of a trial by him was, in fact, not committed, it is not open to him to make an order for the disposal of property under section 413 of the Criminal Procedure Code. The property should in these circumstances be returned to the person in whose possession it was.

(3) That further, by virtue of section 24 (2) of the Sale of Goods Ordinance, where such property has been obtained from a person " by fraud or other means not amounting to theft ", ownership will not re-vest in the person from whom the goods were so obtained by reason only of the conviction of the offender. This section, too, was applicable to the facts of the present case inasmuch as the respondent had parted with the property voluntarily. He was, therefore, not entitled to an order for the possession of such property.

Cases referred to : *In re Suppiah*, (1946) 48 N.L.R. 214.
Silva v. *Hamid*, (1918) 20 N.L.R. 414.
Police Inspector v. *Albert Silva*, (1916) 3 C.W.R. 313.
Shand v. *Atukorale*, (1934) 37 N.L.R. 55.

P. Nagendra, for the appellant and petitioner.

C. P. Fernando with *L. C. Seneviratne*, for the respondent.

D. W. Abeykoon, Crown Counsel, for the Attorney-General, on notice, as *amicus curiae*.

T. S. FERNANDO, J.

In Case No. 18950 of the Joint Magistrate's Court one Appa *alias* Munas was charged by the Police with voluntarily assisting in the disposal of stolen property, viz., four Bridgestone lorry tyres of the value of Rs. 1,760/-, an offence punishable under section 396 of the Penal Code. The Magistrate, after trial, acquitted Munas 29th on October, 1960, as he was doubtful whether the prosecution had proved that Munas knew or had reason to believe that the tyres were stolen property.

After the trial had been concluded, application was made on 31st October, 1960, to the learned Magistrate that the tyres be ordered to be given back to the appellant, Anthony Perera, from whom the Police had taken them. This application was opposed by Tucker & Company, Ltd., the respondent to this appeal, who claimed that the tyres were its property and that the Court should order that they be restored to it. The learned Magistrate, after inquiry held, made order on 26th November, 1960, directing that the tyres be delivered over to Tucker & Co., Ltd. The appellant has appealed to this Court complaining that the Magistrate's Order is wrong. It is admitted by counsel on his behalf that there is no right of appeal here, and his appeal has, therefore, to be rejected.

The appellant has presented also an application invoking the exercise by this Court of its powers of revision in Criminal cases, and it is argued that the application should be granted as the Order regarding the disposal of the tyres is legally unjustifiable. There is precedent for exercising in a proper case this Court's power of revision so as to reverse the exercise of the discretion vested in the Magistrate's Court—See *In re : Suppiah*, (1946) 48 N.L.R. 214.

The petitioner, Anthony Perera, is a dealer in tyres and it is not doubted that he purchased the four tyres in question on 24th March, 1960, from another tyre dealer, also bearing the name of Perera, on the latter representing to the petitioner that these tyres had been bought at a sale held by the Customs Department. Nor is it doubted that the petitioner paid Perera a sum of Rs. 1,200/- at the rate of Rs. 300/- for each tyre and obtained a receipt therefor.

During the trial of the criminal charge laid against Munas it was established that these four tyres were sold by Tucker & Co., Ltd., on 23rd March, 1960, to an unknown man who presented to the Company's salesman a cheque for Rs. 1,780.20 said to be the usual sale price of the four tyres. Delivery was made to the unknown man at the time of presentation of the cheque.

This cheque was duly presented by the Company to the Bank the next day for payment, but was returned with the endorsement :—" no account ".

Counsel for the petitioner relies on section 24 of the Sale of Goods Ordinance (Cap. 70) which enacts as follows :—

> 24. (1) Where goods have been stolen and the offender is prosecuted to conviction, the property in the goods so stolen re-vests in the person who was the owner of the goods, or his personal representative, notwithstanding any intermediate dealing with them.
>
> (2) Notwithstanding any enactment to the contrary, where goods have been obtained by fraud or other wrongful means not amounting to theft, the property in such goods shall not re-vest in the person who was the owner of the goods, or his personal representative, by reason only of the conviction of the offender.

Bertram, C.J., in the case of *Silva* v. *Hamid*, (1918) 20 N.L.R. 414, decided that, where the offence which was the subject-matter of the trial was held by the Magistrate not to have been committed, it was not open to the Magistrate to make an order for the disposal of property under section 413 of the Criminal Procedure Code. He held also that in such circumstances the property should be returned to the person in whose possession it was. It seems to me that the present petitioner's claim should have been upheld on the strength of the decision in *Silva* v. *Hamid* (*supra*). It is open to him, in my opinion, to invoke in his aid also section 24 (2) of the Sale of Goods Ordinance. It can hardly be disputed that these tyres were obtained from Tucker & Co., Ltd., " by fraud or other means not amounting to theft ". That Company, in fact, voluntarily parted with the property. If so, the law declares that the property in the tyres shall not re-vest in the Company. The cases relied on by the petitioner, viz., *Police Inspector* v. *Albert Silva*, (1916) 3 C.W.R. 313 ; *Shand* v. *Atukorale*, (1934) 37 N.L.R. 55 ; and *In re Suppiah* (*supra*) ; all support his contention that the order directing that the tyres be delivered to Tucker & Co., Ltd., is wrong.

In making the order he did the learned Magistrate appears to have been influenced strongly by the circumstance that the petitioner is a Sub-Agent of Tucker & Co., Ltd., the agents in Ceylon for Bridgestone tyres. He appears to have thought that the circumstance that new tyres were being offered for sale to a Sub-Agent by a person not the agent should have made the petitioner suspicious about these tyres or should, at least, have put the petitioner on inquiry in regard to their source. As against this line of reasoning it should not have been overlooked that (*a*) the petitioner himself purchased from another tyre dealer with whom he had had previous dealings in tyres, and (*b*) that a fairly substantial sum was paid for their purchase.

Sufficient grounds have, in my opinion, been shown by the petitioner for the revision of the order relating to disposal of the four tyres. It is accordingly set aside and I direct that the tyres be delivered over to the petitioner.

Appeal rejected but application in revision allowed.

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

K. B. PERERA *vs.* P. DON ARON SINGHO AND OTHERS

S.C. No. 385/60 (*F*)—*D.C. Panadura, No.* 5044.

Argued on : June 17, 1963.
Decided on : June 26, 1963.

Partition action—Minor appearing without guardian-ad litem in such action—Interlocutory decree and order accepting scheme of partition entered thereafter—Does such illegality vitiate proceedings—Are they void or only voidable at minor's instance—Can a party other than the minor complain of such illegality.

Minors—Service of summons personally on minor illegal—Whether such illegality vitiates all subsequent proceedings.

This was an appeal against an order of the learned trial Judge in a partition action, accepting a scheme of partition. It was brought to the notice of Court after interlocutory decree had been entered and after the order appealed from was made, that the 10th and 11th defendants were minors and had not been represented by a guardian *ad litem*. Later the

birth certificate of one of them (the 11th defendant) was produced as proof of his being a minor. Summons had been served personally on the 11th defendant.

It was submitted on behalf of the appellant (the 20th defendant) that the order appealed from was null and void as no guardian *ad litem* had been appointed to represent the 10th and 11th defendants in the action and there had been no service of summons on them according to law. Counsel for the respondent submitted that this order was not void but only voidable and then only at the instance of the minor concerned and not of any other party to the action. He further contended that there was no evidence of any prejudice caused to the 11th defendant by the order appealed from.

Held : (1) That the order appealed from should set aside inasmuch as it had been made after an inquiry at which a minor had not been represented by a guardian *ad litem*. Service of summons personally on the minor, as in the present case, was ineffective and this was an illegality which invalidated the order appealed from. The minor had an interest in the preparation of the scheme of partition but had had no opportunity to state his objections, if any, through a properly appointed representative before the order appealed from was made.

(2) That the appellant being a party to this action was entitled to have the order set aside even though he was not the minor concerned. Since the decree in a partition action is intended to bind everybody, whether a party to the action or not, it was necessary for every party to the action to be vigilant in order to prevent or remove any illegality in the proceedings that might affect the validity of the decree.

Held further : (3) That this illegality which invalidated the order appealed from, also invalidated all proceedings subsequent to the order for issue of summons, but those proceedings could not be set aside as the present appeal was not an appeal from the interlocutory decree.

Cases referred to : *Setun Bibee et al.* v. *Abusaliy Marikar*, (1953) 55 N.L.R. 236 ; XLIX C.L.W. 79.
B. G. Deonishamy v. *M. P. Nonohamy*, (S.C. 112/60-D.C. Hambantota I/4445 P) S.C. Minutes of 15th May, 1963.

A. C. Gooneratne with *N. S. A. Goonetilleke*, for the 20th defendant-appellant.

C. de S. Wijeratne, for the plaintiff-respondent.

ABEYESUNDERE, J.

This appeal is by the 20th defendant in partition action No. 5044 of the District Court of Panadura from an order made by the District Judge on 10th August, 1960, approving one of the two plans for partition submitted by the Commissioner and directing him to draw up a scheme of partition in accordance with that plan and to submit it for confirmation with the necessary report and appraisement.

It was argued for the appellant that the aforesaid order was null and void as no guardian *ad litem* had been appointed in respect of each of the 10th and 11th defendants in the partition action who were minors and there was no legal service of summons in respect of those minors. The plaintiff's proctor had discovered and disclosed to Court the minority of the 10th and 11th defendants after interlocutory decree had been entered in the partition action and after the order appealed from was made. The District Judge called for evidence regarding the minority of the 10th and 11th defendants. The proctor for the plaintiff produced the birth certificate of the 11th defendant and according to that certificate the 11th defendant was a minor. There was evidence of the fact that summons had been served personally on the 11th defendant and no guardian *ad litem* had been appointed to represent him.

The counsel for the plaintiff-respondent argued that the order appealed from was voidable and not void and that it was voidable at the instance of the minor concerned and not of any other party to the partition action. He cited the decision made by this Court on 15th May, 1963, in S.C. Case, No. 112/60 (DC.. Hambantota, Case No. I/4445), and contended that there was no evidence of any prejudice caused to the minor, the 11th defendant, by the order appealed from and that, therefore, it was not necessary to declare the said order to be null and void. In the case cited by the counsel for the plaintiff-respondent there were some interventions in a partition action after interlocutory decree had been entered and, after inquiry into the claims of the intervenients and when the stage of addresses had been reached, it was brought to the notice of the Court that proper substitution proceedings had not been taken regarding the 144th defendant who had

died after interlocutory decree was entered and before the interventions took place. The District Judge who inquired into the objection raised by the intervenients held that the deceased 114th defendant had left an administrable estate and that the administrator of that estate should have been substituted in place of the deceased and that the substitution of 144A defendant, who was the deceased's heir, in place of the deceased was bad. He further held that, as the interventions failed, the improper substitution did not invalidate the proceedings held on the claims of the intervenients. On appeal this Court held that the interests of justice did not demand that the proceedings held on the claims of the intervenients should be quashed as this Court also came to the conclusion that the interventions had failed.

In the case referred to above the person who should have been properly substituted for the deceased defendant might have been affected if the claims of the intervenients had succeeded, but as those claims failed he was not affected by the interventions. It was, therefore, not considered necessary to quash the proceedings held on the claims of the intervenients. The facts are, however, different in the case to which the present appeal relates. The order of the District Judge that a scheme of partition should be prepared according to the plan approved by him was made at an inquiry at which the minor, the 11th defendant, was not represented by a guardian *ad litem*. The minor, therefore, was not given an opportunity to state his objections, if any, through a properly appointed representative before the order appealed from was made. That order concerned the preparation of a scheme of partition and the minor had an interest therein. This Court has set aside a final decree entered in a partition action and all proceedings in the action subsequent to the order for the issue of summons on the ground that summons had not been properly served in respect of certain defendants who were minors by reason of the fact that no guardians *ad litem* were appointed in respect of the minors and that the service of summons personally on the minors was ineffective. (*Setun Bibee et al.* v. *Abusally Marikar*, 55 New Law Reports, page 276). For similar reasons the order appealed from can be set aside by this Court.

The counsel for the plaintiff-respondent argued that the appellant was not the minor concerned and that, therefore, the order appealed from should not be quashed. As the decree in a partition action is intended to bind everybody, whether a party to that action or not, it is necessary for every party to that action to be vigilant for the purpose of preventing or removing any illegality in the proceedings that might affect the validity of the decree. The appellant is a party to the partition action and is, therefore, entitled to seek the assistance of this Court to remove the illegality that has occurred by the making of an order by the District Judge on a matter affecting the minor also when there was no effective service of summons in respect of him. The appeal must therefore succeed. The illegality that invalidates the order appealed from also affects the validity of all the proceedings subsequent to the order for the issue of summons. Those proceedings cannot be set aside on the present appeal which is not from the interlocutory decree entered in the partition action.

I set aside the order made by the District Judge on 10th August, 1960. The appellant is entitled to the costs of his appeal which shall be paid by the plaintiff-respondent.

T. S. FERNANDO, J.
I agree.

Appeal allowed.

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

T. D. YASARATNA SILVA *vs.* A. W. F. SENANAYAKA*

S.C. No. 235/1961 (*R.E.*)—*C.R. Colombo, No.* 79879.

Argued on : 21st March, 1963.
Decided on : 5th April, 1963.

*For Sinhala translation, see Sinhala section, Vol. 6 part 1, p. 3

Landlord and tenant—Action for ejectment of tenant's son in occupation of premises after father's death—Defendant pleading that he was tenant on legal grounds—Rejection of defendant's pleas—Appeal—Point raised in appeal that as plaintiff avers that defendant is a trespasser plaintiff can succeed only on proof of title—Having regard to value of premises, jurisdiction of Court of Requests questioned—Can such plea succeed.

Courts Ordinance, section 75—Jurisdiction of Court of Requests—What is the matter in dispute.

Plaintiff sued the defendant for ejectment alleging that the premises in question had been let to the father of the defendant, that the father had died on 7th March, 1961, and that the defendant continued in occupation claiming to be the tenant of the plaintiff. The defendant in his answer stated : (*a*) that he had been a partner with his father in the business carried on in the premises and was *qua* partner a tenant ; (*b*) that under section 18 of the Rent Restriction Act he had become tenant after his father's death.

After trial the learned Commissioner rejected both these pleas and gave judgment for the plaintiff.

In appeal it was contended on behalf of the appellant that if the defendant was, as the plaintiff averred not a tenant, but a trespasser, the plaintiff could succeed only on proof of his title, which could not be proved in the Court of Requests having regard to the value of the premises.

Held : That as the defendant's answer admitted the title of the plaintiff, the only question in dispute was the allegation of tenancy. Under section 75 of the Courts Ordinance the test of the monetary jurisdiction of the Court of Requests depends on whether there is a *dispute* as to title or not.

D. R. P. Goonetilleke, for the defendant-appellant.

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

H. N. G. FERNANDO, J.

The plaint in this action for ejectment averred that the premises in question had been let to the father of the defendant, that the father had died on 7th March, 1961, and that the defendant continues in occupation claiming to be the tenant of the plaintiff. The defendant took two different pleas in his answer, firstly, that he had been a partner with his father in the business carried on in the premises and was *qua* partner a tenant and as such entitled to continue in occupation, and secondly, that under section 18 of the Rent Restriction Act he had become the tenant after his father's death. Both these pleas were rejected by the learned Commissioner, whose findings of fact cannot be challenged having regard to the evidence.

But counsel for the defendant has raised on appeal a point which was neither put in issue at the trial nor mentioned in the petition of appeal, and which has been met with ability by plaintiff's counsel. The point raised is that if the defendant is, as the plaintiff avers, not a tenant, but a trespasser, the plaintiff can only succeed upon proof of his title to the premises, and having regard to the value of the premises that title cannot be proved in the Court of Requests.

Several decisions were cited during the argument, but I do not find it necessary to refer to them. Under section 75, a Court of Requests has jurisdiction in an action in which the debt, damage or demand does not exceed Rs. 300/-, and in the present action the damages claimed were Rs. 283/-. Under the same section, the Court would have no jurisdiction in an action in which *title to land* is in dispute, if the value of the land exceeds Rs. 300/-. But the title to the premises is not in dispute, for the defendant's substantial plea was that he is a tenant under the plaintiff, and the only question in dispute was this allegation of tenancy. In other words, the defendant's answer admitted the title of the plaintiff, and the Commissioner was not called upon to adjudicate any *dispute as to title*. I would hold, therefore, that the Commissioner did have jurisdiction to determine whether or not the defendant was as claimed a tenant under the plaintiff.

The appeal is dismissed with costs.

Appeal dismissed.

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

AMARASEKERA *vs.* JAYANETTI

S.C. 192 (*Final*) *of* 1959—*D.C. Colombo, No.* 7896/*L*

Argued on : 13th and 14th February, 1962.
Decided on : 22nd August, 1962.

Contract—Alienation of property by person adjudged to be of unsound mind—Alienation made during lucid interval but while such adjudication remained unreversed—Whether such alienation valid—Is the question govered by the English or the Roman-Dutch law.

Civil Procedure Code, Chapter XXXIX, sections 567, 571—*Does Chapter XXXIX have the effect of superseding the Roman-Dutch law as regards capacity of a lunatic to contract during a lucid interval.*

Held : (1) That an alienation of land executed during a lucid interval by a person adjudicated by the District Court to be of unsound mind and incapable of managing his own affairs, is valid even though the execution has taken place while the adjudication remains unreversed.

(2) That this question must be determined by the Roman-Dutch law and not by the English law. The provisions of Chapter XXXIX of the Civil Procedure Code have not superseded the Roman-Dutch law on this point.

Per T. S. FERNANDO, J.—" . . . it seems to me that the decision of the case *In re Walker* was influenced by the peculiar position of the Crown's prerogative in England in dealing with and controlling the property of a lunatic and I am unable to accede to the proposition that the basis of the relevant provisions of Chapter XXXIX of our Civil Procedure Code was not to be found in the Roman-Dutch law ".

Followed : *Hamid* v *Marikar*, (1951) 52 N.L.R. 269.

Authorities referred to : *In re Walker*, L.R. (1905) 1 Ch. D. 160 ; 74 L.J., Ch. 86.
Prinsloo's Curators v. *Crafford and Prinsloo*, (1905) T.S. 669.
Pienaar v. *Pienaar's Curators*, (1930) O.P.D. 171.
Ex parte Human and Another, (1948) 1 S.A.L.R. 1022.
Wessel's Law of Contract in South Africa, (1937 Ed.), Vol. I, para 700.
Lee—Introduction to Roman-Dutch Law (5th Ed.), p. 115.
Voet 27.10.3, 4.

H. V. Perera, Q.C., with *B. J. Fernando* and *D. S. Wijeyewardene*, for the defendant-appellant.

N. E. Weerasooria, Q.C., with *N. R. M. Daluwatte*, for the plaintiff-respondent.

T. S. FERNANDO, J.

The question that arises upon this appeal is whether an alienation of land executed, during a lucid interval by a person who has been adjudicated by the District Court to be of unsound mind and incapable of managing his affairs, void where the execution has taken place while the adjudication remains unreversed.

The facts upon which the question arises are shortly these :—

The appellant was a fireman employed in the Railway Department and met with an accident which appears to have affected his brain. He had as a result to retire from the service of the Railway, but became entitled to a pension, a portion of which he decided to commute in terms of the pension rules. On 30th May, 1945, the appellant's wife, who is incidentally his *guardian-ad-litem* on the present action, made an application to the District Court in terms of Chapter XXXIX of the Civil Procedure Code praying that the appellant be adjudged to be of unsound mind and incapable of managing his affairs. She prayed also that she be appointed manager of his estate and that one Sumitra Aratchy be appointed guardian of his person. In the affidavit supporting her application she stated that the appellant was not possessed of any property save and except certain monies due to him from the Railway by way of pension

and gratuity and arrears of wages. On 23rd July, 1945, the application was allowed by the District Court which also ordered the appointments to be made as prayed for. The certificate of managership was to be issued to the wife of the appellant on her signing a bond. Within a month of the adjudication by Court the appellant was discharged from the mental hospital, and there was no evidence that he had thereafter been sent to a mental hospital.

The appellant's father transferred to him interests in certain lands by deeds P 6, P 7 and P 8 executed on 3rd January 1948, 25th February 1946 and 1st October 1946 respectively. These interests were all conveyed by the appellant, after the death of his father, to one Jayanetti (the husband of the respondent to this appeal) on deeds of transfer P 3, P 4 and P 5 executed on 28th October 1949, 14th January 1950 and 31st March 1950, respectively. Each of these three deeds (P 3 to P 5) contained a clause providing for a conveyance of the interests to the appellant in the event of the latter paying back the purchase price together with interest within five years of the respective deeds of purchase. Jayanetti died intestate in December, 1953, and his widow, the plaintiff, applied for and obtained letters of administration to administer his estate. No repayment was effected by the appellant as provided for in the deeds, and, as the appellant appears to have retained possession of the lands since the dates of execution of P 3 to P 5 and was not prepared to deliver over possession thereof, the present action was instituted on 30th May 1956, by the plaintiff praying for a declaration of title to the interests in the lands affected in her favour as administratrix of her husband's estate and for ejectment of the appellant therefrom and for damages.

The learned District Judge, after trial, entered judgment in favour of the plaintiff and has found that : (i) the adjudication made by the District Court on 23rd July, 1945, has been one obtained formally for the purpose of enabling the appellant's wife to draw his pension, (ii) the appellant was at the time he executed the deeds of transfer P 3 to P 5 of sound mind, (iii) Jayanetti paid the full consideration for each of the transfers before the attesting notary, and (iv) the transfers were not executed as a result of any dishonesty or fraud on the part of Jayanetti. These findings of fact are amply supported by the evidence led at the trial and were not sought to be canvassed on appeal. It is right to add that the evidence did not disclose that Jayanetti was aware that the appellant had been adjudicated in 1945 to be a person of unsound mind.

Mr. Perera for the appellant submitted that the question arising on this appeal does not fall to be determined by the application of the Roman-Dutch law which, he claimed, had been superseded by our statute law, viz., Chapter XXXIX of the Civil Procedure Code. He argued that, once an adjudication has been made and a manager of the estate of a lunatic appointed in terms of section 567 of the Code, a sale of any property forming part of that estate could be effected only with an order of the District Court previously obtained—*vide* section 571. He submitted further, that where the power to order a sale is in the Court no concurrent power in the lunatic can be recognised. For this submission he relied strongly on the English case of *In re Walker*, L.R. (1905) 1 Ch. D. 160, where the Court of Appeal held that when a person has been found lunatic by inquisition, so long as the inquisition has not been superseded, but continues in force, he cannot, even during a lucid interval, execute a valid deed dealing with or disposing of his property. In that case, Vaughan Williams, L.J., considered the effect of section 120 of the Lunacy Act of 1890 which deals with powers exercisable by a committee of a lunatic's estate, under the order of the judge, and, relying upon the Crown's prerogative in England of dealing with and controlling the property of a lunatic, stated that "the moment one sees that the committee, as representing the Crown, has the rights and powers mentioned in section 120 of the Act of 1890, it is perfectly plain that they cannot be effectively exercised by the Crown in the interest and for the benefit of the lunatic, if during the same period some one else is to have the control of the property. In that event there would be a conflict of control which would be entirely inconsistent with the exercise by the committee of those rights of the Crown which have been delegated to him". Mr. Perera submitted that the basis of the relevant provisions of our Civil Procedure Code was to be found not in the Roman-Dutch law but in section 120 of the English Lunacy Act.

It must, however, be pointed out that the case of *In re Walker* (*supra*), came up for consideration in this Court in the case of *Hamid* v. *Marikar*, (1951) 51 N.L.R. 269, before a Bench of two judges in a case which arose in respect of a mortgage bond executed by a person who had been adjudicated to be of unsound mind, at a time

when the adjudication stood unreversed. Said Swan, J., at page 272 :—

> " Whether the mortgage bond entered into by Razeena Umma was null and void is a matter of interest. If it was executed by her in a lucid interval it would, under the Roman-Dutch law, be considered valid. Under English law, however, once a person is adjudged to be of unsound mind and incapable of managing his affairs, any contract entered into by him, while that order stands, is null and void—see *In re Walker* (*supra*). In India the position is the same. Under the Roman-Dutch law, however, a contract made by a person, declared by a competent Court to be a lunatic and for whom a curator has been appointed, would be valid if it was made during a lucid interval. That was the view taken by the Transvaal Supreme Court in the case of *Prinsloo's Curators* v. *Crafford and Prinsloo*, (1905) T.S. 669. In that case Prinsloo had, by order of Court, been declared to be of unsound mind and curators were appointed in 1903. In 1905 he married. It was proved that he was then no longer insane. It was contended that he could not contract while the order was in force. The Court, however, held that an order declaring an alleged lunatic to be of unsound mind was not a judgment *in rem* but only operated, while in force, to create a rebuttable presumption that he was a lunatic."

Prinsloo's case (*supra*) is relied on in Wessel's Law of Contract in South Africa, (1937 ed.), Vol. 1, para. 700, at page 238, as authority for the proposition that a contract by a lunatic, even while the order stands, is valid if it can be shown that he was of sound mind and understood the nature of the transaction at the time he entered into it. It was pointed out to us that the observation of Swan, J., was made by way of an *obiter dictum*, but it is supported by other authorities. For instance, Professor Lee in his Introduction to Roman-Dutch Law, (5th ed.), at page 115, observes :—

> " It is tempting to speak of unsoundness of mind as constituting a status ; but it would not be correct to do so, for mental unsoundness is not necessarily permanent or constant, and the question which must be answered is not, ' Has the man been declared mad ? ' but, ' Was he, in fact, incapable of understanding the particular transaction which is brought in issue ? ' If the answer is negative, the transaction stands."

This observation derives support from Voet, Bk. XXVII, Title 10, sections 3 and 4—*(see* 4 Gane's translation, at pages 594-595)—

> SECTION 3.—" . . . On the other hand, those things are valid which are set forward by him when already employing his reason because the madness has naturally abated. "

> SECTION 4.—" *Curator abstains from management in lucid intervals.*—If the misfortune of madness is not permanent, but the mad person has quite lucid intervals, a curator is assigned to him to administer, indeed, according to the manner and duration of the madness. But if the madness stops he will refrain from all oversight of his affairs, and, now that his principal is in possession of his senses, will leave it to him just as though he had never suffered from madness. This will go on until the onset of madness is renewed, inasmuch as in that case needs is that the administration in his charge should be renewed. Thus it happens that one and the same person has, indeed, the title of curator for the whole time, but has it effectively only when the intermittent madness breaks out again."

Then, in *Pienaar* v. *Pienaar's Curator*, (1930) O.P.D. 171, de Villiers, J.P., commenting on the capacity of a person declared incapable, observed :—

> " In all these instances the person who has been declared insane or otherwise incapable retains his contractual and legal capacities and his administration of his own affairs to the extent to which he is from day to day capable of exercising them. If at any time he is not legally competent to perform a legal act, that incompetence flows from the physical or mental incapacity which prevents him from understanding or from giving his *consensus*, and not from the fact that he has been declared incapable and had a curator appointed to him."

In *Ex parte Human and another*, (1948) 1 S.A.L.R. 1022, de Beer, J., after pointing out that Voet clearly recognises that mental patients may and do have lucid intervals during which they may contract without the assistance of their curators, followed the judgment of the Bench in *Pienaar* v. *Pienaar's Curator* (*supra*), in the course of which de Villiers, J.P., stated :—

> " The mere fact that such a person has been declared insane or incapable of managing his affairs, and that a curator is appointed to such person, does not deprive him of the right of administering his own property and entering into contracts and other legal dispositions to the extent to which he may *de facto* be capable, mentally and physically, of so doing. Such mental or physical capacity may vary from day to day, but at all times it remains a question of fact. The object of appointing a curator is merely to assist the person in performing legal acts, to the extent to which such assistance is from day to day, in varying degrees, necessary. Thus even a person who has been declared insane and to whose estate a curator has been appointed can dispose of his property and enter into contracts whenever he is mentally capable of doing so—Voet (27.10.3, 4)."

On the question arising on this appeal the Roman-Dutch Law is at variance with the English law and I can find no sufficient reason for not accepting as sound the dictum of Swan, J., referred to above. I would, therefore, respectfully follow it here and hold that the question for our decision must be determined by the rule observed in the Roman-Dutch law. Moreover, it seems to me that the decision of the case *In re Walker* (*supra*), was influenced by the peculiar position

of the Crown's prerogative in England of dealing with and controlling the property of a lunatic, and I am unable to accede to the proposition that the basis of the relevant provisions of Chapter XXXIX of our Civil Procedure Code was not to be found in Roman-Dutch law.

The question that arises on this appeal as formulated at the commencement of this judgment has, therefore, in my opinion, to be answered in favour of the plaintiff-respondent. The alienations effected by deeds P 3, P 4 and P 5 are valid, and this appeal must be dismissed with costs.

HERAT, J.

I agree.

Appeal dismissed.

Privy Council Appeal, No. 12 *of* 1961.

Present : **The Lord Chancellor, Lord Horton of Henryton, Lord Evershed, Lord Guest, Lord Pearce.**

GAMALATH RALALAGE DANIEL APPUHAMY *vs.* THE QUEEN

From
THE SUPREME COURT OF CEYLON

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

Delivered on : 13th December, 1962.

Criminal Procedure Code, section 440 (1)—*Witness summarily sentenced by the Supreme Court for giving false evidence—Failure to inform the witness of the gist or substance of the accusation and accordingly an opportunity of dealing with it—Need for the Court to form its own opinion that the evidence given was false and not depend on rider by jury—Penal Code, section* 188.

The appellant, a village headman, was a witness for the prosecution at the trial of eight persons in the Kandy Assizes on charges connected with the looting of a boutique run by a Tamil, one *M*. The appellant's evidence not only differed from that of *M*. in a number of particulars, but also contradictory of what he had recorded in his notebook and reported to police both as to the source of the information he had received as to the plot to loot and as to the place where he received it.

The learned Commissioner in the course of his summing up, after reminding the jury of the evidence given by the appellant, invited the jury to return a rider indicating what they felt about the evidence of the accused.

After returning their verdicts in relation to the accused, the Foreman said, "the headman may be dealt with for giving false evidence ".

After sentencing the accused who were found guilty, the Commissioner said to the accused, " The jury have brought a rider against you that you should be dealt with for giving false evidence. Have you any cause to show why you should not be dealt with ".

The Commissioner having indicated that he was dealing with the appellant summarily, counsel for the appellant rged some matters in mitigation. The learned Commissioner again called upon the appellant saying : " Have you any cause to show ?? " The appellant begged His Lordship's pardon and the learned Commissioner sentenced him to three months' rigorous imprisonment.

Held : (1) That the statements made by the learned Commissioner to the appellant and in his summing up to the jury tend to support the view that he regarded the rider of the jury as equivalent to a verdict of guilty to a charge of perjury.

(2) That section 440 (1) of the Criminal Procedure Code does not require a finding by a jury as a condition precedent to the exercise by the Supreme Court of the summary power to sentence for giving false evidence.

(3) That under section 440 (1) aforesaid, it is for the Court to decide whether false evidence has been given, and if in Court's opinion it has, then the Supreme Court has power to sentence summarily, " as for a contempt of the Court ".

(4) That (*a*) as the observations made by the learned Commissioner to the jury in the course of his summing up were not sufficient to leave the appellant in no doubt as to the matters on which, in the opinion of the Court, he had given false evidence ;

(*b*) as it was not suggested that the whole of the appellant's evidence was false ; and

(*c*) as the appellant was not informed by the learned Commissioner of the gist or substance of the accusation against him and accordingly was given no opportunity of explaining and possibly of correcting a misapprehension as to what had been, in fact, said or meant, the sentence passed upon the appellant should be quashed.

E. F. N. Gratiaen, Q.C., with *Dick Taverne*, for the witness-appellant.

John A. Baker with *Annesley Perera*, for the Crown.

THE LORD CHANCELLOR

The appellant, Gamalath Ralalage Daniel Appuhamy, was a witness for the prosecution at the trail of eight persons at the Kandy Assizes of the Supreme Court of Ceylon in April, 1960. At the end of the trial the Commissioner of Assize summarily sentenced the appellant to three months' rigorous imprisonment for having given false evidence.

Power to pass such a sentence is given by section 440 (1) of the Criminal Procedure Code of Ceylon which provides that :—

" If any person giving evidence on any subject in open Court in any judicial proceeding under this Code gives, in the opinion of the Court before which the judicial proceeding is held, false evidence within the meaning of section 188 of the Penal Code it shall be lawful for the Court, if such Court be the Supreme Court, summarily to sentence such witness as for a contempt of the Court to imprisonment either simple or rigorous for any period not exceeding three months . . . "

The relevant part of section 188 of the Penal Code reads as follows :—

" Whoever, being legally bound by an oath or affirmation, or by any express provision of law to state the truth, or being bound by law to make a declaration upon any subject, makes any statement which is false, and which he either knows or believes to be false, or does not believe to be true, is said to give ' false evidence '."

The charges against the eight accused were in respect of the looting of a boutique run by a Tamil, Mooka Pillai, on the 29th May, 1958, during the racial riots that occurred at that time. Mooka Pillai gave evidence that the appellant, the village headman of a neighbouring village, came to his boutique in the evening of the 29th May, 1958, and told him that people were planning to loot it that night. A lorry was sent for and loaded with goods from the boutique with the intention of taking them to an empty boutique close to the appellant's house. While the lorry was being loaded or just after the loading was finished, three men came into the boutique. One of them, the accused, Seda, said that he had brought about 200 people to loot the shop and in the presence of the appellant and without any attempt by him to protect them, Seda struck both Mooka Pillai and his wife who then ran out of the back of the boutique and took refuge in a neighbour's house.

The appellant stated that he had remained in the boutique until after the raid was over and that he had then driven the lorry, which had not been taken away by the looters, to the police station a short distance away and had then reported the matter to the police. He had made no effort to inform the police before the raid took place or to secure their assistance during the course of it although there was a post office with a telephone close by. His role throughout the raid had been that of a spectator. His evidence differed from that of Mooka Pillai in a number of particulars. He said that he had come to the boutique with a Tamil, Perumal Pillai, on foot while Mooka Pillai said that he had come by car and that Perumal Pillai had not come at all. In his notebook he had recorded that the information about the looting had been given to him by Perumal Pillai but he had told the police when he did report the matter that he had received the information from persons unknown. He said that Perumal Pillai had given him the information when he was at his desk in his house, whereas the notebook stated that it was given to him at Perumal Pillai's boutique. He did not get Perumal Pillai's signature to the report as it was his duty to do.

The appellant was treated as an accomplice by the prosecution and it was suggested to him on behalf of the defence that the looting was planned by him and carried out by him.

The learned Commissioner in the course of his summing up, after reminding the jury of the evidence given by the appellant, invited the jury to consider whether or not it was their duty to return a rider indicating what they felt about the evidence of the appellant. "A headman", he said, "is a person appointed to protect the public, to serve the public, especially at a time of stress like the emergency; and if a headman conducts himself in a way that jeopardises the safety of the public, surely you, gentlemen, who sit in judgment in the highest tribunal of the land, will consider whether it is not your duty to indicate what you think about his conduct, whatever your decision with regard to the accused may be".

Although this might have been taken as an invitation to condemn the appellant for his failure to report the threatened raid to the police and for his failure to take any action to protect Mooka Pillai and his wife, it would seem that it was not so understood by the jury. After returning their verdicts in relation to the accused, the Foreman said "The headman may be dealt with for giving false evidence".

After sentencing the seven accused who were found guilty, the Commissioner said to the accused :

> "The jury have brought a rider against you that you should be dealt with for giving false evidence. Have you any cause to show why you should not be dealt with ?"

Counsel on behalf of the appellant then asked the Commissioner to deal with the matter the next day whereupon the Commissioner said that he was dealing with the appellant summarily. Counsel then urged some matters in mitigation. The learned Commissioner again called upon the appellant, saying,:

> "Have you any cause to show ?"

The appellant begged His Lordship's pardon. The Commissioner then said his offence was a very serious one and sentenced him to three months' rigorous imprisonment.

The statements made by the learned Commissioner to the appellant tend to support the view that the Commissioner regarded the finding of the jury in relation to the appellant as equivalent to a verdict of guilty to a charge of perjury. The appellant was not told that in the opinion of the Court he had given false evidence nor was any indication given to him of the matters in respect of which he was alleged to have given false evidence. He was simply told that the jury had brought a rider against him that he should be dealt with for giving false evidence although the jury's rider was that he might be dealt with for that. He was not asked whether he admitted or denied giving false evidence but only to show cause why he should not be dealt with, a procedure similar to that followed in the criminal Courts of England when after a conviction of felony the prisoner is called upon to show cause why sentence should not be passed upon him.

The course taken by the learned Commissioner in his summing up also tends to support the view that he regarded the rider of the jury as equivalent to a verdict of guilty. After directing the jury very properly as to the way they should regard the evidence of the appellant when considering the guilt or innocence of the accused, he read to the jury a note of the evidence given by the appellant as to the source of information he had received as to the plot to loot and as to the place where he received it and he reminded the jury that the appellant had said that he came to Mooka Pillai's boutique on foot when Mooka Pillai said he came by car.

Having read this passage from the shorthand note and having reminded the jury about the car, the Commissioner invited the jury "to return a rider indicating what" they felt "about the evidence of this headman".

Section 440 (1) of the Criminal Procedure Code does not require a finding by a jury as a condition precedent to the exercise by the Supreme Court of the summary power to sentence for giving false evidence.

Their Lordships are reluctant to conclude that the learned Commissioner decided in the course of the trial of the eight accused to add to that trial, the trial of the appellant, a witness for the prosecution, on a charge of perjury. They do not find it necessary to reach a conclusion on this. If the Commissioner did so decide, the appellant was tried for perjury without any charge being formulated against him and without any opportunity being given to him to put forward any defence he might have.

In *Subramaniam* v. *The Queen*, (1956) 1 W.L.R. 456, Lord Oaksey delivering the judgment of Their Lordships said that in their opinion it was never intended that in the exercise of the power under section 440 (1) in the course of a criminal trial, a subsidiary criminal investigation should be set on foot not against the prisoner charged but against the witnesses in the case and that if such an investigation is necessary it can and should be set on foot under section 440 (4).

It may be, as Counsel for the Crown submitted, that the learned Commissioner merely sought to be helped by the jury on a question of fact. Even so the course taken by the learned Commissioner would not appear to Their Lordships to be justified. Under section 440 (1) of the Criminal Procedure Code it was for the Court to decide whether false evidence had been given, and if in the Court's opinion it has, then the Supreme Court has power to sentence summarily " as for a contempt of the Court ".

It was clearly established in *re Pollard*, (1868) 5, Moore N.S. III ; 16 E.R. 457, on a reference to the Judicial Committee of the Privy Council, that no person should be punished for contempt of Court, which is a criminal offence, unless the specific offence charged against him be distinctly stated and an opportunity of answering it given to him.

The same rule applies in relation to summary punishment for giving false evidence, see *Chang Hang Kiu* v. *Piggott*, (1909) A.C. 312 (J.C.). In that case Their Lordships held that the gist of the accusation against the appellants ought in the circumstances of the case to have been sufficiently clear to the accused from the language employed by the learned Chief Justice. The Chief Justice had said that the whole evidence given by the appellants convinced him of a conspiracy and all that they had said material to one issue was a tissue of deliberate falsehoods. A little later in their judgment they expressed the opinion that the language used by the learned Chief Justice was quite sufficiently specific to make the appellants aware of the pith of the charge against them. But Their Lordships advised that the appeal should be allowed on the ground that the Chief Justice should, before sentencing them, have given the accused an opportunity of giving reasons against summary measures being taken, " an opportunity of explanation and possibly the correction of misapprehension as to what had been, in fact, said or meant ".

It is not in Their Lordships' opinion necessary when proceeding under section 440 (1) for the accusation of giving false evidence to be stated with the particularity required in a count of an indictment. If the Court is of the opinion that the whole of a witness's evidence was false, it may be sufficient as in the case of *Chang Hang Kiu* v. *Piggott* (*supra*), just to say that. But when it is not suggested that the whole of a witness's evidence is false, it is essential that the witness should be left in no doubt as to which parts are alleged to be false. Unless he is so informed, he is deprived of the opportunity of explanation and possibly of correcting a misapprehension as to what had been, in fact, said or meant.

It cannot, in the opinion of Their Lordships, be said that the observations made by the learned Commissioner to the jury in the course of his summing up, were sufficient if the appellant was present and heard what was said—and there is no evidence that he was—to leave him in no doubt as to the matters on which, in the opinion of the Court, he had given false evidence.

It was not suggested that the whole of the appellant's evidence was false. It clearly was not ; and, no doubt, the prosecution sought to attach some importance to his evidence of identification.

In Their Lordships' opinion the appellant was not informed by the Commissioner of the gist or substance of the accusation against him and accordingly was given no opportunity of dealing with it.

For these reasons Their Lordships have humbly advised Her Majesty that this appeal be allowed and the sentence passed upon the appellant quashed.

Appeal allowed.

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

KHAN AND OTHERS *vs.* M. G. ARIYADASA

S.C. Nos. 707-711 *of* 1962—*M.C. Matara,* 66552.

Argued on : 8th, 9th and 10th April, 1963.
Decided on : 6th May, 1963.

Penal Code, sections 32, 146—*Criminal Procedure Code, sections* 152 (3), 180 (1), 180 (2)—*Joinder of charges—Unlawful assembly and common intention—Unlawful assembly—Does section* 146 *of the Penal Code create a specific offence* ?

"*Stare Decisis,*" *the principle of—Decision arrived at* "*per incuriam*"*—Meaning thereof—Concession of counsel on a point of law.*

Six accused persons were charged, *inter alia,* as follows :—

(1) being members of an unlawful assembly—(punishable under section 140 of the Penal Code) ;

(2) being members of the said unlawful assembly, committing house-trespass by entering the house of one Ariyadasa—(punishable under section 434 read with section 146) ;

(3) being members of the said unlawful assembly, using force or violence—(punishable under section 144) ;

(4) being members of the said unlawful assembly, one or more members of which caused hurt to certain persons—(punishable under section 314 read with section 146) ;

(5) committing house-trespass—(punishable under section 434) ;

(6) wrongfully confining the said Ariyadasa—(punishable under section 333) ;

(7) wrongfully confining one Gomis—(punishable under section 333) ;

(8) voluntarily causing hurt to the said Ariyadasa—(punishable under section 314).

After trial, the 1st accused was acquitted and the other five accused were convicted on charges 1 to 7. The 2nd accused was further convicted on charge 8. The learned Magistrate, being also a District Judge, had assumed jurisdiction under section 152 (3) of the Criminal Procedure Code in the case of charge No. 3 which was not triable summarily.

On appeal, it was argued by counsel for the accused-appellants that :—

(*a*) Section 146 of the Penal Code created no offence and was merely a basis of criminal liability ;

(*b*) Consequently, the joining together in one indictment of charges 2, 3 and 4 which were based on the existence of an unlawful assembly, with charges 5, 6, 7 and 8 which were based on the existence of a common intention amounted to a fatal misjoinder, since what the law permitted was the joining together of different offences and not one and the same offence by different names;

(*c*) There had been no proper assumption of jurisdiction by the Magistrate in terms of section 152 (3) of the Code.

Reliance was placed on the case of *Don Marthelis et al.* v. *The Queen,* (S.C. Nos. 5-10 of 1962; S.C.M. of 19.3.1963),* where a bench of two judges had held that charges based on the allegation of unlawful assembly could not be validly joined with charges based on common intention.

Held : (1) That section 146 of the Penal Code creates a specific offence, the punishment for which depends on the offence of which the offender is by that section made guilty.

(2) That sections 180 (1) and 180 (2) of the Criminal Procedure Code permits the joinder of charges based on the existence of an unlawful assembly with charges based on the existence of a common intention.

*See 64 C. L. W. 30

(3) That the decision of two judges in the case of *Don Marthelis et al.* v. *The Queen* (*supra*), had been arrived at *per incuriam* and was in any event inconsistent with the Court of Criminal Appeal decision in *The King* v. *Heen Baba*, 51 N.L.R. 265.

(4) That the question whether jurisdiction had been properly assumed in terms of section 152 (3) must be judged on the facts and circumstances as known to the Magistrate at the time the question came to be decided by him and not by what may have happened at the trial at a point of time after he had decided that question. In the present case jurisdiction had been properly assumed in terms of the section and further, the reasons given by the learned Magistrate at the time he assumed jurisdiction had been vindicated by the events that accompanied the trial.

The following *dicta* of the Court of Appeal in England in *Morelle Ltd.* v. *Wakeling*, (1955) 1 A.E.R. at 718, was quoted with approval:—

" As a general rule the only cases in which decisions should be held to have been given *per incuriam* are those of decisions given in ignorance or forgetfulness of some inconsistent statutoty provision or of some authority binding on the Court concerned : so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong."

Per T. S. Fernando, J. :— " It seems to me that a simple test for deciding whether what the prosecution alleges are two distinct and separate offences are in reality one and the same offence would be to consider whether the elements necessary to establish the one are the same as those necessary to establish the other. Judged by this simple test, it will be readily seen that what was alleged in charge No. 2 in this case was an offence different from that alleged in charge No. 5, and what was alleged in charge No. 4 was an offence different from that alleged in charge No. 8."

Followed : *The King* v. *Heen Baba*, 51 N.L.R. 265 ; XLII C.L.W. 26.
Cases considered : *Barendra Kumar Ghosh* v. *The Emperor*, 1925 A.I.R. P.C. 1.
Morelle Ltd. v. *Wakeling*, (1955) 1 A.E.R. 708 ; (1955) 2 Q.B. 379 ; (1955) 2 W.L.R. 672.
Nanak Chand v. *State of Punjab*, (1955) A.I.R., S.C. 274.
Not followed : *Don Marthelis et al.* v. *The Queen* , LXIV C.L.W. 30

Colvin R. de Silva with *M. L. de Silva* and *A. H. Moomin*, for the 2nd and 4th accused-appellants.

G. E. Chitty, Q.C., with *Prins Gunasekera*, for the 3rd accused-appellant.

5th accused-appellant in person.

Colvin R. de Silva with *D. R. Wijegoonewardene*, for the 6th accused-appellant.

C. Ranganathan with *G. D. C. Weerasinghe*, for the complainant-respondent.

T. S. Fernando, J.

The 1st to the 5th appellants (who were respectively the 2nd to the 6th accused at the trial) and another who was the 1st accused thereat stood their trial in the Magistrate's Court of Matara on ten charges which are set out briefly in the following paragraph.

All six accused were charged in the first eight charges as follows :—

(1) being members of an unlawful assembly—punishable under section 140 of the Penal Code ;

(2) being members of the said unlawful assembly, committing house-trespass by entering the house of one Ariyadasa—punishable under section 434 read with section 146 of the said Code ;

(3) being members of the said unlawful assembly, using force or violence—punishable under section 144 of the said Code ;

(4) being members of the said unlawful assembly, one or more members of which caused hurt to certain persons—punishable under section 314 read with section 146 of the said Code ;

(5) committing house-trespass — punishable under section 434 of the said Code ;

(6) wrongfully confining the said Ariyadasa—punishable under section 333 of the said Code ;

(7) wrongfully confining one Gomis—punishable under section 333 of the said Code ;

(8) voluntarily causing hurt to the said Ariyadasa—punishable under section 314 of the said Code.

Charge No. (9) was one framed against the 2nd, 3rd and 4th accused in respect of hurt caused to the said Gomis—punishable under section 314, while charge No. (10) named the 2nd accused alone as having caused hurt to one Daisy, the wife of Ariyadasa—punishable under section 315 of the said Code.

All ten charges save charge No. (3) were triable summarily. The Magistrate, being also a District Judge, assumed jurisdiction in terms of section 152 (3) of the Criminal Procedure Code to try charge No. (3) summarily and, after trial held on all ten charges, he found the 2nd to the 6th accused guilty on the first seven charges. He further found the 2nd accused guilty on charge (8) and the 2nd and the 4th accused guilty on charge (9). The 2nd accused was acquitted on charge (10). The 1st accused was acquitted on charges (1) to (8), *i.e.*, on all the charges that had been framed against him. Each of the appellants was sentenced to a term of three months' rigorous imprisonment on each of the charges on which he was found guilty and convicted, the sentences being ordered to run concurrently.

The 1st accused was at the date of the commission of the offences the Officer-in-Charge of the Excise Station at Matara, while the 2nd accused was an Inspector of Excise and the 3rd to the 6th accused excise guards, all attached also to the Matara Excise Station. The case for the prosecution which has been accepted by the learned Magistrate was that, some two days before the commission of the crimes alleged against these accused persons, the 6th accused had been assaulted by Ariyadasa, a bus driver employed under the Ceylon Transport Board, for unseemly behaviour and the making of indecent gestures at his (Ariyadasa's) wife, Daisy. The Magistrate has found that this assault was the motive for a concerted attack on the day in question on Ariyadasa by the 2nd to the 6th accused who arrived in one party by car at Ariyadasa's compound, entered his verandah, kicked him, handcuffed him, forced him into a car, and then forced also into the same car Ariyadasa's brother, Gomis, a retired vel vidane, who happened to come to his brother's house on hearing the noise of this disturbance. From his compound Ariyadasa and Gomis were taken in the car to the Walgama Excise Station, thence to a house and finally to the Matara hospital where an allegation was made by the 2nd accused that Ariyadasa had ganja on him at the time he was seized. The two men were thereafter released by the 2nd accused on bail, and they promptly hurried to the Police Station and complained of the assault on them.

Ariyadasa and Gomis were charged in the Magistrate's Court by the 2nd accused with the unlawful possession of ganja but, the 2nd accused (a material witness) being absent on the date of trial, the Magistrate, refusing an application for a postponement, acquitted the accused. No appeal was preferred by the prosecution against the acquittal.

At the trial in the present case the 1st accused relied on an alibi and pleaded that he was ignorant of any transaction in relation to Ariyadasa. The Magistrate has held that " the evidence against the 1st accused was unsatisfactory and insufficient to bring the charges home to him ". The 2nd accused testified at the trial in the course of which he stated that, with the 3rd to the 6th accused, he set out on this day on a legitimate raid on receiving information against Gomis ; that he saw Gomis on the road with a parcel ; that Gomis seeing the Excise car passed the parcel on to Ariyadasa and that they both then began running along the road ; that the Excise party had to chase these two men and arrest them with some effort, but not before some force had to be used to secure their arrest. The 3rd to the 6th accused gave no evidence. All six accused persons were defended by one counsel. The Magistrate rejected the evidence of the 2nd accused as being false.

In regard to the facts of the case I heard counsel for the appellants as well as the 5th accused who appeared by himself, but I found it impossible to reach a conclusion that there has been any wrong decision on the facts affecting any one of these appellants. The case against the 2nd accused was, indeed, strengthened by the admission of a confession of his guilt made by him to Mr. Samaraweera, at that time and even today the Minister of Local Government of this country. Quite apart from this circumstance, learned counsel who appeared for Ariyadasa has pointed out to me that the incidents detailed by the 2nd accused when he gave evidence were not put to the prosecution witnesses, Gomis, Ariyadasa and Daisy, at any stage of the prosecution ; on the other hand, the case for the defence as put to these witnesses while they were being cross-examined

was materially different. The appeals on the facts must fail.

Mr. De Silva advanced two matters of law as militating against the convictions. They were—

(*a*) that there has been in this case no proper assumption of jurisdiction in terms of section 152 (3) of the Criminal Procedure Code ;

(*b*) that there has been a misjoinder of charges in that charges based on the existence of an unlawful assembly have been joined with charges framed relying on section 32 of the Penal Code.

Mr. Chitty supported objection (*a*), but in answer to me stated that he preferred to say nothing in regard to objection (*b*).

In regard to (*a*), as I have pointed out already, all ten charges save charge No. (3) were triable summarily. Charge No. (3), in spite of the fearsome name it carries—rioting—implies nothing more than that hurt or mischief has been committed by persons who were at the time members of an unlawful assembly. Where both the offence of unlawful assembly and that of causing hurt or committing mischief are summarily triable, it will be seen that charge No. (3) is not summarily triable only in a very narrow and technical sense. In any event, the learned Magistrate was of opinion that the offence which was the subject of this charge No. (3) could itself be tried summarily. He has set out his reasons. They were that : (1) the facts were simple, (2) there were no complicated questions of law, and (3) speedy and expeditious disposal of the case was desirable. The question whether jurisdiction has been properly assumed in terms of section 152 (3) must be judged on the facts and circumstances as known to the Magistrate at the time the question came on to be decided by him and not by what may have happened at the trial at a point of time after he had decided that question. In the instant case, however, I am satisfied that the reasons relied on by the Magistrate at the time he assumed jurisdiction have been vindicated by the events that accompanied the trial. I am unable to uphold objection (*a*).

In regard to objection (*b*), so far as I understood Mr. De Silva, he claimed that the trial was invalid in that certain charges which had been included in the total of ten charges could not have been joined with the others without violating the relevant provisions of Chapter XVII of our Criminal Procedure Code. More specifically, while conceding that all ten offences alleged may have been committed in the course of one and the same transaction as that expression is understood in that Chapter, he argued that the joining together at one trial (or in one indictment) of charges (2), (3) and (4) with charges (5), (6), (7) and (8) amounted to a fatal misjoinder of charges. I must confess that this argument came to me as quite a surprise having regard to my own knowledge of the practice of joining such charges together which has been obtaining in our Courts for a very long time. Indeed, had not the question been raised seriously by counsel, of such long and tried experience as Mr. De Silva himself, I should have been minded to dismiss the point summarily as it seemed to me reasonably plain that the practice I have referred to above is warranted by section 180 (1) as well as by section 180 (2) of our Criminal Procedure Code.

Mr. De Silva, however, contended that what can be so joined together are different offences but not one and the same offence by different names. He argued that section 32 of the Penal Code which was obviously the foundation of charges (5), (6), (7) and (8) created no offence, and that likewise section 146 created no offence and remained merely a basis of criminal liability. Speaking for myself, I should have thought that this argument was set at rest some years ago by our Court of Criminal Appeal in the case of *The King* v. *Heen Baba*, 51 N.L.R. 265 ; 42 C.L.W. 26. The answer to the question that confronted the three judges who decided that case depended on whether charges of offences (based on section 32) are implied in charges of offences based on membership of an unlawful assembly. Said the judges in that case :—

> " It is well settled law that section 146 creates a specific offence and deals with the punishment of that offence and that section 32 merely declares a principle of law and does not create a substantive offence."

For this statement of the law the Court relied on the opinion of the Judicial Committee of the Privy Council in the leading case of *Barendra Kumar Ghosh* v. *Emperor*, (1925) A.I.R., P.C. 1, delivered by Lord Sumner. His Lordship, after referring to the Indian Penal Code equivalents of sections 32 and 146, viz., sections 34 and 149 of that Code, stated that " section 149, however, is certainly not otiose for in any case it creates a specific offence and deals with the punishment of that offence alone. In the course of the same

speech, Lord Sumner, explaining the difference between the two sections 24 and 149, stated :—

> "There is a difference between object and intention, for, though their object is common, the intentions of the several members may differ and, indeed, may be similar only in respect that they are all unlawful, while the element of participation in action which is the leading feature of section 34, is replaced in section 149, by membership of the assembly at the time of the committing of the offence. Both sections deal with combinations of persons, who become punishable as sharers in an offence. Thus they have a certain resemblance, and may to some extent overlap, but section 149 cannot at any rate relegate section 34 to the position of dealing only with joint action by the commission of identically similar criminal acts, a kind of case which is not in itself deserving of separate treatment at all."

Mr. De Silva suggested that the opinion of the Judicial Committee that section 149 creates a specific offence is an *obiter dictum*. I am unable to agree, but, even if Mr. De Silva is right in that suggestion, it is necessary to remind ourselves that even an *obiter dictum* of the Judicial Committee is still entitled to the highest respect in our Country.

The trial judge in *Heen Baba's case* (*supra*) had directed the jury that, where the indictment consisted solely of charges framed on the basis of the existence of an unlawful assembly, even if the jury reached a conclusion that no unlawful assembly was established, it was competent for them to find the accused guilty of the substantive offences alleged in the charges by placing reliance on section 32. The jury in that case found the accused not guilty on the charges in the indictment, but found them guilty of the substantive offences alleged in those charges read with section 32. This course is precisely what the Court of Criminal Appeal held it was not competent for the jury to do in the absence of specific charges. To quote the words of the judgment, "for the reasons given above we are of opinion that in the absence of a charge the appellants could not have been convicted (of any of the offences) under sections 433, 380, 383, 328 read with section 32". I think the language used itself justifies one in inferring that the Court implied there that charges based on the existence of an unlawful assembly could have been validly joined with the charges based on the existence of a common intention as described in section 32.

If I may say so with humility, I am in respectful agreement with the decision of the Court of Criminal Appeal in *Heen Baba's case* (*supra*), and the practice of the Attorney-General in framing indictments, at any rate after the date of the judgment in that case, has always been in keeping with the law as interpreted therein. In any event, it is sufficient to observe that I am bound by the ruling of the Court of Criminal Appeal in that case.

Mr. De Silva, however, brought to my attention in the course of his argument a hitherto unreported judgment delivered by the Supreme Court on March 19, 1963, in the case of *B. Don Marthelis and others* v. *The Queen*.* In that case, Abeyesundere, J., (with Herat, J., agreeing), upholding an argument that the indictment presented by the Attorney-General was invalid in that charges based on the allegation of unlawful assembly could not be validly joined with charges based on common intention, stated as follows :—

> "Section 178 of the Criminal Procedure Code requires every charge to be tried separately except in the cases mentioned in sections 179, 180, 181 and 184 of that Code. Crown Counsel who appeared for the Attorney-General conceded that none of the four last-mentioned sections applied to the counts in the indictment in this case. The joinder of the two sets of charges referred to above is, therefore, not according to law."

As I find that the Attorney-General, this concession of Crown Counsel notwithstanding, is even today persisting in presenting and supporting indictments in the same form which has been successfully objected to in *Don Marthelis* v. *The Queen* (*supra*), I fear I must surmise that the concession is personal to the learned Crown Counsel concerned and is not one made on the authority of the Attorney-General. Even if I am found to be wrong in this surmise, being a concession of counsel on a question of law, it is not binding on the Court. I am, therefore, free to ignore it where I am satisfied that there is express provision in the Code enabling the joinder. I have referred above already to the enabling provisions, viz., sub-sections (1) and (2) of section 180 of the Criminal Procedure Code, and I need only add that the effect of joining charges must be understood as limited by the provisions of section 67 of the Penal Code. As no reference has been made in the recent judgment to *Heen Baba's case* (*supra*), it is not unreasonable to infer that the Court has not considered its effect on the point raised. Had the Court considered it I entertain little doubt that the Court would have referred

* 64 C.L.W. 30

to it in the judgment, particularly as the decision being one of the Court of Criminal Appeal is presumably binding on a Bench of two Judges of the Supreme Court, although the Court of Criminal Appeal is technically a Court different from the Supreme Court. Moreover, the opinion of the Privy Council is binding on the Supreme Court.

In regard to the principle of *stare decisis* which is observed also in Ceylon, the law as at present understood appears to be that if a relevant authority is not mentioned in the judgment, the decision may be challenged. It is useful in this connection to refer to a fairly recent decision of the Court of Appeal in England, *Morelle, Ltd.* v. *Wakeling*, (1955) 1 A.E.R., at 718, where five judges concurred in stating that—

> " as a general rule the only cases in which decisions should be held to have been given *per incuriam* are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the Court concerned ; so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong. This definition is not necessarily exhaustive, but cases not strictly within it which can properly be held to have been decided *per incuriam* must in our judgment, consistently with the *stare decisis* rule which is an essential feature of our law, be, in the language of Lord Greene, M.R., of the rarest occurrence."

If the wrong concession on the part of counsel has led to the Court entertaining the feeling that it was unnecessary to examine the wording of section 180, and if that section, though referred to, did not come to be examined by the Court, and if when it is now examined it plainly supports the validity of the set of charges, then it seems to me it may be said that the case has been decided *per incuriam* ; alternatively, as *Heen Baba's case* (*supra*), has not even been mentioned in the judgment, it must be presumed that the judgment was arrived at through forgetfulness of that decision which was binding on the Court. In that sense, too, it seems to me that *Don Marthelis* v. *The Queen* (*supra*), was decided *per incuriam*.

As the sections of the corresponding provisions of the Indian Penal Code are word for word the same as those of our Penal Code which came to be modelled largely on that very Code, it may be of some interest to refer to the view taken recently by the Supreme Court of India on the question of law decided in *Heen Baba's case* (*supra*). In *Nanak Chand* v. *State of Punjab*, A.I.R. (1955) S.C. 274, three judges of that Court have in the year 1955 come to a conclusion that a person charged with an offence read with section 149 cannot be convicted of the substantive offence without a specific charge being framed. Said Imam, J., (delivering the judgment of the Court)—at p. 278—" A charge for a substantive offence under section 302 or section 325 is for a distinct and separate offence from that under section 302 read with section 149 or section 325 read with section 149 ". Mr. De Silva, in support of his argument that section 146 created no offence, pointed to the absence in that section of any provision in respect of punishment. This matter, too, has received comment in the Indian judgment where it states—*see* p. 278—that " section 149 creates an offence, but the punishment must depend on the offence of which the offender is by that section made guilty. Therefore, the appropriate punishment section must be read with it. It was neither desirable nor possible to prescribe one uniform punishment for all cases which may fall within it ". The Code provides other similar instances of specific offences being created, *e.g.*, abetment and conspiracy, where the punishment section has to be read with the section creating the offence. Further, it seems to me that a simple test for deciding whether what the prosecution alleges are two distinct and separate offences are in reality one and the same offence would be to consider whether the elements necessary to establish the one are the same as those necessary to establish the other, Judged by this simple test, it will be readily seen that what was alleged in charge No. (2) in this case was an offence different from that alleged in charge No. (5), and what was alleged in charge No. (4) was an offence different from that alleged in charge No. (8).

Whatever view may be taken on the question whether *Don Marthelis* v. *The Queen* (*supra*), was decided *per incuriam*, bound as I am by the decision of the Court of Criminal Appeal in *Heen Baba* v. *The King* (*supra*), I am free not to follow *Don Marthelis' case*.

The second question of law relied on also fails. In the result all the appeals are dismissed.

Appeals dismissed.

Present : **Herat, J., and Abeyesundere, J.**

DON MARTHELIS *et al. vs.* THE QUEEN

S.C. 5, 10/'62—*D.C.* (*Crim.*) 1962 *Colombo N.* 2055/33289/*C.*

Argued and decided on : 19th March, 1963.

Dr. Colvin R. de Silva with *D. S. Wijesinghe*, for the accused-appellants.

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

ABEYESUNDERE, J.

Of the thirteen accused in this case, the 1st, 4th, 5th, 6th, 9th and 11th accused were convicted on all the nine counts in the indictment and sentenced to various terms of imprisonment which in respect of each accused aggregated to fifteen months' rigorous imprisonment. The convicted accused have appealed from their convictions and the sentences passed on them. Dr. Colvin R. de Silva, who appeared for the accused-appellants, argued that the indictment was invalid by reason of the misjoinder of charges. Counts (1) to (5) were based on the allegation of unlawful assembly and counts (6) to (9) which related to the offences of causing simple hurt and committing mischief were based on common intention. Section 178 of the Criminal Procedure Code requires every charge to be tried separately except in the cases mentioned in sections 179, 180, 181 and 184 of that Code. Crown Counsel who appeared for the Attorney-General conceded that none of the four last-mentioned sections applied to the counts in the indictment in this case. The joinder of the two sets of charges referred to above is, therefore, not according to law. Consequently the indictment is invalid. We quash the convictions of the accused-appellants and order that they be discharged.

HERAT, J.

I agree.

Appeal allowed.

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

SUPERINTENDENT, WALAPANE ESTATE, WATUMULLA
vs.
WALAPANE SRI LANKA WATU KAMKARU SANGAMAYA, UDA PUSSELLAWA

S.C. No. 3/1962—*Labour Tribunal, No. LT.* 3/5853.

Argued on : February 15, 1963.
Decided on : March 27, 1963.

Estate Labour (Indian) Ordinance (Cap. 133), *section* 23—*Meaning of term "quits" therein—Whether applicable only to case where labourer voluntarily quits employer's services.*

Held : That under section 23 of the Estate Labour (Indian) Ordinance an employer who lawfully terminates the contract of service of a labourer may terminate the contract of service of his spouse at the same time. The application of this section is not confined only to the case in which a labourer voluntarily quits the services of an employer.

Per BASNAYAKE, C.J.—"The word 'quits' occurs not only in section 23 but also in sections 22 and 25 (3), and neither in section 23 nor in the other section does it admit of the restricted meaning given to it in the case referred to above The word 'quits' is not a term of art and given the ordinary meaning that is appropriate to the context of section 23 it means 'to leave'. A labourer lawfully quits the service of his employer when he leaves after his services come to an end either when he or the employer in the exercise of the right to terminate the contract of service lawfully terminates it. Whether the employer lawfully terminates the contract of service or the labourer does so, the statute imposes on the employer the duty under pain of punishment of determining the contract of service of his spouse where the spouse is also a labourer under a contract of service with that employer and no application is made under the proviso to section 23 (1). That provision is designed for the benefit of the spouse of a laoourer. It prevents the employer from discharging the husband without at the same time releasing the wife. "

Overruled : *The Ceylon Workers' Congress* v. *The Superintendent, Kallebokka Estate*, (1962) 64 N.L.R. 95.

H. V. Perera, Q.C., with *S. Sharvanada* and *L. Kadirgamar*, for the employer-appellant.

S. Kanakaratnam with *Nimal Senanayake*, for the applicant-respondent.

BASNAYAKE, C.J.

This appeal first came up for hearing before my brother T. S. Fernando. At the hearing before him learned counsel for the appellant canvassed the correctness of the decision in *The Ceylon Workers' Congress* v. *The Superintendent, Kallebokka Estate*, 64 N.L.R. 95. As he formed the view that the question arising for adjudication was one of doubt or difficulty he reserved the question under section 48 of the Courts Ordinance for the decision of more than one Judge. I accordingly made order under section 48A of that Ordinance constituting a Bench of three Judges and the appeal now comes up for hearing before us in pursuance of that Order.

This appeal is from the decision of a labour tribunal and is lodged under the right granted by section 31D (2) of the Industrial Disputes Act as amended by the Industrial Disputes (Amendment) Act. The material sub-sections of section 31D reads :—

> " (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.
>
> (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."

The question of law that arises for decision on this appeal is whether section 23 of the Estate Labour (Indian) Ordinance affords no authority to an employer who lawfully terminates the contract of service of a labourer to terminate the contract of service of his spouse at the same time. The President of the labour tribunal has found that in the instant case the contract of service of the labourer, Sinnasamy, was lawfully terminated by the employer, and that the services of his spouse were terminated in consequence of the termination of her husband's services. But in view of the decision in *Ceylon Workers' Congress* v. *Superintendent of Kallebokka Estate*, 64 N.L.R., p. 95, he holds that the termination of the services of Sinnasamy's wife, Velamma, is illegal and unjustified and has ordered that she be reinstated with back wages which he fixes at Rs. 600/-.

The present appeal is from that order. An appeal lies only on a question of law, and five questions have been certified by counsel as fit questions for adjudication by this Court. The questions certified overlap, are not elegantly worded and are not confined to questions of law. As the certificate is one required by section 340 (2) of the Criminal Procedure Code, Counsel should be careful to state with precision the question or questions of law without stating questions of mixed law and fact. The only question of law that emerges from them is that stated above. I shall now turn to that question. Section 23 of the Estate Labour (Indian) Ordinance reads :

> " 23 (1) At the time when any labourer lawfully quits the service of any employer, it shall be the duty of that employer to issue to that labourer a discharge certificate substantially in form II in Schedule B, and, where at such time the spouse or a child of such labourer is also a labourer under a contract of service with that employer, it shall be the duty of the employer, subject as hereinafter provided, to determine such contract and to issue a like certificate to such spouse or child :
>
> Provided that where such spouse or child wishes to continue in service under such contract and produces to the employer a joint statement signed by both husband and wife to that effect, nothing in the preceding provisions of this sub-section shall be deemed to require the employer to determine such contract or to issue a discharge certificate to such spouse or child.
>
> (2) Any employer who refuses or neglects to give a discharge certificate to any labourer as required by this section shall be guilty of an offence, and shall be liable on conviction thereof to a fine which may extend to one hundred rupees, and a further fine not exceeding five rupees for every day during which such default shall continue.
>
> (3) In this section, ' child ' means a minor and includes an adopted or illegitimate child who is a minor."

In the case of the *Ceylon Workers' Congress* v. *The Superintendent of Kallebokka Estate* (*supra*) my brother Tambiah held that the above section does not apply to a case in which the employer terminates the services of a labourer and that its application is confined to the case in which a labourer voluntarily quits the service of an employer.

The word " quits " occurs not only in section 23 but also in sections 22 and 25 (3), and neither in section 23 nor in the other section does it admit of the restricted meaning given to it in the case referred to above. The word " quits " is not a term of art and given the ordinary meaning that

is appropriate to the context of section 23 it means "to leave". A labourer lawfully quits the service of his employer when he leaves after his services come to an end either when he or the employer in the exercise of the right to terminate the contract of service lawfully terminates it. Whether the employer lawfully terminates the contract of service or labourer does so, the statute imposes on the employer the duty under pain of punishment of determining the contract of service of his spouse where the spouse is also a labourer under a contract of service with that employer and no application is made under the proviso to section 23 (1). That provision is designed for the benefit of the spouse of a labourer. It prevents the employer from discharging the husband without at the same time releasing the wife. In our opinion the case of *The Ceylon Workers' Congress* v. *The Superintendent of Kallebokka Estate* has been wrongly decided and on the findings of fact in the instant case it was the duty of the employer to determine the contract of service of the labourer's spouse and to issue to her a discharge certificate.

The appeal is allowed and the decision of the Labour Tribunal, that the determination of the contract of Sinnasamy's wife, Velamma, is illegal and unjustifiable together with the award of Rs. 600/- as back wages, is set aside.

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

Appeal allowed.

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

RANASINGHE *vs.* THE BRIBERY COMMISSIONER

S.C. 4/62—*Bribery Tribunal Case, No.* 35/*I*, 172/60.

Argued on : 27th November, 1962.
Decided on : 20th December, 1962.

Bribery Act—Vesting of judicial power in Bribery Tribunals—Appointment to Judicial Office—Exercise of judicial power—Ceylon (Constitution) Order-in-Council, 1946—*Sections* 29, 55—*Amending procedure—Speaker's Certificate.*

This was an appeal from a conviction by a Bribery Tribunal. It was argued by counsel for the accused that, following the decision in *Piyadasa* v. *The Bribery Commissioner*,* a Bribery Tribunal has no jurisdiction to try and find the accused guilty of the offence of bribery and that, accordingly, the conviction and sentence should be quashed.

Counsel for the Crown argued—

(1) That a conviction by a Bribery Tribunal, as distinct from the imposition of a sentence, is not an exercise of judicial power.

(2) That the "office" established by the Bribery Act is the office of membership of the panel constituted under section 41 of the Act and, though it is a paid office, is not a judicial office since the *panel* does not as such try charges of bribery.

(3) That because there is no express opinion in section 29 (4) of the Ceylon Constitution declaring an amending or repealing Act to be null and void if not passed by a two-thirds majority, the Court has no power to declare such an Act to be void.

(4) That once a Bill has received the Royal Assent, the Court has no power to inquire whether it was passed by the requisite majority, and must hold it to have been duly enacted.

Held : (1) That a Bribery Tribunal exercises judicial power when it *tries* a person on a charge of bribery.

(2) That there is no question of a wholesale challenge of the entire Bribery Act since the Legislature can validly confer judicial power on specially created tribunals, and the objection which lies against a conviction by a particular Bribery Tribunal is that judicial power validly vested in the special tribunals cannot be lawfully exercised by persons who are appointed to the Tribunal by the Governor-General and not by the Judicial Service Commission.

* 62 C.L.W. p. 73

(3) That the legal effect of the Bribery Act is that it purports to appoint to a Bribery Tribunal such persons from a panel appointed by the Governor-General as the Chairman may select. The Act designates, *by office*, persons holding office on the panel to be judges of Bribery Tribunals.

(4) That sections 29 (3) and (4) of the Ceylon Constitution impose a special control and a general control, respectively, on every Bill which, though not in form an amending Bill, contains provision which is in conflict with some Constitutional provision.

(5) That in the absence of the Speaker's Certificate endorsed upon the Bribery (Amendment) Act of 1958, validity cannot be claimed for any provision which is inconsistent with secton 55 of the Constitution.

Cases referred to : *Piyadasa* v. *The Bribery Commissioner*, LXII C.L.W. 73
Senadhira v. *The Bribery Commissioner*, 63 N.L.R. 313. ; LX C.L.W. 65
Don Anthony v. *The Bribery Commissioner*, 64 N.L.R. 93 ; LXI C.L.W. 100
Jailabdeen v. *Janina Umma*, 64 N.L.R. 419
McCawley v. *The King*, (1920) A.C. 691.
Krause v. *The Commissioner of Inland Revenue*, (1929) A.D. 286.
Harris v. *Minister of the Interior*, (1952) 2 S.A.L.R. 428.

Nimal Senanayake, for the appellant.

R. S. Wanasundera, Crown Counsel, for the respondent.

H. N. G. FERNANDO, J.

The recent decision of this Court in *Piyadasa* v. *The Bribery Commissioner*,* S.C. 3/62, *Bribery Tribunal*, S.C.M., 31.10.62, if followed, would compel us to hold on the present appeal that "a Bribery Tribunal has no jurisdiction to try and find the accused guilty of the offence of bribery" (*per* Tambiah, J.), and accordingly to quash the conviction of the appellant and the sentence passed against him. But learned Crown Counsel, argued that the question should be reconsidered and relied on two grounds :

(1) That a conviction by a Bribery Tribunal, as distinct from the imposition of a sentence, is not an exercise of judicial power, a proposition which is supported by the observations of Sansoni, J., in the case of *Senadhira* v. *The Bribery Commissioner*, 63 N.L.R. 313, to the effect that the power to adjudicate is only an arbitral power ;

(2) That a challenge of the jurisdiction to convict is fundamental, and amounts to a challenge of the validity of the entire Act, and cannot, therefore, be made in the exercise of a right of appeal conferred by the Act itself.

Both these matters have been dealt with in my own very recent unreported judgment in *Kader Saibo Seyed Jailabdeen* v. *Abdul Rahuman Danina Umma*,† S.C., 2/1962 Quazi Court, No. 626, Colombo South S.C.M., 17.12.62, I there state that I no longer adhere to the opinion I had formed when, *Don Antony* v. *The Bribery Commissioner*, 64 N.L.R. 93, was decided. On the contrary, I express my agreement with Tambiah and Sri Skandarajah, JJ., that, in the context of the relevant provisions of the Act, a Bribery Tribunal does exercise judicial power when it *tries* a person on a charge of bribery. As to Crown Counsel's second argument, my opinion as stated in the unreported judgment is that there is no question of a wholesale challenge of the entire Act, that the Legislature can validly confer judicial power on specially created tribunals, and that the objection which lies against a conviction by a particular Bribery Tribunal is that the judicial power validly vested in the special tribunals cannot be lawfully exercised by persons who are appointed to the Tribunal by the Governor-General, and not by the Judicial Service Commission. I will not here repeat my reasons, but would like to add one further observation. In examining an enactment with reference to any alleged Constitutional invalidity, a Court must strive to reach a conclusion which will render the will of the Legislature effective, or as effective as possible. The conclusion I reach with reference to the Bribery Act, is in accord with this principle, for in my opinion the primary intention of Parliament was to establish the spceial tribunals and to assign to them the jurisdiction to try charges of bribery, The intention that the Governor-General should have power to appoint judges to these tribunals, however important, is ancillary to the primary intention, which latter intention is impaired only in a slight

† 64 N.L.R. 419 * 62 C.L.W. 73

degree, and not materially, by a decision that the power of appointment alone is *ultra vires*.

Crown Counsel has in his appeal raised what is perhaps a new point for consideration. His contention was that the "office" established by the Bribery Act is the office of membership of the panel constituted under section 41 of the Act. This office he concedes to be a paid office, but it is not a judicial office, for the panel does not as such try charges of bribery. He argued that even if a Bribery Tribunal does exercise judicial power, the Governor-General appoints only to the panel, and not to the Tribunal itself. But is a Court to notice only the mere act of appointment to the panel, and to ignore the purpose for which the panel is created, namely, the purpose that Bribery Tribunals shall be constituted by selection from the panel ?

Let me take the case of a statute which provides that Crown Counsel shall in specified circumstance function as Magistrates. The same argument may be advanced, namely, that the original appointment of a person to be a Crown Counsel was not to a judicial office, and that when a Crown Counsel thus functions as a Magistrate in pursuance of the statute he does so by virtue of his appointment to the non-judicial office of Crown Counsel, and does not, when so functioning hold a paid judicial office. The answer to this argument is that section 55 of the Constitution vests in the Judicial Service Commission the exclusive power to appoint to judicial office, whether the appointment is made *by name* or whether it is made *by office*. The hypothetical statute would conflict with section 55 in that the Statute itself, that is Parliament itself, would purport to appoint Crown Counsel *by office* to be Magistrates. Although a Crown Counsel so functioning may be paid only the salary of his primary office, the payment for the period when he functions as Magistrates would be in respect of the judicial office to which the statute appoints him.

Similarly, the legal effect of the Bribery Act is that it purports to appoint to a Bribery Tribunal such persons from a panel appointed by the Governor-General as the Chairman may select. The Act designates, *by office*, persons holding office on the panel to be judges of Bribery Tribunals. But that power of designation belongs exclusively to the Commission. Crown Counsel's argument is in defiance of the important constitutional principle that "you cannot do indirectly that which you cannot do directly".

Although section 29 (4) was not expressly mentioned in the Judgment in *Senadhira* v. *The Bribery Commissioner* (*supra*), the Court assumed that a provision of an Act of Parliament which conflicts with section 55 of the Constitution is invalid unless passed by a two-thirds majority in the House of Representatives. The point is expressly mentioned in the *Piyadasa* judgment. Section 29 (4) provides—

> "In the exercise of its powers under this section, Parliament may amend or repeal any of the provisions of this Order . . .
>
> Provided that no Bill for the amendment or repeal of any of the provisions of this Order shall be presented for the Royal Assent unless it has endorsed upon it a certificate under the hand of the Speaker that the number of votes cast in favour thereof in the House of Representatives amounted to not less than two-thirds of the total number of members of the House . . .
>
> Every certificate of the Speaker under this sub-section shall be conclusive for all purposes and shall not be questioned in any Court of law.'.

In the present appeal, Crown Counsel made two important and interesting submissions with regard to this sub-section :—

(*a*) That because there is no express provision in sub-section (4) declaring an amending or repealing Act to be null and void if not passed by a two-thirds majority, the Court has no power to declare such an Act to be void.

(*b*) That once a Bill has received the Royal Assent, the Court has no power to inquire whether it was passed by the requisite majority, and must hold it to have been duly enacted.

In regard to the first of these submissions, Counsel pointed to the express provisions for nullity which is made in sub-section (3), and argued that the absence of similar provision in sub-section (4) was deliberate and is decisive. For the general submission, he relied on three decisions, one from Australia and two from South Africa.

In *McCawley* v. *the King*, (1920) A.C. 691, the alleged conflict was between an Imperial Act of 1867 establishing the Constitution of Queensland and an Act of 1916 enacted by the Queensland Parliament. Section 16 of the Constitution Act had provided that the Commission of Judges of the Supreme Court of Queensland "shall remain in full force during good behaviour". The 1916

Act set up an Industrial Arbitration Court, and sub-section (6) of section 6 of this Act provided as follows :—

> " The Governor may appoint the President or any Judge of the Industrial Court to be a judge of the Supreme Court . . .
>
> . . . The President and each Judge of the Industrial Court shall hold office for seven years from the date of appointment."

The Supreme Court of Queensland held the provision to be inconsistent with the Constitution Act, because of the limitation of the term of office to seven years, and on this ground held that the provision was void and inoperative. The High Court of Australia was of opinion that the Constitution " is a fundamental and organic law which can only be repealed or modified with special formality. That opinion was, however, rejected by the Privy Council. Lord Birkenhead drew a distinction between what he termed a " controlled " and an " uncontrolled " Constitution, the former of which he described as one in which the Constitution framers " have created obstacles of varying difficulty in the path of those who would lay rash hands on the Constitution ". His examination of various constitutional statutes and instruments affecting Queensland showed that " *the Legislature of Queensland is master of its own house, except in so far as its powers have in special cases been restricted* ". In the absence of any special provision to the contrary in the Constitution, he held that the Legislature was fully entitled to vary the tenure of the judicial office.

I readily accept for Ceylon the principle as stated by Lord Birkenhead which is italicised above. But that principle does not entitle the Crown to maintain that ours is an " uncontrolled " Constitution ; for in addition to the special control imposed by sub-section)3) of section 29, we have the general control which sub-section (4) imposes in the case of any Bill to amend any provision of the Constitution. There was not, in the constitution of Queensland, any provision resembling our section 29 (4).

The next case is that of *Krause* v. *The Commissioner of Inland Revenue*, (1929) A.D. 286, where the Supreme Court of South Africa considered the validity of the levy of income tax on the salary of a judge of the Supreme Court of Transvaal. The objection to the levy was founded on a provision in the Constitution Act that the salaries of judges should not be diminished during their term of office. What is relevant for present purposes is the statement of Wessels, J.A., that " except in the cases mentioned in section 152 of the South Africa Act, the Courts of this country cannot declare a portion of an Act of Parliament unconstitutional ". Section 152 expressly authorised amendments of the Constitution, but in regard to *Bills affecting certain specified sections of the Constitution*, it provided that they must be passed by both Houses of Parliament sitting together. A law to diminish the salaries of Judges clearly did not fall within the narrow and specified enumeration set out in section 152. I need to observe only that, unlike section 152 of the South Africa Act, our section 29(4) applies to *every* Bill to amend any provision of the Constitution.

The other South African case cited by Crown Counsel, *Harris* v. *Minister of the Interior*, (1952) 2 S.A.L.R. 428, virtually defeats his own arguments. Five Judges of the Supreme Court of South Africa there held invalid an Act of 1951 which purported to establish separate electorates for " whites " and for " coloureds ". The ground of invalidity was that section 35 of the Constitution Act gave equal rights of representation to all voters irrespective of race, and that the right could not be altered by an amending law unless passed by both Houses of Parliament sitting together. To reach this conclusion, the Court relied on the simple fact that section 152 of the Constitution expressly provided for such a sitting in the case of a Bill to amend section 35. In the case of the Constitution of Ceylon, there is the simple fact that section 29 (4) contains express provision applicable to all constitutional Bills.

The South African judgment is of interest in another connection. The Act which was impugned did not purport to amend or repeal section 35, but only enacted a new law which the Court held to be in conflict with that section. The judgment accordingly supports the opinion that our section 29 (4) is applicable to a Bill which, though not in form an amending Bill, contains provision which is in conflict with some constitutional provision.

The second submission regarding section 29 (4) requires some preliminary explanation. The Proviso provides that no amending Bill shall be presented for the Royal Assent unless it has endorsed on it a certificate of the Speaker that it was passed by a two-thirds majority of the House of Representatives. The submission is that the Royal Assent to an amending Bill establishes conclusively its due passage into law, that the Proviso

deals only with a matter of Parliamentary procedure, and that even though the Bill is not endorsed with the certificate, a Court must nevertheless regard it as having been validly enacted, and cannot inquire into the question of compliance with the terms of the Proviso.

Of course, if the intention of which the Proviso is the expression is in accordance with this submission, the matter ends there. But is that the intention ? In my opinion, the language clearly manifests an intention that no Bill to amend any provision of the Constitution shall pass into law unless it had received the requisite majority in the House of Representative. The passage by such a majority is made a condition precedent for enactment. Ordinarily, the question of fact, whether such a condition has been satisfied, is determinable by judicial inquiry. But in this context, where the question relates to proceedings in Parliament, the possibility of a judicial inquiry is very properly avoided. Instead, the Proviso prescribes the sole means by which the question is to be determined, namely, the Certificate of the Speaker endorsed upon a Bill that it was passed by the requisite majority. The Certificate " is conclusive for all purposes and shall not be questioned in any Court of law ", These words indicate the function which a Court is intended to perform in the case of a constitutional amendment, that is, to ascertain whether the Bill bears the Speaker's Certificate, for it is upon proof or production of the Certificate that the Court becomes bound by its conclusive effect. The very proposition that a Court cannot " look behind " the Certificate implies that in the first instance the Court must " look for " the Certificate. The absence of the Certificate is as conclusive as its presence ; and in the absence of a Certificate the Court cannot be invited to inquire and determine whether, nevertheless, the condition precedent was satisfied, for it is just such an inquiry that the sub-section intended to prevent. It follows that, in the absence of the Speaker's Certificate endorsed upon the Bribery Amendment Act of 1958, validity cannot be claimed for any provision which is inconsistent with section 55 of the Constitution.

Crown Counsel thought that his argument derived some support from the observations upon section 29 (4) made by Sir Ivor Jennings in *The Constitution of Ceylon* (at page 56), but may not have been aware of the note in the Preface that the learned author was not attempting a legal exposition. These observations I have only examined after forming my own opinion as to the intention and effect of the Proviso. They do not refer to the situation I have here to consider, namely, the case of a Bill which conflicts with the Constitution, but which does not bear the Speaker's Certificate.

I would hold for these reasons that the conviction of the appellant in this case and the orders made against him are null and inoperative, on the ground that the persons composing the Bribery Tribunal which tried him were not lawfully appointed to the Tribunal.

L. B. DE SILVA, J.
I agree.

Appeal allowed.

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

SIMON SILVA *vs.* THE DEBT CONCILIATION BOARD AND OTHERS*

S.C. Application No. 212 *of* 1962.

In the matter of an Application for the grant and issue of mandates in the nature of " Certiorari " and Prohibition in terms of section 42 *of the Courts Ordinance.*

Argued on : 10th and 11th June, 1963.
Decided on : 11th June, 1963.

Reasons deliverel on : 25th June, 1963.

* For Sinhala translation, see Sinhala section, Vol. 6, part 2, p. 5.

Writ of "Certiorari" and Prohibition—Debt Conciliation Ordinance (Cap. 81) amended by No. 5 of 1959—Conditional—Transfer—Application by vendor for relief under section 14 A and 19 B—Notice of application sent to purchaser without order from the Board and after expiry of period stipulated in agreement—Sale of property by purchaser despite notice—Validity of such Sale—Is entertaining such application for relief and issue of notice mere matter of form.

The 7th respondent to this petition sold a land on 18th March, 1957, to the 8th defendant for Rs. 6,000/- subject to the condition that if this sum was repaid within three years from the date of sale together with interest at 15%, the 8th respondent was to retransfer the land.

The 7th respondent, on 15th February, 1960, made an application to the Debt Conciliation Board for relief in respect of the transacton under sections 19A and 19B of the Debt Conciliation Ordinance as amended by Act, No. 5 of 1959.

This application was received by the Board on the same day, *i.e.*, more than 30 days before the expiry of the said three years (as required by section 19A (1))

The Secretary of the Board despatched on 7th April, 1960, a notice to the 8th respondent that an application had been made by the 7th respondent, but a copy of the application was not attached thereto. Notwithstanding the receipt to this notice on 10th April, 1960, the 8th respondent sold the land to the petitioner on 16th April, 1960.

The Board inquired into this application on 20th February, 1962, and made order declaring the said sale of 16th April, 1960, null and void in view of section 19 B (2) and the petitioner challenged the validity of this order in these proceedings for a writ of *certiorari* and Prohibition.

The order of the Board contains on the face of it an admission that the Board did not meet and apply its mind and cause the Secretary to send the notice.

Held : (1) That the application of the 7th respondent, not having been entertained by the Board, but action taken thereon only by the Secretary, the notice received by the 8th respondent was not a valid notice in terms of the Statute.

(2) That, therefore, the prohibition or alienation or other disposition of property imposed by section 19 B (1) does not attach to the property. Hence the sale of the petitioner is valid.

(3) The act of entertaining an application under section 19 A (1) is not mere matter of form. It is in the nature of a judicial act. Section 49 only protects acts done by the Board and not acts done by the others.

Per T.S. Fernando, J.—(*a*) " It appears to me that there is a duty on the Board to meet in time sufficient to enable the notice to reach the creditor before the expiry of the redeemable period. The facts of this case disclose that the Secretary has delayed nearly two months after the receipt of the application before sending out a notice ".

(*b*) " There was neglience in that the Secretary failed to attach to the notice a copy of the application ".

H. W. Jayewardene, Q.C., with *L. C. Seneviratne*, for the petitioner.

M. T. M. Sivardeen, for the 8th respondent.

M. M. Kumarakulasingham with *U. A. S. Perera*, for the 7th respondent.

T. S. Fernando, J.

The following are the reasons for the order made by me at the conclusion of the argument on this application whereby I quashed the order made on 20th February, 1962, by the Conciliation Board.

By deed No. 353 of 18th March, 1957, the 7th respondent sold an allotment of land to the 8th respondent for a sum of Rs. 6,000/- subject to the condition that if the said sum was repaid within a period of three years from the date of the sale together with interest at 15% the 8th respondent

was to retransfer the land to him. The powers of the Debt Conciliation Board established under the Debt Conciliation Ordinance of 1941 (Cap. 81) to effect settlements of debts owned by a person to his secured creditors were extended by the (Amendment) Act, No. 5 of 1959, to cover settlements of debts purporting to be secured " by any such conditional transfer as is a mortgage within the meaning of the Ordinance ". To give effect to this extension of the Board's powers certain new sections were enacted by the (Amendment) Act, and two of these—Sections 19 A and 19 B—require examination upon this applicaton.

These two sections are reproduced below :—

19 A. (1) The Board shall not entertain any application by a debtor or creditor in respect of a debt purporting to be secured by any such conditional transfer as is a mortgage within the meaning of this Ordinance unless that application is made, at least, thirty days before the expiry of the period within which that property may be redeemed by the debtor by virtue of any legally enforceable agreement between him and his creditor.

(2) Where the Board entertains an application of a debtor in respect of such a debt as is referred to in sub-section (1) the 'Board shall cause notice of that fact signed by the Secretary to be sent together with a copy of the application by registered post to the creditor to whom the applcation relates.

19 B. (1) Where a creditor receives a notice under sub-section (2) of section 19A relating to an application of a debtor of his in respect of such a debt as is referred to in sub-section (1) of that section, he shall not sell, alienate, transfer, lease or mortgage the property to which such notice relates, unless such application is dismissed by the Board or unless the settlement effected under this Ordinance in respect of such debt permits him to dispose of such property.

(2) Any sale, alienation, transfer lease or mortgage effected in contravention of sub-section (1) shall be null and void.

The 7th respondent made on 15th February, 1960, an application to the Board for a settlement to be effected in respect of the transaction which was the subject of deed No. 353. This application was received at the office of the Board on that day, *i.e.*, more than 30 days before the expiry of the period specified in section 19 A (1), and I am content for the purpose of the proceeding before me to assume that it was so received on behalf of the Board. The Secretary of the Board despatched on 7th April, 1960, a notice to the 8th respondent that an application had been made by the 7th respondent, but did not attach to that notice a copy of the application itself. This notice was received by the 8th respondent on 10th April, 1960, who, however, sold the land to the petitioner by deed No. 4357 executed on 16th April, 1960.

The Board inquired into the application made by the 7th respondent and by its order of 20th February, 1962, declared that the sale of the land by deed No. 4357 of 16th April, 1960, is null and void in view of section 19 B (2). This is the order that was challenged in this proceeding on the ground that it was vitiated by error of law on the face of the record and was in excess of the Board's jurisdiction.

There is no dispute now between the parties that the transaction represented by deed No. 353 is one in respect of a debt secured by such a conditional transfer of immovable property as is a mortgage within the meaning of the Ordinance ; the dispute relates to the question whether the notice received by the 8th respondent was a valid notice under sub-section (2) of section 19 A.

The contention of the petitioner is that an application must receive consideration by the Board for the Board to ascertain whether it is in respect of a debt purporting to be secured by any such conditional transfer as is a mortgage within the meaning of the Ordinance. The expression " mortgage " had not received a statutory definition in the Ordinance until section 4 of the (Amendment) Act, No. 5 of 1959, defined it as follows :—

"' mortgage ', with reference to any immovable property, includes any conditional transfer of such property which, having regard to all the circumstances of the case, is in reality intended to be security for the repayment to the transferee of a sum lent by him to the transferor."

It is conceded that before the notice was sent out by the Secretary the Board did not consider the question whether the application was one in respect of a debt purporting to be of the nature specified in section 19 A (1) either at a meeting or in some other lawful manner. The Board in the course of its written order of 20th February, 1962, took the view that the entertaining of an application was a formal act and could be effected by the Secretary on behalf of the Board which can regulate its own procedure. Section 62 of the Ordinance empowers the Minister to make regulations in respect, *inter alia*, of the procedure to be followed at the hearing of applications. No. regulation empowering the Board to delegate to the Secretary its function of entertaining applications has been brought to my notice. Even if such a regulation had been made, having regard to the view—indicated below—which I have taken of the nature of the duty involved in the act of 'entertaining", such regulation would, in my opinion, have been *ultra vires* the powers of the Minister.

Learned counsel for the 7th respondent argued that the expression "entertain" in section 19 A (1) means receive or hold for consideration and that the entertaining of an application need not be done by the Board itself but could be effected on its behalf by any one authorised by it to do so. He was compelled to concede that the same word in section 19 has not that meaning. I can see no good reason for saying that the word has a different meaning in the new section 19 A. The Order of the Board contains on the face of it an admission that the Board did not meet and apply its mind and cause the Secretary to send the notice. The decision the Board reaches at section 19 A (1) stage will be reached *ex parte* and is tentative ; nevertheless, it is a decision in the nature of a judicial act much in the same way as the *ex parte* decision of a Court entertaining or refusing to entertain a plaint in a civil suit. The power to make such a decision cannot, in the absence of power to do so, be delegated.

The prohibition on alienation or other disposition of property imposed by section 19 B (1) is dependent on the receipt of a notice under sub-section (2) of section 19 A. In other words, the issue of a notice in terms of that sub-section and its receipt thereafter by the creditor is a condition precedent to the coming into force of such a prohibition. The laying down of a minimum period of 30 days before the expiry of the redeemable date for applications to be made and the prohibiting of alienations after receipt of notice make it reasonably plain that the purpose was to ensure that the notice will reach the creditor before the expiry of the redeemable date. In the present case the application not having been entertained by the Board but action taken thereon only by the Secretary, the notice received by the 8th respondent was not a valid notice in terms of the Statute. That being so, the prohibition on alienation does not attach to the property.

A further objection was taken to the validity of the notice. Section 19 A (2) requires that the notice signed by the Secretary shall be sent to the creditor together with a copy of the application. In the instant case no copy of the application was attached to the notice. As I have held that the notice is invalid because it was issued without the Board entertaining the application it is unnecessary for me to decide here whether the requirement that a copy of the application be sent together with the notice is imperative or merely directory.

Reference has been made in the challenged order of the Board that section 49 of the Ordinance enacts that it shall be the duty of the Board to do substantial justice in all matters coming before it without regard to matters of form. The Board was inclined to take the view that the first or *ex parte* entertaining of the application under section 19 A (1) was merely a matter of form. As already indicated by me above, the act of entertaining is not mere form ; but, even on a contrary assumption, section 49 only protects acts done by the Board without regard to matters of form and not acts done by others, *e.g.*, its Secretary.

It has been pointed out to me that the Board cannot by the very nature of its composition meet frequently. This difficulty is irrelavant as an answer to the ground of challenge made in this proceeding. There is a requirement that the application must be presented at least 30 days before expiry of the redeemable period, and this time was deemed by the legislature to be ordinarily sufficient for the Board to meet without undue inconvenience. It appears to me that there is a duty on the Board to meet in time sufficient to enable the notice to reach the creditor before the expiry of the redeemable period. The facts of this case disclose that the Secretary has delayed nearly two months after the receipt of the application before sending out a notice, Not only was the Board not convened to consider the entertaining of the application, but, even though the

Board has without authority left it to the Secretary to send out to the creditor a notice in respect of every application received in time, there was negligence in that the Secretary failed to attach a copy of the application.

Counsel for the 7th respondent sought to avoid the issue of a writ in this case on the ground of an alleged lack of *bona fides* on the part of the creditor in regard to the sale of 16th April, 1960. It is only right to say that on the material placed before me it was not possible to sustain this allegation. Moreover, this Court's discretion was invoked not by the creditor but by the petitioner who was the purchaser.

In the special circumstances of this case where the 7th respondent has, without any fault on his own part, lost an opportunity of obtaining relief under the Ordinance, I have refrained from making any award in respect of costs.

Applicatoin allowed.

Present : **Kingsley Herat J.**

JOSEPH *vs.* MARIAMPILLAI, POLICE SERGEANT BATTICALAO*

S.C. 979 *of* 1962—*M.C. Batticaloa,* 5579.

Argued and decided on : February 11, 1963.

Penal Code, section 488—*Charge of disorderly behaviour while intoxicated—Intoxication not proved by medical evidence—Such proof vital for conviction.*

Held : Where a state of intoxication is an essential element of an offence, such intoxication must be proved by medical evidence, in order to establish the offence.

(No appearance for the accused-appellant).

G. P. S. de Silva, Crown Counsel, for the Attorney-General.

HERAT, J.

In this case the accused-appellant is unrepresented and absent, but, the learned Crown Counsel, in the highest tradition of the Attorney-General's Department, has brought to my notice a vital fact which vitiates the conviction.

The appellant was charged under section 488 of the Penal Code which reads as follows :—

> " Whoever, in a state of intoxication, appears in any public place or in any place which it is a trespass in him to enter, and there conducts himself in such a manner as to cause annoyance to any person, shall be punished with simple imprisonment for a term which may extend to one month, or with fines which may extend to one hundred rupees, or with both."

The evidence for the prosecution was that of a police officer who says that he found the accused-appellant strongly smelling of liquor and behaving in a disorderly manner. This officer further stated that the accused-appellant was not in a position to make a statement.

It must be noted that one of the elements of the offence is that the person charged should be in a " state of intoxication " at the time of the offence. The accused-appellant was not examined by any medical officer who could have reported as to whether the appellant was in an intoxicated state of mind because a man smelling of liquor and behaving in a disorderly manner does not necessarily follow that he is in a state of intoxication. I, therefore, hold that one vital element of the offence charged is not borne out by the evidence. This point had been taken in the lower Court but the learned Magistrate thought that the evidence of the police officer, which I have referred to above, was sufficient to establish that element of the offence, too. I cannot agree with this view. I, therefore, allow the appeal and quash the conviction.

Conviction quashed.

*For Sinhala translation, see Sinhala section, Vol. 6 part 3, p. 10

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

KARUNANAYAKE *vs.* GUNASEKARA AND ANOTHER

S.C. No. 105/60—*D.C. Matara, No.* 20713/*P.*

Argued on : 23rd, 24th and 25th October, 1962.
Decided on : 25th October, 1962.

Registration of Documents Ordinance, sections 12, 13 *and* 14—*Registration of Documents Regulations, regulations* 12, 13 *and* 14—*Registration in proper folio—What constitutes proper folio—Proviso to section* 14 (1)—*Circumstances which justify the application of the proviso—Competition between a duly registered deed and one not duly registered.*

The main dispute in this case was with regard to the Southern 1/3rd of a land called Kellegehenawatta, between the 22nd defendant on the one hand, and the 24th, 27th and 28th defendants, on the other. The 22nd defendant claimed title through a deed No. 27702, dated the 8th September, 1937 (22 D 4), while the 24th, 27th and 28th defendants in their joint answer claimed the benefit of prior registration for their deed No. 484 of the 21st October, 1940 (27 D 14) as against 22 D 4. The trial judge held that 27 D 14 prevailed over 22 D 4 by prior registration, but held in favour of the 22nd defendant on the question of prescription. The folio in which the first registered instrument affecting the land which was the subject-matter of this action was registered was B 49, folio 5. That registration was continued in B 71, folio 6, and B 90, folio 106.

Deed 22 D 4 was registered in B 211/276, which did not invite reference to any other registration. It was not contended that this registration was in the wrong folio. Deed 27 D 14 was registered in B 82, folio 217, which had a remark to the following effect :—" See B 100/79. Entire land registered in B 71/6 ". B 82, folio 217, however, was not a continuation of B 49, folio 5, which was the folio in which the subject-matter of the action was first registered. It was argued, however, that 27 D 14 was properly registered in a new folio in terms of the proviso to section 14 (1) of the Registration of Documents Ordinance.

Held : (1) That the deed 27 D 14 had not been duly registered in terms of the Registration of Documents Ordinance.

(2) That before a deed could be registered in a new folio under the proviso to section 14 (1), entry in the proper folio according to the normal practice must not be feasible, or special circumstances must exist. That provision did not vest in the Registrar an arbitrary power to enter in a new folio an instrument which could and should be entered in the folio in which the first registered instrument affecting the same land was registered, or in a continuation thereof ; and that no special facts or circumstances existed with reference to 27 D 14 necessitating the application of the proviso.

(3) That, therefore, in the circumstances the deed 22 D 4 was not void as against 27 D 14.

Per BASNAYAKE, C.J.—"In the Registration of Documents Ordinance the word is used in the sense of a leaf of a folio size 20 x 15. The Ordinance contemplates the commencement of the registration on a folio and when the commencing folio is full the continuation of the registration on another folio which is the continuation of the folio in which the first registration was made and it should be so stated and should not be numbered as a new folio but described as "continuation of folio No. . . . .", the number of the original folio should be stated as the number. A new folio bears a new number. In the case of any entry in a new folio under the proviso to section 14 (1) the prescribed cross-references should be made. The prescribed cross-reference is "See Vol. . . . fol. . . . for a similar property ". In the case of a continuation no cross-references are needed. The necessary information is contained in the words "continuation of folio No. . . . " with the number of the original folio. "

E. B. Wikramanayake, Q.C., with *H. E. P. Cooray*, for the 24th defendant-appellant.

C. Ranganathan with *M. Shanmugalingam*, for the 27th and 28th defendants-appellants.

H. W. Jayewardene, Q.C., with *R. Dheeraratne*, for the 22nd and 32nd defendants-respondents.

H. Deheragoda, Crown Counsel, for the Attorney-General, the 23rd defendant-respondent.

BASNAYAKE, C.J.

This is an action for partition of a land called Kellegehenawatte bounded on the North by Dumbakellekumbura, East by Nayidekankanamagewatte, South by road and West by Rukgahadeniya, in extent 6 acres. It is common ground that—

(*a*) this land is depicted in Plan No. 873 (marked X) and described as a land of 6 acres, 2 roods, 04.11 perches ;

(*b*) the land was possessed in three koratuwas, Western, Eastern and Southern, each of equal extent ;

(*c*) Aron de Silva, Gunasekera and other members of his family possessed the Southern 1/3rd and enjoyed the produce thereof.

The main dispute is in regard to that Southern 1/3rd. The contest is between the 22nd defendant on the one hand, and the 27th and 28th defendants, on the other. The 22nd defendant claimed 3/4th of the Southern 1/3rd less the extent of 22.75 perches donated by him to the Director of Education. He also relied on deed No. 27702, dated 8th September, 1937 (22 D 4) from B. M. Wijarama. In their joint answer the 24th, 27th and 28th defendants claimed the benefit of prior registration for their deed No. 484 of 21st October, 1940 (27 D 14) as against the deed on which the 22nd defendant claimed his title. After the institution of their action the 27th and 28th defendants, Ramasamy Chettiar and Vairawan Chettiar, sold to the 24th defendant by deed No. 6526 of 5th October, 1950 (27 D 13) "All that right, title, interest and claim of us and the Lot or Lots that may be allotted to us in D.C. Matara, Case No. 20713 or the proportionate share of money that may be allotted to us in the event of a sale being ordered in the said case".

The present appeal is by the 24th, 27th and 28th defendants. The question for decision is whether deed No. 27 D 14 on which the 27th and 28th defendants rely or deed Nos. 22 D 3 and 22 D 4 on which the 22nd defendant relies have priority. It is contended on behalf of the 27th and 28th defendants that the deed No. 22 D 4 (27702 of 8th September, 1937) is void as it has not been registered under Chapter 3 of the Registration of Documents Ordinance as against deed No. 27D14 which the 24th, 27th and 28th defendants contend is duly registered. The learned District Judge held that 27 D 14 prevails over 22 D 3 and 22 D 4 by virtue of prior registration, but he held against them on the question of prescription and upheld the claim of the 22nd defendant to a decree in his favour on the ground of possession. Learned counsel for the 22nd defendant-respondent contends that 27 D 14 is not duly registered. We shall, therefore, examine this question first.

The provisions of law that call for consideration in a discussion of the question are sections 12, 13 and 14 of the Registration of Documents Ordinance and regulations 12, 13 and 14 of the Registration of Documents Regulations all of which are reproduced at the end of this judgment. Under section 14 (1) every instrument presented for registration must be registered in the book allotted to the division in which the land affected by the instrument is situated and in or in continuation of the folio in which the first registered instrument affecting the same land is registered. The expression "folio" is not defined in the Ordinance. Black's Law Dictionary defines it thus :

> "A leaf. In the ancient law books it was the custom to number the leaves, instead of the pages ; hence a folio would include both sides of the leaf ; or two pages. The references to those books are made by the number of the folio, the letters 'a' and 'b' being added to show which of the two pages is intended ; thus 'Bracton, fol. 100a'.
>
> A large size of book, the page being obtained by folding the sheet of paper once only in the binding. Many of the ancient law books are folios.
>
> When used in connection with legal documents, it means a certain number of words varying from 72 to 100,".

In the Registration of Documents Ordinance the word is used in the sense of a leaf of a folio size 20 x 15. The Ordinance contemplates the commencement of the registration on a folio and when the commencing folio is full the continuation of the registration on another folio which is the continuation of the folio in which the first registration was made and it should be so stated and should not be numbered as a new folio but described as "continuation of folio No. . . .", the number of the original folio should be stated as the number. A new folio bears a new number. In the case of any entry in a new folio under the proviso to section 14 (1) the prescribed cross references should be made. The prescribed cross reference is "See Vol. . . . fol. . . . for a similar property". In the case

of a continuation no cross references are needed. The necessary information is contained in the words "continuation of folio No. . . ." with the number of the original folio.

It would appear from the registration entries produced in the instant case that the practice of the Registrar-General is not in strict conformity with the Ordinance and that there is at present little difference between a continuation folio under section 14 (1) and a new folio opened under the proviso. If the requirements of the Ordinance had been adhered to strictly the confusion that appears to have arisen on account of the different registration entries might have been avoided. The folio in which the first registered instrument affecting the land which is the subject-matter of this action was registered is B 49, folio 5. It would appear from the documents produced in this case that B 71, folio 6, and B 90, folio 106 are a continuation of that registration. Deed 27 D 14 is not registered in a continuation of B 49, folio 5, but it is registered in B 82, folio 217 which has a remark to the following effect :—"See B. 100/79. Entire land registered in B. 71/6".

The registration B 82, folio 217 has been continued in B 183, folio 134. It is not denied by learned counsel for the 27th and 28th defendants that B 183, folio 134 is not a continuation of the folio B 49, folio 5 in which the first registered instrument affecting this land is registered. Deed 22 D 4 is also registered in B 211/276. It contains no remarks inviting reference to any other registration. 22 D 4 conveys—

> "All those undivided three-fourth (3/4) part of the paraveni fruit trees and of soil (save and except the planter's share of 3 plantation standing thereon) and the planter's share of the 1 and 2 plantations standing thereon of the land called Dakumkellegehena (Southern portion of Kellegehena) situated at Talalla in Wellaboda Pattu of Matara District, Southern Province, and bounded on the North by the Northern Portion of Kellegehena where Jeewathhamy resided, East by Naidakankanamagewatta and Siyambalawehenewatta, South by the Road, West by Ruggahadeniya and containing in extent about four acres".

The competing deed 27 D 14 describes the land thus—

> "An undivided three-fourth (3/4th) part or share of all the paraveni trees and soil of the southern portion in extent two acres of the land called Kellegehena and of the planter's half-share of the trees and the entirety of the fifteen cubits tiled house and all other buildings and everything else appertaining thereto and standing thereon situated at Talalla in the Wellaboda Pattu of the District of Matara, Southern Province of the Island of Ceylon and bounded on the North by the Northern portion of the same land belonging to Sellawaduge Don Aberan and others, East by Naide Kankanangewatte and Siyambalawehenewatte on the South by Polwattedeniya Paluwatte and old road and on the West by Liyanagahakumbura and Rukgahadeniya and registered in the Matara District Land Registry under title B 183/134 being property and premises held and possessed by the said Vendor under and by virtue of the deed of transfer bearing No. 22, dated the 9th day of April, 1921, and attested by Mr. G. F. Ernst of Matara, Proctor and Notary."

22 D 4 and 27 D 14, in our opinion, do not convey divided interests although mention is made of a specific extent of land as if the land conveyed were a divided allotment. The opening words of the description are—"An undivided 3/4th part or share".

Learned counsel for the 27th and 28th defendants-appellants sought to shelter himself under the proviso to section 14 (1). He submitted that under that proviso an instrument might, if the Registrar thinks fit, be entered in a new folio, cross references being entered in the prescribed manner so as to connect the registration with any previous registration affecting the same land or any part thereof. As the value attached to prior registration of any instrument in the proper folio is so great (section 7) the power conferred by the proviso to section 14 (1) cannot be construed as enabling the Registrar to render nugatory the requirement that an instrument affecting a land should be registered in or in continuation of the folio in which the first registered instrument affecting the same land is registered. That provision does not vest in the Registrar an arbitrary power to enter in a new folio an instrument which can and should be entered in the folio in which the first registered instrument affecting the same land was registered or in a continuation thereof. The words "thinks fit" confer a discretionary power which must be exercised in a case where registration according to the rule laid down in

sub-section (1) of section 14 is, having regard to the facts and circumstances of the case before him, not feasible, or in a case in which the entry in a new folio is proper in the special circumstances of the case before him. A situation such as that contemplated in the proviso can arise in the registration of a final decree of partition. Regulation 13 (3) of the Registration of Documents Regulations (Vol. I, Subsidiary Legislation, p. 547) in prescribing how the Registrar should proceed when registering a deed affecting land states that when the Registrar is doubtful as to the identity of the land he must register the later instrument on a new folio and connect the two folios by cross references thus : " See vol. . . . folio . . . for a similar property ".

Learned counsel for the appellant is unable to refer us to any facts and circumstances which necessitated the commencement of a new folio for registering 27 D 14. Not only is 27 D 14 in the wrong folio but the cross references in that folio are not made in the prescribed manner. He also concedes that the folio in which the first registered instrument affecting the same land was registered is the proper folio for the registration of documents affecting that land. It is not contended that 22 D 4 is registered in the wrong folio. Under the circumstances 22 D 4 is not rendered void by the prior registration of a subsequent instrument affecting the same land. Therefore, the decision of the learned District Judge has to be reversed on that point. This decision goes to the root of the case and it is not necessary to go into the other matters.

We reverse the judgment of the learned District Judge and hold that 22 D 4 which is a prior deed is duly registered and is not rendered void by 27 D 14 which is not duly registered. Subject to that decision in other respects the judgment of the learned District Judge is affirmed. The case will now go back for further proceedings.

The 24th, 27th and 28th defendants will pay the costs of appeal of the 22nd defendant.

HERAT, J.

I agree.

Judgement reversed and case sent back.

REGISTRATION OF DOCUMENTS ORDINANCE

12. (1) Every Registrar shall prepare and keep the prescribed books for the registration of instruments, allotting to each book (which may be in as many volumes as necessary) a defined division of his province or district.

(2) The books for the registration of instruments established under the Land Registration Ordinance, 1891,* or any enactment repealed by that Ordinance shall continue to be used, and shall be deemed to be kept under this Chapter.

13. (1) Every instrument (except a will) presented for registration shall contain embodied therein, or in a schedule annexed thereto, an accurate and clear description of the land affected thereby, its boundaries, extent, and situation specifying the district and the village, pattu, korale, or other division of the district in which the land is situated ; and in case the land is situated in any town, the name, if any, of the street in which it is situated.

(2) If the land consists of a divided portion of a land or allotment, such portion shall be clearly and accurately defined by its particular boundaries and extent.

(3) If the land consists of an undivided share in a land, the proportion which the share bears to the entire land shall be stated, and a description of the entire land shall be given as required by sub-section (1).

(4) A person desiring to register a will shall give to the Registrar a written description of the land affected thereby which shall comply with the provisions of sub-sections (1) to (3) of this section.

(5) No instrument, other than a will, which does not state the particulars required by the foregoing provisions of this section shall be registered except with the sanction of the Registarr-General, who shall give his sanction, if it is shown to his satisfaction—

(*a*) that the description is sufficient to enable the land to be identified with reasonable certainty ; or

(*b*) that it was impracticable to insert the required particulars in the instrument.

* Repealed by Ordinance No. 20 of 1931.

Any person aggrieved by a decision of the Registrar-General under this sub-section may, within thirty days from the date of such decision being communicated to him, institute in any District Court having jurisdiction a suit against the Registrar-General praying for the variation or reversal of such decision.

(6) Where the description of the land affected by an instrument executed or made after the commencement of this Ordinance is not contained in a schedule to the instrument, a fee of five rupees shall be payable for the registration in addition to any other fee which may be payable :

PROVIDED that nothing in this sub-section shall be construed so as to apply to or affect any grant or lease of Crown land made or executed after the commencement of this Ordinance.

(7) There shall be typewritten or written in ink at the head of every instrument (except a will) presented for registration a reference to the volume and folio in which some earlier instrument relating to the same land is registered if such reference is known to the notary who prepared the instrument, or, if the instrument was not prepared by a notary, if such reference is known to the person presenting the instrument for registration.

14. (1) Every instrument presented for registration shall be registered in the book allotted to the division in which the land affected by the instrument is situated and in, or in continuation of, the folio in which the first registered instrument affecting the same land is registered :

Provided that—

(*a*) an instrument may, if the Registrar thinks fit, be entered in a new folio, cross references being entered in the prescribed manner so as to connect the registration with any previous registration affecting the same land or any part thereof ; and

(*b*) where no instrument affecting the same land has been previously registered, the instrument shall be registered in a new folio to be allotted by the Registrar.

(2) An instrument, whether registered before or after the commencement of this Ordinance, shall not be deemed to be duly registered under this Chapter unless it is registered in accordance with the foregoing provisions of this section.

(3) Every order made after the commencement of this Ordinance under section 4 of Ordinance No. 1 of 1897* entitled " An Ordinance relating to claims to Forest, Chena, Waste, and Unoccupied Lands " and embodying therein an agreement between the Government Agent or Assistant Government Agent or the special officer appointed under section 28 of that Ordinance and the claimant shall be registered in a new folio to be allotted by the Registrar, and an instrument affecting land dealt with by the agreement and registered after registration of the order shall not be deemed to be duly registered under this Chapter unless it is registered in or in continuation of the folio in which the order is registered.

THE REGISTRATION OF DOCUMENTS REGULATIONS

12. Each registrar shall keep in his office a series of books in Form B to be called the Land Registers, for the registration of instruments affecting land situated within his registration district. Each registration district shall, with the approval of the Registrar-General, be divided into defined divisions of convenient size, to be called registration divisions, and there shall be assigned to each such division a separate register or set of registers to be designated by a separate letter of the alphabet.

13. (1) Registration of an instrument affecting land shall be effected by entering the particulars required in Form B in the proper folio of the register kept under regulation 12 for the registration division in which the land is situated. The registrar shall sign the entry in the register and shall also endorse on the instrument the volume and folio in which registration has been effected and the place and date of registration, thus :

Registered $\frac{A\ 5}{130}$
Colombo, January 16, 1928.

(Signed) A.B.,
Registrar.

(*N.B.*—A 5 is the volume reference, and 130 the folio reference).

* Repealed by Ordinance No. 20 of 1931.

(2) When two or more lands are affected by the same instrument, the volume and folio references required by paragraph (1) of this regulation shall be—

(*a*) Endorsed on the instrument in the order in which the lands appear in the instrument ; and

(*b*) Entered in the margin of the instrument against the descriptions of the several lands affected.

(3) If, at the time of registration of an instrument affecting land, the registrar finds that the description of the land affected thereby differs in any respect from the description of the same land appearing in the register by reason of the prior registration of another instrument affecting the same land, he shall, if he is satisfied as to the identity of the land, enter the later instrument in the same folio as the earlier instrument, and shall make a note of the differences in the remarks column of the entry relating to the later instrument: Provided that if he is doubtful as to the identity of the land he shall register the later instrument on a new folio, but shall connect the two folios by cross references thus :—

"See Vol. ....., fol. ....., for a similar property."

14. When an instrument affecting land relates to a divided portion of an area of land and an earlier instrument affecting that area has been already registered, the registrar shall register the instrument relating to the divided portion in a separate folio connecting it with the entry relating to the whole area by cross references, thus :—

"Instruments relating to a portion of this property are registered in Vol. ....., fol. ....." (for the earlier instrument).

"Instrument relating to the property of which this property is a portion are registered in Vol. ....., fol. ....." (for the later instrument).

IN THE COURT OF CRIMINAL APPEAL

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

THE QUEEN *vs.* M. R. FERNANDO

Appeal No. 66 *of* 1962 *with Application No.* 70 *of* 1962—*S.C. No.* 379/1961, *M.C. Colombo South, No.* 12643/*N.*

Argued and decided on : October 17, 1962.

Evidence Ordinance, sections 155, 8 (2), 9—*Evidence illegally admitted in rebuttal—Can witness be contradicted by ommission in earlier statement—Such evidence referred to in summing up—Possible adverse effect on jury—Alteration of verdict and sentence.*

Criminal Procedure Code, sections 122, 123—*Accused not bound to make statement during investigation under Chapter XII of Code—Whether officer inquiring can examine accused.*

Evidence was given by the accused of the circumstances in which he stabbed the deceased, to show that he was exercising his right of private defence. Evidence was then led in rebuttal by the Crown under section 155 of the Evidence Ordinance, to show that none of those circumstances were recorded in a police statement made by the accused soon after the incident. In the summing up, the attention of the jury was focussed on this omission in the police statement.

Held : (1) That section 155 of the Evidence Ordinance did not permit the admission of a statement in rebuttal to contradict the accused by reason of the omission therein of facts deposed to in evidence.

(2) That the evidence led in rebuttal could not be considered relevant even under section 8 (2) or section 9 of the Evidence Ordinance.

(3) That, in any event, an accused person was not bound to make a statement in the course of an investigation under Chapter XII of the Criminal Procedure Code.

Held further : That the forcible direction as to the effect of this evidence illegally admitted, could have prejudiced the mind of the jury against the defence.

T. S. P. Senanayake (*assigned*), for the accused-appellant.

N. Tittawella, Crown Counsel, for the Attorney-General.

BASNAYAKE, C.J.

The appellant was convicted of the murder of Potupitiyage Mariya Isabella Fernando, his mistress.

The evidence for the prosecution was that the accused stabbed the deceased a number of times with a chisel he had. The defence of the accused was that he was on his way to work and that he saw the deceased talking to a man on the pavement and as he approached her the man went off; that he questioned her, "When the child is ill, do you do such a thing and refuse to come also?"; that thereupon she started abusing him in obscene language and afterwards seized him by his male-organ and squeezed it. He could not breathe in consequence and stabbed her in defence of his person a number of times.

In the course of the cross-examination of the accused he was asked whether he, in his statement to the police, stated all the facts which he had stated in his defence at the trial, and his answer was that he had stated all those facts. At the close of the case for the defence the learned Crown Counsel moved to call a witness in rebuttal. This was allowed and he called Sub-Inspector Abeysingha. The following is the evidence given by him :—

"563. *Q.* You already told Court that you recorded the statement made by this accused ?

A. Yes.

564. *Q.* When did you record this statement ?

A. On the 15th of April, at 8.15 p.m.

565. *Q.* Did you record the entirety of what he had to say ?

A. Yes.

566. *Q.* Did you omit to record anything that he told you ?

A. No.

567. *Q.* Did you hear what he had to say ?

A. Yes.

568. *Q.* Did you, after recording the statement, read over the statement to him, and explain it to him in Sinhalese ?

A. Yes.

569. *Q.* Did he admit it to be correct ?

570. *Q.* I am referring to the statement as to what happened on the 15th of April ?

A. Yes.

571. *Court :* Read the whole thing first. Never mind taking time, and then answer the questions. Otherwise you might find yourself in difficulty.

A. Yes.

572. *Q.* Has he mentioned to you that when that man was talking to her and when he came there that man went away ?

A. No.

573. *Q.* Has he also said he questioned his wife why she was talking to people on the pavement when her child was ill ?

A. No.

574. *Q.* Has he also told you that he then went behind her and the deceased had abused him saying "go and have intercourse with your mother" ?

A. No.

575. *Q.* Did he tell you in the course of his statement that the deceased held him by his male organ ?

A. No.

576. *Q.* Did he tell you that the deceased squeezed his private parts ?

A. No.

577. *Q.* Did he tell you that he was unable to breathe when the deceased held him by his male organ ?

A. No.

578. *Q.* Did he mention anything about his dropping the hammer and a saw at the scene of the incident ?

A. He stated he had his carpentry tools with him.

579. *Court : Q.* Has he said anything about the hammer and saw ?

A. Yes.

580. *Q.* Did you find a hammer and a saw at the scene ?

A. No.

581. *Q.* Did he complain of any pain in his private parts ?

A. No.

582. *Q.* If he had complained of any pain would you have taken him before a doctor ?

A. Yes."

It was submitted by the learned counsel for the appellant that the above questions should not have been allowed as there is no provision of the Evidence Ordinance which permits them. Omission to state a fact deposed to in evidence does not fall within the ambit of the expression " former statement ". Under section 155 of the Evidence Ordinance the credit of a witness may be impeached by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted. The questions put to the witness are not admissible under that section. Section 155 or any other section of the Evidence Ordinance lends no authority for the course adopted by Crown Counsel. Learned Crown Counsel sought to call in aid sections 8 (2) and 9 of the Evidence Ordinance on the ground that it was proof of conduct. The former provision reads—

> " The conduct of any party, or of any agent to any party, to any suit or proceeding in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto."

and the latter reads—

> "Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity of anything or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened, or which show the relation of parties by whom any such fact was transacted, are relevant in so far as they are necessary for that purpose."

In the instant case the failure of the accused to narrate to the Sub-Inspector the facts which he narrated from the witness-box cannot be said to be " conduct which influences or is influenced by any fact in issue ". This evidence given by the Sub-Inspector was not relevant under section 8 (2) or under section 9 of the Evidence Ordinance.

The learned Commissioner in the course of his charge to the jury emphasised the failure of the accused to state to the police the defence which he sought to place before Court thus :—

> " His suggestion is that this was a clandestine affair, because, on seeing him, that man quietly slipped away. Then, if that be so, would you expect the accused to inform the Police about it ? He says he told the Police, but you have the evidence of the Inspector, Sub-Inspector Abeysinghe, that the accused did not mention that fact to him. Has the Sub-Inspector any reason to omit to record such a thing if the accused had told him this ? The accused himself admits that he can assign no reason for the Police to omit to record it if he had mentioned it. He also tried to tell you that the Inspector may not have heard it. Did this Inspector strike you as a person who is deaf ? He has given evidence in this Court. He may have a little voice which may not carry very far but is he deaf—that is the Inspector ? That is the question."

The learned Commissioner later on in his charge reverted to the same topic and stated—

> " Then the accused says that he related to the Police all this about the man, what that woman did to him, about the use of indecent words and also her holding him by the testicles and squeezing, but you have heard Sub-Inspector Abeysinghe's evidence that even those matters were not mentioned by the accused to the Inspector. Were these not important matters which he should have mentioned ? He says that he mentioned them. Are you prepared to accept this man's evidence in preference to that of Sub-Inspector Abeysinghe who has no reason to omit to record these things ? Then, is this all false or an invention, as submitted by the Crown, in order to raise a defence of an exculpatory or mitigatory plea ? That is a

question for you. If you disbelieve the accused, when he says that these things happened on this day before the incident, then, of course, he is not entitled to the benefit of any of the exceptions pleaded by him, either the general exception that he acted within the rights given to him by law of acting in the exercise of the right of private defence, or of exceeding the right of private defence, or acting under grave and sudden provocation, or acting in the course of a sudden fight."

We are unable to hold that the jury were uninfluenced by so forcible a direction as to the effect of the evidence illegally admitted.

Apart from the fact that it is doubtful whether an accused person may be examined by an officer inquiring into an offence under Chapter XII an accused person is not bound to make a statement in the course of an investigation under Chapter XII. Section 123 expressly provides—

"No inquirer or police officer shall offer or make or cause to be offered or made any inducement, threat, or promise to any person charged with an offence to induce such person to make any statement with reference to the charge against such person. But no inquirer or police officer shall prevent or discourage by any caution or otherwise any person from making in the course of any investigation under this Chapter any statement which he may be disposed to make of his own free will."

Were it not for the wrong direction, it was open to the jury to accept the version of the accused. If they were given the correct direction and the jury were allowed to return their verdict on such a direction, the verdict might have been one of culpable homicide not amounting to murder. We accordingly substitute a verdict of culpable homicide not amounting to murder for the verdict of murder.

In view of the ferocity of the attack on the deceased, we think nothing short of 12 years' rigorous imprisonment would meet the ends of justice and we accordingly substitute for the sentence of death the sentence of 12 years' rigorous imprisonment.

Varied.

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

K. KUMARATNAM *vs.* E. SELLIAH

S.C. No. 113/1963—*M.C. Chavakachcheri, No.* 16606.

Argued on : 5th April, 1963.
Decided on : 27th June, 1963.

Motor Traffic Act, as amended by Act No. 63 of 1961, sections 5, 235, 240—Charge under section 180 (2) for carrying passengers in excess of the number permitted in a private car—Test for determining whether particular vehicle is a private car—Is the Magistrate entitled to look outside the certificate of registration.

Held : That in a charge under section 180 of the Motor Traffic Act as amended by Act, No. 63 of 1961, for carrying more than seven persons in a vehicle registered as a private car, it is not permissible for a Magistrate to look outside the certificate of registration for the purpose of determining whether or not the particular vehicle is a private car.

V. S. A. Pullenayagum, Crown Counsel, for the complainant-appellant.

No appearance for the accused-respondent.

H. N. G. FERNANDO, J.

This was a prosecution for an alleged offence against section 180 (2) of the Motor Traffic Act, as amended by Act No. 63 of 1961. The vehicle was registered on 17th February, 1960, as a private car and its seating capacity as specified in the certificate of registration was seven persons excluding the driver.

Upon the facts, there is no doubt that 17 passengers were carried on the vehicle on the date of the alleged offence, and the Magistrate would undoubtedly have convicted the accused of carrying more than seven passengers, but for a rather

interesting construction he has placed on the relevant provisions of the Act.

" Private car " is defined in section 240 of the Act as a " motor car registered as a private car ". The expression " motor car " is defined as " a motor vehicle, not being a . . . , which is constructed or adapted for the carriage of not more than eight persons ". In considering the definition of private car, the Magistrate holds that in order to be a " private car " a vehicle must, firstly, be a motor car and must, secondly, be registered as a private car. He agrees that the second condition is fulfilled, but considers that the first question has yet to be determined, namely, whether the vehicle is " constructed or adapted for the carriage of not more than eight persons ". The evidence being to the effect that there are seating arrangements for the accommodation of more than eight persons, he reaches the conclusion that this vehicle is not a motor car.

An examinations of the definitions in section 240 of the several different types of motor vehicles shows that all the definitions taken together are intended to be an exhaustive list of all types of vehicles for the purposes of the application of the Act to vehicles. In regard to passenger carrying vehicles, a main line of distinction is drawn between those intended for the carriage of persons for a fee or reward and those not so intended. In the latter case the prefix " private " is generally employed in the Act. Of those private vehicles, some are classified as motor cycles, ambulances and invalid carriages, and apart from the types just mentioned, a vehicle which is " private " has to be registered either as a coach or as a car, the distinction between them being made by reference to the question whether the vehicle is constructed or adapted for the carriage of more than eight persons or not more than eight persons. Section 5 of the Act deals with the registration of cars and coaches.

Section 235 provides that when any question, as to the class to which a motor vehicle of any type or classification should be deemed to belong, arises in connection with a registration or licensing of the vehicle, the decision of the Commissioner on that question shall be final and conclusive. At the stage, therefore, when the accused's vehicle was registered as a " private car ", the Commissioner finally and conclusively decided in connection with that registration that the vehicle is a car and not a coach. But the learned Magistrate in this case has formed the opinion that the determination is not conclusive for purposes other than that of registration and that accordingly if the seating accommodation is subsequently altered, a vehicle may subsequently be regarded as not being a car ; even if this opinion be correct, there was no evidence in this case to the effect that the seating accommodation had been increased after the date of registration of the vehicle, and in the absence of such evidence the only material before the Court as to the seating capacity was to be found in the certificate of registration containing the Commissioner's determination.

For this reason alone the Magistrate's order of acquittal cannot be upheld. In addition, it is perhaps useful for me to express disagreement with the opinion expressed by the learned Magistrate. It will be seen that section 5 provides that a motor car may be registered as a private car or as a hiring car, and that a motor coach may be registered as a private coach or as an omnibus. The definitions in section 240 of a " private car " as a motor car registered as a private car and of a " private coach " as a motor coach registered as a private coach, merely invoke the respective classifications which are determined at the time of registration. In other words, the definition declares to be a private car that which has been registered as a private car under section 5. Although the definition does contain the expression " motor car ", that expression is used in the definition only because what is registerable as a private car under section 5 is that which has been determined for the purpose of section 5 to be a motor car. I do not, therefore, agree with the Magistrate that in a charge under section 180 it is permissible to look outside the certificate of registration for the purpose of determining whether or not a particular vehicle is a private car.

The order of acquittal is set aside. I convict the accused and sentence him to a fine of Rs. 100/-.

Acquittal set aside.

Present : **Tambiah, J.**

E. M. CHARLIS APPUHAMY *vs.* W. T. SENEVIRATNE,*
INSPECTOR OF POLICE, MADAMPE.

S.C. 954/'62—*M.C. Chilaw*, 43449.

Argued on : 8th February, 1963.
Decided on : 12th February, 1963.

Vagrants Ordinance (*Cap.* 32)—*Charge under section* 4 (*c*) *for wilfully exposing person in indecent manner—Meaning of the word "elsewhere" in section* 4 (*c*)—*Whether ejusdem generis rule applies.*

Held : That the words "street, road, highway, public place, or elsewhere" in the context of section 4 (*c*) do not belong to the same genus. Therefore, the *ejusdem generis* principle of interpretation is inapplicable and it means any place other than a public place.

Cases referred to : *United Towns Electric Co.* v. *Attorney-General of Newfoundland*, (1939) 1 A.E.R. 423; 55 T.L.R. 382.
Sussex Peerage Case, (1844) 11 Cl. and F. 85; 8 Jur. 793
Abeyewardane v. *Amaradasa*, (1945) XXX C.L.W. 55.

J. D. Aseervatham, for the accused-appellant.

R. I. Obeysekere, Crown Counsel, for the Attorney-General.

TAMBIAH, J.

The accused-appellant was convicted for wrongfully exposing his person in an indecent manner to the annoyance of one Emalin Wijesinghe and others, an offence punishable under section 4 (*c*) of the Vagrants Ordinance and was sentenced to pay a fine of Rs. 20/- or in default to undergo one month's rigorous imprisonment.

The only question for decision in this appeal whether the appellant has committed an offence under section 4 (*c*) of the Vagrants Ordinance.

Section 4 (*c*) of the Vagrants Ordinance (Cap. 32) enacts :

> "4. (*c*) every person wilfully exposing his person in an indecent manner, or exhibiting any obscene print, picture, or other indecent exhibition, in any street, road, highway or public place or elsewhere, to the annoyance and disgust of others ;

The appellant's counsel argued that the word "elsewhere", in the above section, means a public place. He also urged that the *ejusdem generis* rule should be applied in construing the meaning of the word "elsewhere" in the context.

I cannot agree with his argument. The words "street, road, highway, public place, or elsewhere" in the context of section 4 (*c*) of the Vagrants Ordinance, do not, in my view, belong to the same genus. If there is no mention of a genus in a sentence, there is no room for the application of the *ejusdem generis* principle (*vide United Towns Electric Co., Ltd.* v. *Attorney-General of Newfoundland*, (1939) 1 A.E.R., p. 423, at 428, *per* Lord Thankerton). Any attempt to construe the word "elsewhere" in the same context to mean a public place would not only lead to an absurdity, but would also render the latter part of the section meaningless and ungrammatical.

It is significant to note that the English Vagrants Act, (1824), section 4, has omitted the word "elsewhere" (*vide* Stone's Justices' Manual, p. 2621). The deliberate inclusion of the word "elsewhere" in section 4 (1) of our Vagrants Ordinance in juxtaposition to "public place", show that the word means any place other than a public place. If the words of a statute are in themselves precise and unambiguous, then no more can be necessary than to expound these words in their natural sense. The words themselves alone do, in such case, best declare the intention of the law-giver (*vide Sussex Peerage Case*, (1844) 11 Cl. and F, at 143 ; *Abeyewardene* v. *Amaradasa*, 30 C.L.W., p. 55). In such a case, every word must be given a meaning unless

* For Sinhala translation, see Sinhala section, Vol. 6 part 4, p. 13

the context otherwise requires a different construction.

The intention of the Legislature in enacting section 4 (*c*), is to punish any person who wilfully exposes his person in an indecent manner or exhibits any obscene print, or picture or other indecent exhibition *in any place* to the annoyance and disgust of others.

The appellant's counsel also contended that the whole scope of the Vagrants Ordinance is to prevent idling or doing obnoxious acts in a public place. This contention is also untenable since certain acts done in private premises are also penalised by the Ordinance (*vide* section 3 (1) *c et seq.*).

For these reasons, I dismiss the appeal.

Appeal dismissed.

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

WARAKAPITIYE SANGANANDA TERUNNANSE

vs.

MEERUPPE SUMANATISSA TERUNNANSE

S.C. No. 639/1960 (*F*)—*D.C. Matara, Case No.* 289/*L.*

Argued on : May 6, 1963.
Decided on : May 15, 1963.

Buddhist Ecclesiastical Law—Deed by Viharadhipathy, G., granting plaintiff, his co-pupil "full authority to manage, administer and hold the office of Adhikari" in 1930*—Several years later, G's. senior pupil, the defendant, disputing plaintiff's rights—Contention that G. abandoned his rights—Effect of said grant.*

S., a monk entitled to four temples, executed a deed in 1928 (P 12) in favour of his senior pupil, *G.*, granting him "full authority to manage, administer and hold the office of Adhikari" of the four temples subject to certain conditions—*G.*, in due course became Vihiradhipathy and executed a deed in 1930 (P 13) in the very same terms in the said deed (P 12) in favour of his co-pupil, the plaintiff, in respect of one of the temples only. For several years, plaintiff officiated as Adhikari and the defendant disputed the former's rights.

In an action filed by the plaintiff against the defendant for a declaration that plaintiff was the lawful Viharadhipathy, the learned District Judge held in his favour. The defendant appealed.

Held : (1) That, if P 13 in favour of the plaintiff is to be regarded as an appointment of his successor as Viharadhipathy, *G.* had no right to divert the succession from his own pupils and appoint the plaintiff to succeed him.

(2) That the contention on behalf of the plaintiff that P 13 should be regarded as an act of abandonment of *G's* rights as Viharadhipathy cannot be accepted as there are no words in P 13 which show such abandonment.

(3) The evidence led is not inconsistent with the position that the plaintiff was appointed by *G.* to act for him as *de facto* Viharadhipathy of the temple in question as *G.* was residing in another temple miles away.

(4) That although a renunciation by a monk of his right to be Viharadhipathy may be inferred from facts and circumstances, such an inference will not be drawn if the matter is left in a state of doubt.

A. F. Wijemanne, for the defendant-appellant.

H. Wanigatunga with *H. L. Karawita*, for the plaintiff-respondent.

SANSONI, J.

The plaintiff, who claims to be the lawful Viharadhipathi of Sudassanarama Temple in Welihinda, has sued the defendant, who is also a Buddhist monk, for a declaration of title in respect of a certain land and for ejectment and damages. The defendant denied that the plaintiff was the lawful Viharadhipathi of Sudassanarama Temple ; he claimed that he was himself entitled to that

* For Sinhala translation, see Sinhala section, Vol. 6, part 3, p. 11.

position, although he made no claim in reconvention in that respect. The learned District Judge has held in favour of the plaintiff and given him judgment as prayed for in his plaint. The defendant has appealed.

It is not in dispute that at one time Akurugoda Sudassi was the Viharadhipathi of that Temple and three other Temples known as the Lalpe Sudarmaramaya, Akurugoda Nagarukkaramaya and Warakapitiya Tribhumikaramaya. His senior pupil was Meeruppe Gunananda. The plaintiff was also a pupil of his, and he had other pupils as well, but all of them were junior to Gunananda. In 1928 Sudassi executed a deed in favour of Gunananda granting him "full authority to manage, administer and hold the office of Adikari" of the four Temples subject to certain conditions.

Meeruppe Gunananda in due course became the Viharadhipathi of the four Temples, and he executed in the plaintiff's favour deed P 13 of 1930 containing the very same terms to be found in deed P 12. The deed, however, was only in respect of the Welihinda Temple. It contains the same conditions as those appearing in P 12.

One question that arises on this appeal is the effect that deed P 13 has on the rights of the plaintiff and the defendant, respectively. The first point to be stressed is that the plaintiff is only a co-pupil of Gunananda while the defendant, it is common ground, is the senior pupil of Gunanda. It is quite clear on the authorities that, if deed P 13 is to be regarded as an appointment of his successor as Viharadhipathi, Gunananda had no right to divert the succession from his own pupils and appoint the plaintiff to succeed him.

The plaintiff's counsel and the learned District Judge have regarded deed P 13 as an act by which Gunananda abandoned his rights as Viharadhipathi of the Welihinda Temple, but I am unable to share this view. There are no words in P 13 which convey the idea of such abandonment. On the contrary, Gunananda has made provision in it for his pupils to exercise their rights in the Temple and that is inconsistent with an abandonment of his rights. Further, it is not the plaintiff's case that deed P 12, which is exactly in the same terms as deed P 13, was an act of abandonment by Sudassi. For if that had been his case, Gunananda would have lost his claim to succeed Sudassi as Viharadhipathi. I think the more reasonable view to take of the deed P 13 is that it was an appointment of the plaintiff by Gunananda to act for him as *de facto* Viharadhipathi of Welihinda Temple because Gunananda was residing in another Temple. The defendant, at the time when deed P 13 was executed, would have been only 19 years old and it was, therefore, only natural that Gunananda should ask an older priest to manage this Temple on his behalf.

But the plaintiff's counsel urged us also to consider the evidence given by Gunananda in an earlier case brought by the present plaintiff against a third party in respect of this Temple. That evidence was given in 1935. Gunananda there said that he gave this deed to the plaintiff as he was living 30 miles away. He added : "I was giving the deed not temporarily. After two years I found it was difficult to manage Welihinda". This evidence may well mean that Gunananda found it more convenient to appoint a deputy to look after the affairs of this Temple because he could not look after them from 30 miles away.

The law is clear that although a renunciation by a monk of his right to be Viharadhipathi may be inferred from facts and circumstances, such an inference will not be drawn if the matter is left in a state of doubt. It is quite usual for a monk who is the Viharadhipathi of several Temples to give charge of one or more of those Temples to other monks, who would normally reside in and look after those temples and their temporalities. It is not always convenient for a Viharadhipathi to look after temples which are situated some distance away from the temple in which he resides, and he may appoint managers or deputies for this reason. Any acts of possession or management by such appointees are referable to that appointment ; they would all be on behalf of the lawful Viharadhipathi and would not give the appointee any claim to that title.

In this case, it would seem that the plaintiff has managed the affairs of the Welihinda Temple for many years, and that the defendant recognised him as *de facto* Viharadhipathi. But that would not enable the plaintiff to call himself or to be declared controlling Viharadhipathi, because he is not a pupil of Gunananda. His action must fail because he cannot establish the title upon which he claimed to bring this action.

I would, therefore, set aside the judgment under appeal and dismiss the plaintiff's action with costs in both Courts.

HERAT, J.

I agree.

Set aside.

Present : **Kingsley Herat, J.**

JOSLIN SILVA *vs.* INSPECTOR OF POLICE, ALUTGAMA

S.C. 25/63—*M.C. Kalutara,* 48557.

Argued and decided on : February 15, 1963.

Legislative Enactments of Ceylon (1956 *Ed.*), *section* 12 (3)—*Charge under the* 1938 *Edition for criminal offence—Later plaint amended referring to the relevant sections as numbered in* 1956 *Edition—Acquittal of accused though charge proved.*

The accused was originally charged under the 1938 edition of the Legislative Enactments for a criminal offence. An amended plaint was filed after the 1956 edition of the Legislative Enactments had come into force. The amended plaint charged him with the same offence but referred to sections as numbered in the 1956 edition. The Magistrate found the charge proved but acquitted the accused on a point of law, namely, that the amended plaint charged the accused of an offence he had not committed.

Held : (1) That this was a wrong decision of law as section 12 (3) of Chapter I of the 1956 edition of the Legislative Enactments provided that the 1956 edition was the sole authentic edition of the legislative enactments. It is not a question of alteration of the first charge. The offence must, by reason of that section, be deemed to have always existed.

(2) That the accused had been correctly charged.

(3) That there was no prejudice caused to the accused.

(4) That the acquittal of the accused should be set aside and a conviction entered.

R. I. Obeysekera, Crown Counsel, for the complainant-appellant.

Austin Jayasuriya, for the 2nd accused-respondent.

HERAT, J.

In this case the complainant, Inspector of Police, has appealed with the sanction of the Attorney-General from the acquittal of the 2nd accused-respondent. The 2nd accused, respondent who is a woman was acquitted on 14th May, 1962. She was originally charged under the 1938 edition of the New Legislative Enactments and that charge read as follows :—

" That she did on the 10th day of June, 1961, at Ganegama have in her possession 550 grains of part to wit : Pods, leaves, seeds, etc., of the Hemp plant commonly known as ' *Canabis Sativa L* ' without a permit from the proper authority, in breach of section 26 of the Poison, Opium and Dangerous Drugs Ordinance, Chapter 172 N.L.E. read with section 76 (1) (*a*) of the said Ordinance and thereby committed an offence punishable under section 76 (5) (*a*) of the said Ordinance."

The date of this charge was 12th June, 1961. Thereafter two other accused were added and an amended plaint was filed against them in which the present accused-appellant was the 2nd accused. This amended plaint was filed on 18th December, 1961, by which date the 1956 revised edition of the Legislative Enactments of Ceylon had been published and come into force. Section 12 (3) Chapter I of the said revised 1956 edition reads as follows :—

" The revised edition shall, on or after the date on which it comes into force, be deemed to be and be without any question whatsoever in all Courts of justice and for all purposes whatsoever the sole authentic edition of the legislative enactments of Ceylon therein printed."

This revised edition admittedly came into force in December, 1961, before the amended charge was framed. The amended charge reads as follows :—

(2) " That you did at Ganegama, on the 10th day of June, 1961, have in your possession 550 grains of part to wit : Pods, leaves, seeds, etc., of the Hemp plant commonly known as ' *Canabis Sativa L* ' without a permit from the property authority in breach of section 52 (1) of the Poisons, Opium and Dangerous Drugs Ordinance, Chapter 218 L.E.C. and thereby committed an offence punishable under section 78 of the Poisons, Opium and Dangerous Drugs Ordinance, Chapter 218 L.E.C."

This was an alternative charge against the 2nd accused-appellant. This second charge, in view of the 1956 revised edition coming into force

and because of the terms of section 12 (3), Chapter I set out above, contains a reference to the offence as numbered in the new edition.

As far as the offence is concerned it is couched in the identical language as appears in the 1938 revised edition. The 1st and 3rd accused were acquitted and there is no appeal from that acquittal. The learned Magistrate acquitted the 2nd accused-respondent on a point of law whilst finding that the charge had been established against her. The point of law on which the learned Magistrate acquitted the 2nd accused-respondent was that she had committed an offence, namely, the offence with which she was originally charged and that when the charge was amended she should have been charged with that identical offence and the charge should have been couched in the language employed in respect of that offence in the 1938 edition of the New Legislative Enactments. The learned Magistrate held that the reference in the amended charge to the 1956 revised edition of the Legislative Enactments of Ceylon amounted to a charge of an offence which the 2nd accused-respondent never committed. I think, with respect, that the learned Magistrate's reasoning is fallacious. By reason of section 12 (3) of Chapter I of the 1956 revised edition of the Legislative Enactments of Ceylon all Courts of Justice are compelled to regard the law as set out in the 1956 edition as the only authentic law of this country existing at the time. It is not a question of the original offence referred to in the first charge being altered in any way by a change of language in the revised 1956 edition. The offence is there and by reason of section 12 (3) of Chapter I it must be deemed to have always existed for all purposes whatsoever by all Courts of Justice.

Accordingly, I am of opinion that the 2nd accused-respondent was correctly charged in the amended plaint. She has not been prejudiced in any way. I, therefore, set aside the acquittal of the 2nd accused-respondent and convict her on count (2) of the amended charge.

There remains the question of sentence. Mr. Advocate Austin Jayasuriya on her behalf has eloquently pleaded for leniency in respect of the sentence which should be passed upon her. He urges that she is a woman and a first offender. Crown Counsel admits that there is no evidence of any previous convictions. The maximum sentence that may be imposed for an offence under this section extends to Rs. 1,000/- or imprisonment for a term not exceeding one year, or both fine and imprisonment.

I will treat the 2nd accused-respondent as a first offender and impose a fine of Rs. 250/-, in default three months simple imprisonment.

Acquittal set aside.

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

ELIATAMBY *vs.* KUMARASEGARAMPILLAI

S.C. 143/'60 *(F)—D.C. Point Pedro, Case No.* 5928.

Argued on : 5th and 6th December, 1962.
Decided on : 8th February, 1963.

" Quia timet " action—Person possessing a contingent interest in land—His right to a declaratory decree protecting such interest before it has vested in him.

R. was the grantee on a deed which conveyed an undivided interest in a land. The plaintiffs who were children of *R.*, alleged that the deed created a *fidei commissum* which would vest the title to the land in them after *R*'s. death. The land was partitioned and the decree in the partition action gave *R.* a divided lot in lieu of his undivided interest, but did not refer to the alleged *fidei commissum*. The rights of *R.* in the divided lot were sold in execution and from the purchaser it devolved on the defendants who commenced to build on it. The plaintiffs while *R.* was still living sued the defendants : (1) for a declaration that the deed created a *fidei commissum* in their favour ; (2) for an order to prevent the defendants from erecting buildings on the said lot.

The Supreme Court did not consider it necessary to decide whether the deed created a *fidei commissum*, and if so, whether the defendants were entitled to claim compensation for improvements as *bona fide* possessors when the rights of the plaintiffs as *fidei commissarii* mature.

Held : That even if the defendants' right to the land was that of fiduciaries, there being no dispute that this was buildable land, the defendants were entitled to erect buildings and otherwise improve the land for the full enjoyment of that right.

(2) That as there was no present risk of loss or impairment of the interest of the plaintiffs when the time arrived for its enlargement into a vested right, their claim was premature and they could not claim the protection of a declaratory decree.

Case referred to : *Hewavitharna* v. *Chandrawathie*, 53 N.L.R., 169; XLV C.L.W. 73

H. V. Perera, Q.C., with *C. Ranganathan* and *E. Gooneratne*, for the defendants-appellants.

H. W. Jayawardene, Q.C., with *S. Sharvananda* and *S. S. Basnayake*, for the plaintiffs-respondents.

L. B. DE SILVA, J.

Vairamuttu Kandiah and his wife, Nagamuttu, conveyed their interests in a land called " Kalanai " described in the plaint to their son, Rajaratnam, upon deed No. 4248, dated 15th May, 1921. The 2nd and 3rd plaintiffs are the two children of Rajaratnam. They claim in this action that the deed No. 4248 created a *fidei commissum* in favour of the children of Rajaratnam after his death.

Rajaratnam was also entitled to certain other interests in this property upon deed No. 3482, dated 10th March, 1919. In partition action No. 24217, D.C. Jaffna, Rajaratnam was allotted lot 5 in the partition plan in lieu of his undivided interests on both deeds. There was no reference in the partition decree that his interests derived under deed Nol 4248 of 15th May, 1921, were subject to a *fidei commissum*.

The rights of Rajaratnam in the said lot 5 were sold in execution in the partition action for non-payment of costs and were purchased by Arumugam Murugesu. Murugesu's rights have now devolved on the defendants-appellants. The defendants commenced to erect a building on the said lot in spite of the protests of the plaintiffs. The plaintiffs thereupon filed this action for a declaration that deed No. 4248 aforesaid, created a *fidei commissum* in favour of the 2nd and 3rd plaintiffs—and to prevent the defendants from erecting any buildings on the said property. Rajaratnam is still alive.

For the purpose of deciding this appeal, it is sufficient to consider if a cause of action has now accrued to the plaintiffs as set out in their plaint. Whether the deed in question created a *fidei commissum* or not and if it did create a *fidei commissum*, whether the defendants are entitled to claim compensation for improvements as *bona fide* possessors or not when the rights of the 2nd and 3rd plaintiffs as *fidei commissarii* mature, there is no doubt that the defendants are entitled to erect buildings and otherwise improve this property for the full enjoyment of their rights even if their only right to this property was that of fiduciaries. They are doing no wrong to the plaintiffs nor committing any mischief to the property by erecting buildings. It is not suggested that this is not a buildable property.

In *Hewavitharna* v. *Chandrawathie*, 53 N.L.R. at p. 174, Gratiaen, J., stated :

> " As at present advised, I see no reason why relief in a *quia timet* action should necessarily be denied to a person who, though possessing only a contingent interest in land, is placed by the conduct of some third party in such a situation that *there exists at present a substantial and imminent risk of the loss or impairment of his interest when the time eventually arrives for its enlargement into a vested right*.
>
> The principles applicable under our common law are in conformity with this view. So long as proof is forthcoming of some threatened ' concrete invasion of a party's rights ' he can claim the protection of a declaratory decree in his favour."

In this case there is no such risk of loss or impairment of the rights of the 2nd and 3rd plaintiffs when their rights become vested, even if the deed in question created a valid *fidei commissum*. It would, indeed, create great hardship on fiduciaries if they are prevented from effecting useful improvements on *fidei commissary* property with a view to obtaining the full benefit of the property while they are entitled to possession thereof.

We accordingly allow the appeal, set aside the judgment and decree of the District Court and dismiss the action of the plaintiffs with costs on the ground that their claim is premature. The defendants-appellants are entitled to the costs of this appeal.

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

Appeal allowed.

Privy Council Appeal, No. 45 *of* 1962

Present at the hearing :

Viscount Radcliffe, Lord Evershed, Lord Morris of Borth-Y-Gest, Lord Devlin, Sir Kenneth Gresson.

NARAHENPITAGE WALTER DE COSTA

vs.

THE TIMES OF CEYLON LIMITED & ANOTHER

From

THE SUPREME COURT OF CEYLON

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

DELIVERED THE 9TH JULY, 1963.

Defamation—" Animus injuriandi " an essential basis of the cause of action in the Roman-Dutch Law—Defences of justification and fair comment—How established.

On the First Cause of Action

The appellant who was from Kotte and was an old boy of Ananda Sastralaya, Kotte, was a teacher in that school from 1934 to 1955. For a period prior to July, 1953, he acted as Principal during the absence of the Principal. In June 1953, Mr. Alagiyawanna, who was then in the Education Deparment was appointed Vice-Principal and after that date he acted as Principal. This appointment was deeply resented by the appellant. In the period that followed there appeared certain writings on the walls of the school in the form of " anti-Alagiyawanna " slogans. There was also failure in some cases to pay " facilities fees ". In March, 1955, the appellant was appointed Principal. On the 5th of December, 1955 and again on 23rd of December, 1955, and 3rd of January, 1956, the respondent newspaper published the following statements : (*a*) that the apellant who had during the term of office of Mr. Alagiyawanna, as Principal induced students not to pay facilities fees, had, when he himself was appointed Principal, enforced this payment ; (*b*) that when Mr. Alagiyawanna was Principal, the appellant had incited the students to write anti-Alagiyawanna slogans on the walls of the school. The Privy Council accepted the findings of the District Court that both these statements were true and,

Held : (1) That the affairs of the school were of such concern and interest that the publication of these statements was in the public interest or for the public benefit.

(2) That the publication of these statements could not be regarded as unjustifiable resurrection of past events no longer qualifying to attract public interest.

(3) That if any part of statement (*a*) was comment, it was fair, *bona fide* and in the public interest. It was fair and legitimate to say in Kotte that an assistant teacher at a school in Kotte who had requested children not to pay facilities fees had after becoming Principal enforced this payment.

On the Second Cause of Action

On the 12th of September, 1954, the appellant applied for permission to retire under a scheme which enabled teachers who were unable to give instructions in either Sinhala or Tamil to exercise an option to retire with compensation for loss of career. He stated that he did not consider himself competent to give instruction in Sinhala. His application was refused on the grounds that he had passed the S.S.C. Examination with Sinhala as a subject, that he had also passed the B.A. (Hons.) Indo-Aryan offering Pali and Sanskrit, and that he was also the author of a text book in Botany produced in Sinhala. It was not, however, shown that the obtaining of a B.A. Degree in Indo-Aryan from the University of London involved the passing of an examination in Sinhala nor was it shown that someone who possessed a degree in Indo-Aryan was competent to give instruction through the medium of Sinhala. Further, in regard to the text book in Botany the evidence disclosed that it was made possible with the assistance of two friends. The appellant appealed from that refusal to the Minister of Finance who was Mr. Jayawardena. In February, 1956, Parliament was dissolved. During the elections that followed, the appellant was a supporter and a worker of the U.N.P. He was seen driving a car which carried on it a poster bearing a photograph of Mr. Jayawardena, the Minister of Finance, who was a member of the U.N.P. On or about the 5th of April 1956, the elections had resulted in the defeat of the U.N.P. On the 7th of April, the Minister of Finance, Mr. Jayawardena, who had himself been defeated in the election, went to his office to discharge his duties as Minister until the 15th of April. There were some 145 appeals he had to consider before he relinquished office. He allowed the appeal of the appellant and sanctioned his retirement.

The District Judge accepted the evidence of Mr. Jayawardena that he did not bring his own mind to bear on the question of the appellant's retirement but had acted on the advice of his officials. On the 8th of May, 1956, and the 11th May, 1956, the respondent newspaper published two items of news which said : (*a*) that the appellant who had a degree in Indo-Aryan had retired on full pension on the ground of inability to teach in Sinhala ; (*b*) that a Sinhala book on Botany written by him had been accepted by the Educational Publications Board; (*c*) that the appellant worked hard for a certain political party during the elections and that it would not be difficult for the Education and the Finance Ministers of the new government to know how he could have retired during the time of the election. The statement that the appellant had retired " with full pay " was a mis-statement of fact, and so was the statement that the text book on Botany was accepted by the Educational Publications Board. In fact, the appellant did not retire " with full pay " nor was his book accepted by the Educational Publications Board.

Held : (1) That these two news items did suggest that the appellant had retired by falsely pretending that he could not teach in Sinhala, and that he had been able to retire by some improper means to which he had been a party.

(2) That in so far as the words contained a statement of facts the respondent had failed to justify them.

(3) That in so far as the words contained comment they were not fair because material facts were not truly stated, and there was no adequate foundation for the serious and damaging suggestions made in those two news items.

Per LORD MORRIS.—" The law which must be applied in approaching the issues which arise in this appeal is the law of defamation in Roman-Dutch Law as applied in Ceylon. The existence of *animus injuriandi* is therefore an essential basis of the cause of action. As Basnayake, C.J., pointed out in his judgment, defamation is a species of *injuria* and *injuria litteris* is committed when a person has assailed the reputation of another by publishing to a third person matter intended to bring him into contempt, ridicule or hatred *animo injuriandi :* and *animus injuriandi* being a state of mind has in the generality of cases to be inferred from the words and the occasion on which and the context and the circumstances in which they are used. If the existence of *animus injuriandi* is shown or can be presumed to exist, the defence may seek to negative it by raising a plea of justification. In order to establish that plea it is not enough to show that the words complained of are true : it must be shown that their publication was in the public interest or for the public benefit. A further defence that may be raised is that of fair comment. This necessitates establishing that the facts upon which the comment is based are true, that the comment is in reality comment and is fair and *bona fide*, and that the comment is made on a matter of public interest."

Judgment of the Supreme Court reported in : 62 N.L.R. 265.

Plaintiff-appellant in person.

E. F. N. Gratiaen, Q.C., with *R. K. Handoo* and *Mrs. Q. A. Nonis* for the defendants-respondents.

LORD MORRIS OF BORTH-Y-GEST

This is an appeal from the judgment and decree of the Supreme Court of Ceylon, dated the 23rd October, 1959, dismissing with costs the appeal of the appellant from the judgment and decree of the District Court of Colombo, dated the 10th June, 1957, which dismissed with costs an action for damages which the appellant brought against the respondents. At all material times the first respondents owned and the second respondent edited a Ceylon newspaper known as " Lankadipa ". The appellant alleged that on the 5th and 23rd December, 1955, on the 3rd January, 1956, and on the 8th and 11th May, 1956, the respondents published certain defamatory matter of and concerning him in the newspaper. The respondents admitted the publications and put forward pleas of justification and fair comment.

From 1934 down to April, 1955, the appellant was a teacher in the school called Ananda Sastralaya at Kotte. The appellant was an old boy of the school and as the learned District Judge held he was " a person of the locality ". For a period prior to July, 1953, he acted as Principal during the absence on leave owing to ill-health of Mr. Wickremesinghe, the Principal. In June, 1953, Mr. Alagiyawanna who was then in the Education Department was appointed Vice-Principal and after that date he acted as Principal. As a result certain difficulties arose. The learned District Judge held that although Mr. Alagiyawanna was well qualified and well suited for the post and was a sincere and honest man the appointment was perhaps in the circumstances an unhappy one. It was deeply resented by the appellant. Mr. Kularatne was then the general manager of

Buddhist Schools of the Colombo Buddhist Theosophical Society and it was he who invited and appointed Mr. Alagiyawanna to occupy the post of Vice-Principal—a new post which Mr. Kularatne then created. Dr. Adikaram, who wielded influence in the sphere of Buddhist education and who later succeeded Mr. Kularatne as Manager of the Buddhist Theosophical Society, felt that the appointment was unfair to the appellant and attempted to dissuade Mr. Alagiyawanna from accepting. Mr. Kularatne accompanied Mr. Alagiyawanna to the school on the 1st July, 1953, in order to instal him in his new office and informed the appellant that Mr. Alagiyawanna would act as Principal from that date. The appellant indicated resolute opposition and the conflict of testimony as to the unhappy events of that occasion was resolved by the learned District Judge against the appellant.

In the period that followed there were two circumstances in connection with the school which call for mention, viz., (*a*) there appeared certain writings on the walls of the school in the form of " anti-Alagiyawanna " slogans ; (*b*) there were failures in some cases to pay " facilities' fees ".

Before referring to the passages in the newspaper which gave rise to the litigation it is necessary to refer to certain events of general importance and to mention further facts in connection with the appellant's career.

After the achievement of Independence in 1948 the Government took steps to put its new educational policy into effect. It was recognised however that some teachers would be unable to give instruction in either Sinhalese or Tamil and a scheme was evolved under which teachers who were so unable could, subject to certain conditions, exercise an option to retire with compensation for loss of career. On the 12th September, 1954, the appellant, who was then on pay leave in order to study in America, applied for permission to retire under one of the provisions (Rule 6*b*) of the Teachers Pension Regulations. He stated that he did not consider himself competent to give instruction in Sinhalese. He added that, because he felt that the turn over to Swabasha was not in the interests of the country, he could not conscientiously do his best as a teacher. He further stated that he would not in 1934 have embarked upon the teaching profession if the new policy could then have been foreseen. By a letter dated the 25th November, 1954, he was informed that his application was refused. That letter was signed, not personally by, but by someone for the Director of Education. Their Lordships reject a submission advanced by the appellant that the letter should for that reason be regarded as having no effect. The appellant appealed from the decision to the Minister of Finance who was Mr. Jayawardene. He did so by letter dated the 14th March, 1955, giving as his reason for delay the fact that he had been on leave in America. He addressed a letter to the Minister of Education dated the 21st April, 1955, asking him to support the appeal. The Minister of Finance rejected his appeal. The appellant was so informed in June, 1955. In the meantime (*i.e.*, after the 14th March and before June) he had become Principal of the school. In his judgment the learned District Court Judge recorded that " in 1955 Dr. Adikaram beat Mr. Kularatne in a contest to become the manager of the Buddhist Theosophical Society. The principalship of the Ananda Sastralaya fell vacant and on 1st April, 1955, the plaintiff who was then in America was appointed principal ". By letter dated the 28th September, 1955 addressed to the Director of Education the appellant again applied for permission to retire. He did so under Rule 6*c* of the Teachers Pension Regulations which Rule had by then been added to the Regulations. For present purposes it is sufficient to state that Rule 6*c* has reference to teaching in higher classes than those to which Rule 6*b* applies. The appellant's application was based as before upon his feeling that he did not consider himself competent to give instruction in Sinhalese. In the course of his letter he stated :

> " I have had no good background in Sinhalese as indicated by the fact that for my first public examination, E.S.L.C., 1930, I did not offer Sinhalese.
>
> As a second language was compulsory I had to offer Sinhalese for the S.S.C., but I got through the examination only in my second attempt.
>
> Subjects for my Intermediate Examination were Mathematics, Botany and English. I studied for my degree in Indo-Aryan in the University of London reading and writing the subjects in the Roman Script.
>
> I find it extremely difficult to continue in the profession under the Government's Swabhasa Policy."

By a letter dated the 29th November 1955 from the Director of Education (which was signed for him) the appellant was informed that he could not be permitted to retire under the provisions of Rule 6*c*.

In January, 1956, the appellant was given a medical certificate which recommended an absence from duty for a month and during January, February and March, 1956, he was given permission by Dr. Adikaram to be away from the school. By letter dated the 10th February, 1956, the appellant appealed to the Minister of Finance against the decision of the Director of Education refusing him permission to retire under the Teachers Pension Regulations. In the course of his letter he stated :—

"In the whole of my career as a teacher I have never been taking a class in Sinhalese.

I have no good background in the subject as indicated by the fact that for my first public examination (E.S.L.C., 1930) I have not offered Sinhalese.

My subjects for the Intermediate were English, Mathematics and Botany and for my degree in Indo-Aryan I studied in the University of London—under a German Professor who had no knowledge in Sinhalese—reading and writing the languages in the Roman script.

May I submit that I am convinced that the turnover to Swabasha is detrimental to the progress of the country and as such I am unable to do my best in my profession.

My present position requires a very sound knowledge in Sinhalese. Other than teaching much public speaking and correspondence has to be done by a Principal of an Assisted School to collect funds to put up buildings etc."

On the 19th February Parliament was dissolved. In the ensuing election the appellant was a supporter of and a worker for the U.N.P. party. As members of that party Mr. Anandatissa de Alwis and Mr. Jayawardene (the Minister of Finance) contested respectively the Kotte and the Horana seats. The appellant issued a pamphlet in the Kotte division in support of the U.N.P. cause and candidate. He had also been seen driving a car at Horana which carried on it a poster bearing a photograph of Mr. Jayawardene.

In connection with the appellant's appeal to the Minister of Finance the Director of Education addressed a letter dated the 7th March, 1956 to the Permanent Secretary to the Ministry of Education in the course of which he stated:-

"2. Mr. Costa admits that he passed the S.S.C. Examination with Sinhalese as a subject. He also passed the B.A. Hons. Indo-Aryan Examination offering Pali and Sanskrit. He is also the author of a Text Book in Botany produced in Sinhalese. It is for this reason that he was not allowed to retire under Rule 6c.

3. In fairness to Mr. Costa, it must also be stated that although he had passed in Sinhalese at the S.S.C. Examination he has not, in his career, taken a class of students in Sinhalese. It is correct to state that when he studied for the Indo-Aryan Hons. Examination in London his Professor was a German who used the Roman Script in teaching him Pali and Sanskrit. He also maintains that the text book in Botany was prepared by him over a period of years in English but that he had obtained the assistance of Messrs. K. C. Weerasinghe and Sunil Wijewickrema to do the book in Sinhalese. This point is made by him in the final paragraph of the introductory note to his book which is sent herewith for reference and return.

4. I should like to state that Mr. Costa has interviewed me on several occasions and has pointed out to me his utter inability to cope with the responsibilities, which devolve on him as the Principal of a Secondary School as a result of his imperfect knowledge of the Sinhalese Language."

On about the 5th April 1956 it became known that the election had resulted in the defeat of the U.N.P. party with the consequence that there would be a change of government. There was later a new Cabinet. On the 7th April the Minister of Finance (Mr. Jayawardene), who had himself been defeated in the election, went to his office in order to attend to outstanding matters which awaited him. He had to discharge his duties as Minister until the 15th April. Amongst other matters there were some 145 appeals which he had to consider before he relinquished office. In dealing with these he relied entirely on the minutes made by officials in his Ministry and in the Ministry of Education. Amongst the appeals with which he dealt was that of the appellant. He allowed the appeal and sanctioned the retirement of the appellant. That was on the 7th April, 1956. The learned District Judge accepted his evidence to the effect that he did not bring his own mind to bear on the question of the appellant's retirement. The learned Judge said that he did not for a moment believe that Mr. Jayawardene's action was prompted by any improper motives. The learned Judge did, however, consider that those who were responsible for advising the Minister had at that point of time completely changed their minds or had been persuaded to do so even though no fresh material was placed before them.

The passages in the newspaper in respect of which the appellant instituted his action fall into two groups. These were referred to in the District Court and in the Supreme Court as the first and second causes of action respectively and for that reason (even though strictly speaking each passage, if defamatory, would ground a separate cause of action) a similar mode of reference may be adopted.

The first cause of action relates to the publication of :—

" (1) a news item in the issue of the ' Lankadipa ', dated 5th December, 1955, under the heading ' Kasu Kusu ', and

(2) two letters in the issues of the ' Lankadipa ', on 23rd December, 1955, and 3rd January, 1956, respectively.

The news item in question (P1 of 5th December, 1955) is as follows :—

" The people of Kotte question as to why the assistant teacher who carried on a powerful campaign requesting the children of a certain Buddhist school in Kotte not to pay facilities fees is enforcing the payment (of facilities fees) on becoming the Principal."

The letter published on 23rd December, 1955, is from one Mahindapala Boteju (P2) but the complaint is only in respect of the following passages contained therein:

(*a*) " It was when the present Principal was an assistant teacher in the same school that the children were encouraged not to pay and led astray.

(*b*) The fact that black stains are sprinkled on the glory that was of the school can be seen from the talks that go on at the (road) junctions here. The staff is opposed to the Principal ; excepting one third, all the rest of the students are opposed to him."

The letter of 3rd January, 1956, (P3) is written by one Kirtisiri Ameratunge and the passage complained of in the letter is as follows:—

" As a past student I know that it was the present Principal who made the students disobedient and act as rebels. Everyone who was at the Sastralaya during the time of the Principalship of Mr. S. Wickremasinghe knows that it was the present Principal who set the children against the then Vice-Principal, Mr. Alagiyanna, who is now the Principal of Sri Sumangala Vidyalaya, Panadura."

" To obstruct the work of the school the present Principal who was then an assistant teacher induced not only the students but also their parents not to pay facilities fees. It is not a secret as to who got the students to write the anti-Alagiyawanna slogans on the school buildings."

The appellant pleaded that these statements involved the following innuendos :—

(1) that the appellant when an assistant teacher misused his position as teacher by inciting the students and their parents not to pay facilities fees and that in so doing he was actuated by unworthy and dishonest motives ;

(2) that the appellant secured his appointment as Principal by these unfair and unworthy methods ;

(3) that the appellant was directly responsible for the students of the said school becoming disobedient and rebellious ;

(4) that the appellant by these actions had forfeited the confidence of the people of Kotte, his own staff and pupils and was, therefore, not a fit and proper person to be either a teacher or a Principal ; and

(5) that the appellant by his actions has brought dishonour on the name of the school."

In respect of that cause of action the appellant claimed a sum of Rs. 50,000/-.

The second cause of action relates to certain publications which appeared in the same newspaper after the appellant had retired from the post of Principal.

" The first of these publications appeared in the ' Lankadipa ' of 8th May, 1956, as a news item. It is as follows :—

' Mr. N. W. de Costa, Principal, Ananda Sastralaya, Kotte, has retired from the post of Principal. He who has a degree in Indo-Aryan has retired on full pension under the regulations for retirement due to his inability to teach in Sinhalese. The Sinhalese book titled " Udbhida Vidyawa " is a book written by him. In a short time he will be leaving for America to teach English ',

" The second publication is a letter written by one K. Jayasekera and published in the issue of the ' Lankadipa ' of 11th May, 1956. The passages complained of are as follows :—

' It was published in the " Lankadipa " that Mr. N. W. de Costa, Principal Ananda Sastralaya, Kotte, retired on the ground of inability to teach in Sinhalese. He has an external degree in Indo-Aryan of the University of London. The book titled " Udbhida Vidyawa " which is accepted by the Education Publications Board is written by him. But it is a wonder to the people of Kotte and Horana as to how he retired with full pay. Though he did not go to school for the whole of last term, he worked hard at Kotte and at Horana for a certain political party. Further, he issued leaflets under his name. It is not difficult for the Education Minister

and the Finance Minister of the new Government to know how he could retire during the time of the election though his previous attempts to retire were unsuccessful '."

The innuendo in regard to those publications which was pleaded by the appellant was as follows :—

"The plaintiff although well qualified in Sinhalese had by falsely pretending he could not teach in Sinhalese and by employing other corrupt means obtained the permission of the Government to retire from the teaching service."

In respect of that cause of action the appellant claimed a sum of Rs. 60,000/-.

The respondents pleaded justification, qualified privilege, fair comment and absence of *animus injuriandi*.

A large number of issues were framed at the trial. The learned District Judge found numerous issues of fact in favour of the respondents and dismissed the action. The appeal in the Supreme Court was heard by Basnayake C.J., Pulle J. and Sinnetamby J. By a majority judgment (Basnayake C.J. dissenting) the appeal was dismissed and the judgment of the learned District Judge was affirmed. The learned Chief Justice considered that the appellant was entitled to succeed in his claim and would have awarded him Rs. 5,000/- damages.

The law which must be applied in approaching the issues which arise in this appeal is the law of defamation in Roman-Dutch law as applied in Ceylon. The existence of *animus injuriandi* is therefore an essential basis of the cause of action. As Basnayake C.J., pointed out in his judgment defamation is a species of *injuria* and *injuria litteris* is committed when a person has assailed the reputation of another by publishing to a third person matter intended to bring him into contempt ridicule or hatred *animo injuriandi :* and *animus injuriandi* being a state of mind has in the generality of cases to be inferred from the words and the occasion on which and the context and the circumstances in which they are used. If the existence of *animus injuriandi* is shown or can be presumed to exist the defence may seek to negative it by raising a plea of justification. In order to establish that plea it is not enough to show that the words complained of are true : it must be shown that their publication was in the public interest or for the public benefit. A further defence that may be raised is that of fair comment. This necessitates establishing that the facts upon which the comment is based are true, that the comment is in reality comment and is fair and *bona fide*, and that the comment is made on a matter of public interest.

Their Lordships think that it will be convenient to deal separately with the two causes of action. The first cause of action relates to the publications of the 5th December 1955, 23rd December 1955, and the 3rd January 1956. Their Lordships consider that the ordinary and natural meaning of the language used is clear. There does not appear to be any necessity for ascribing secondary meanings. In agreement with the view expressed by Sinnetamby J., Their Lordships consider that there is nothing in the passages which suggests to the average reader that the appellant secured his appointment as Principal by inciting students and parents not to pay facilities fees.

The decision in regard to this first cause of action will, Their Lordships think, mainly depend upon the question as to whether certain facts were established. The passages are really founded and built upon two assertions of fact. One of these concerns facilities fees. The passages first assert that whereas when the appellant was an assistant teacher he carried on a campaign requesting students and their parents not to pay facilities fees when he became Principal he enforced the payment of facilities fees. If there were such requests the use of the word "campaign" lacks importance. Nor did the description of the campaign as a powerful one add to the significance of the words. The other assertion contained in the passages is that the appellant set the children against the then Vice-Principal, Mr. Alagiyawanna, and induced them to write "Anti-Alagiyawanna" slogans on the school buildings. Assuming that these two serious assertions or statements of fact were shown to have been true Their Lordships consider that the affairs of the school were of such concern and interest that publication of the passages was in the public interest or for the public benefit. Furthermore if some words in or parts of the passages were by way of comment on the facts set out in the passages the comments appear to Their Lordships to have been fair and *bona fide* and in the public interest. Their Lordships do not consider that in the circumstances of this case the passages are to be characterised as unjustifiable resurrections of past events no longer

qualifying to attract public interest. The vital issue as to this part of the case is whether the two statements were true. The learned District Court Judge, advantaged as he was by seeing and hearing the witnesses, has found that the statements were true. He heard four young men and he stated in his judgment that " according to them it was the plaintiff who was responsible for the anti-Alagiyawanna slogans and it was he who instigated students to refrain from paying facilities fees ". Each one of the four young men did not testify in regard to both those matters but both those matters were established if the testimony of the young men was acceptable. The learned District Judge in his Judgment examined carefully the criticisms of their evidence which Counsel had advanced but held that he could not agree that the witnesses were unworthy of credit. He expressly stated that they impressed him favourably and that he accepted their evidence in preference to that of the appellant. Their Lordships observe that one of the witnesses (Dharmakirti) stated that the appellant had asked him not to pay facilities fees and in his presence had likewise asked other students and had asked him to go and persuade other students and further had given as a reason for not paying that a part of the fees went to Mr. Alagiyawanna.

In the passage which was published on the 23rd December, 1955, there occurs the sentence :— " The staff is opposed to the Principal ; excepting one-third all the rest of the students are opposed to him ". There was evidence which suggested that there were factions on the school staff and which showed that the troubles concerning admission cards for the examinations were discussed in Kotte and caused distress among the students. Though it was not shown that all the staff were opposed to the appellant and though the stated percentage of student opposition was not proved the sting of the passages complained of in the first cause of action did not rest in the sentence quoted. If it was shown that when the appellant was a teacher he carried on a campaign requesting students and their parents not to pay facilities fees, and that when he was Principal he enforced the payment of such fees, and if it was shown that the appellant had set the children against Mr. Alagiyawanna and had induced them to write "Anti-Alagiyawanna " slogans on the school buildings, Their Lordships consider that the appellant could not succeed in respect of the first cause of action. There were conflicts of evidence at the trial but there was evidence which, if accepted by the learned Judge, warranted him in reaching the conclusions of fact which he expressed. Their Lordships see no basis for disturbing them.

In regard to the publication of the 5th December 1955, Their Lordships have noted that the opening words are : " The people of Kotte question as to why . . . ". It was urged that the evidence did not establish that the matters referred to were the talk of Kotte. Here is an example of words which on one view record a statement of fact and on another view express a comment. If the words are recording fact Their Lordships would not regard the words as stating that all the people of Kotte were making the matters referred to their topic of conversation. If the view is held that fact was being recorded there was some evidence that the matter of admission cards was " the talk of Kotte " and there was some evidence that " school affairs were being discussed at junctions and on the road ". Their Lordships consider however that, more naturally interpreted, the words do no more than express a comment on a matter which was claimed to be of public interest to the people of Kotte. The comment (if founded on facts truly stated), that someone who as an assistant teacher at a school in Kotte had requested children not to pay facilities fees was after becoming Principal enforcing their payment was in Their Lordships' view one that it was fair and legitimate to express in Kotte.

In regard to the first cause of action Their Lordships have not been persuaded that the conclusions reached by the learned Judge at the trial and by the majority in the Supreme Court were erroneous.

Their Lordships now pass to consider the second cause of action which relates to the publication of the 8th and 11th May, 1956. The learned Judge at the trial held that the words did bear the innuendo which was pleaded. The view of the majority in the Supreme Court was that " while the passages themselves convey to the minds of the reader the suggestion that the plaintiff retired by falsely pretending that he could not teach in Sinhalese though well qualified in that language " the passages did not necessarily suggest that corrupt means were employed in obtaining permission to retire. They added that the passages did not " suggest corruption as such unless it be limited to the fact that the plaintiff was able to retire by working for a " certain political party ". Their conclusion was that the final passage of the words published on the 11th May certainly suggested that the appellant was able to retire by improper

means though they thought that the words were mainly directed against the retiring Finance Minister.

Their Lordships consider that the passages do contain the suggestions (*a*) that the appellant had retired by falsely pretending that he could not teach in Sinhalese ; and (*b*) that it was as a result of some improper means to which he had been a party that he had been able to retire. (The writer of the letter of the 11th May clearly intended so to suggest).

In so far as the words contain statements of fact to such effects Their Lordships do not consider that justification was established. In so far as the words contain comment it becomes necessary to consider whether there was the requisite basis for establishing the plea of fair comment.

Certain additional facts must now be mentioned. The appellant has a degree in Indo-Aryan. It is a degree in the University of London. It was not, however, shown that the obtaining of such a degree involved the passing of an examination in Sinhalese or that the appellant offered Sinhalese as a subject for his degree. Nor was it shown that someone who possessed a degree in Indo-Aryan was competent to give instruction through the medium of Sinhalese to the class designated in paragraphs 6*b* and 6*c* of the Teachers Pension Regulations. In studying for his degree in Indo-Aryan in the University of London he had read and written the subjects in the Roman Script. The appellant was the author of a book entitled " Udbhida Vidyawa ". The evidence showed that in so far as it could be said that the book was written by the appellant in Sinhalese that was only achieved with the assistance of two friends. (The appellant's version was that he prepared the book in English and that it was translated into Sinhalese by the two friends). The book was not accepted by the Educational Publications Board.

There was evidence which established that for many purposes the appellant had a measure of competence in Sinhalese. In his judgment in the Supreme Court Sinnetamby J. said : " It is also significant that throughout his efforts to retire on the ground that he could not teach in Sinhalese the plaintiff concealed the fact that he passed the London Matriculation in Sinhalese which was calculated to create the wrong impression that he passed in Sinhalese only in the S.S.C. and that, too, at the second attempt, *vide* D. 17 ; actually, though he failed the entire examination in his first attempt, he passed in Sinhalese ". It is to be observed, however, that the appellant did not assert that he had no understanding of Sinhalese. His applications to retire under the provisions of the Teachers Pension Regulations were not based upon any such suggestion : they were based upon his claim that the imperfections in his knowledge of Sinhalese were such that he lacked a proper competence to give instruction in that language.

If the words giving rise to the second cause of action are regarded as containing a statement of fact that the appellant had falsely pretended that he could not teach in Sinhalese their Lordships consider that the evidence fails to establish the truth of any such statement. Likewise if the words are regarded as containing a statement of fact that his permission to retire was the result of employing improper means the truth of such statement was not established. The suggestion which the words conveyed was that an application which lacked merit was acceded to as the reward for political service rendered to the Minister. Their Lordships consider that the evidence did not warrant this suggestion. It was not shown that the Minister had knowledge of the political activities—such as they were—of the appellant. Quite apart from this the finding of the learned Judge at the trial was that the Minister in reaching his decision relied entirely on the advice of his officials. The part played by the appellant in the election did not have any effect so far as the fate of his appeal to the Minister of Finance was concerned.

It remains for Their Lordships to consider whether to the extent that the words which are the basis of the second cause of action can be regarded as comments the defence of fair comment can avail the respondents. Some of the words may be regarded as introducing or denoting comment. By way of example it may be said that the words " But it is a wonder to the people of Kotte and Horana as to . . . " are introductory to and indicative of comment. To the extent that the words which are the basis of the second cause of action suggest comments—the comments are undoubtedly adverse to the appellant. One comment, if comment it be, is that the appellant had been allowed to retire on account of inability to teach in Sinhalese in spite of the fact that he was really quite competent to teach in that language. Another is that though he was able to teach in Sinhalese and had not been successful in his application to retire yet by working hard

during the election he had secured a reversal of a previous decision. Their Lordships consider that these comments could not in any event be justified as being fair unless they were founded on facts truly stated which gave adequate support for them. Some of the statements which were made were incorrect. It was stated that the appellant had retired " with full pay ". The writer of the letter was completely misinformed as to this and he took no step to verify the statement that he made. The appellant did not retire with full pay. That was a particularly serious mis-statement. The statement that the book " Udbhida Vidyawa " was accepted by the Educational Publications Board was also incorrect. The statement that the book was written by the appellant did not convey the information which in the context and in the circumstances was relevant and which called for mention, *i.e.*, that its appearance in Sinhalese was only made possible by reason of the assistance which the appellant had received. Apart, however, from these considerations Their Lordships are of the opinion that the material was quite inadequate as the foundation of the serious and damaging comments (assuming that the passages can be regarded as comments) that were made. The facts do not support the serious critical comment to the effect that the appellant's claim to retire on account of inability to teach in Sinhalese was based on false pretences. Neither do the facts give support for a comment that the permission given to the appellant to retire was improperly secured as the reward of partisan political service.

Whichever approach is followed their Lordships consider that neither the defence of justification nor that of fair comment was established. Their Lordships consider that the appellant was entitled to succeed in respect of the second cause of action. In considering the amount which should be awarded Their Lordships have paid great heed to the assessment made by the learned Chief Justice, while remembering that his figure was awarded on the basis that the appellant should succeed on the first as well as on the second cause of action. Having regard to the content of the defamation covered by the second cause of action which involved what were undoubtedly the more serious allegations their Lordships consider that an award of Rs. 5,000/- should be appropriate to the case.

Their Lordships will humbly advise Her Majesty that the appeal should be allowed, that the judgments of the District Court and of the Supreme Court should be set aside and that judgment should be entered for the appellant for Rs. 5,000/-. The respondents must pay the appellant one half of his costs of the trial and such costs as he incurred in the Supreme Court and before Their Lordships' Board.

Appeal allowed.

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

L. P. DAYAWATHIE *vs.* V. T. DE SILVA & OTHERS

Application No. 325—*D.C. Matara, No.* 21360.

In the matter of an application to set aside and/or vacate the order dated 23rd *January*, 1961 *made in S.C.* 5443/*F*/58, *D.C. Matara.*

Argued on : 10th November, 1961 and 26th November, 1961.
Decided on : 28th November, 1961.

Civil Procedure Code—Minor defendant attaining majority while action pending—Fact of majority not brought to notice of Court—Whether minor was properly represented—Was minor bound by the decree entered against her—Should notice of appeal have been served personally on minor in such a case—Does remedy by way of revision or restitution lie—Civil Procedure Code, section 771.

A minor defendant, who was represented by a *guardian-ad-litem* in a pending action, attained majority without bringing that fact to the notice of Court. The District Court dismissed the plaintiff's action against the minor after she attained majority and when she continued to be represented by the guardian. The plaintiffs appealed to the Supreme Court which set aside the judgment of the District Court and gave judgment for them against the defendant. The same *guardian-ad-litem* represented the defendant while the appeal was pending and when the order of the Supreme Court was delivered. The defendant contended that the Supreme Court order was not binding as notice of the appeal had not been served on her and sought to have it set aside by way of revision or restitution.

Held : (1) That a minor, who is a defendant, and on attaining majority does not bring that fact to the notice of Court and ask that his *guardian-ad-litem* be released from the case is bound by all the orders of the Court.

(2) That the minor was duly represented both in the District Court as well as in the Supreme Court and the decree of the Supreme Court entered against him was not a nullity.

Held further : (3) That in any event, even if she was not given due notice of appeal, the defendant-petitioner could have applied for relief under section 771 of the Civil Procedure Code and the remedy of revision on restitution was, therefore, not available to her.

Cases referred to : *Umra* v. *Barkat Ali*, (1928) A.I.R. Lahore 371.
Lanka Sanyasi v. *Lanka Yerran Naidu*, (1928) A.I.R. Madras 294.
Seshagiri Rao v. *Jaggannadham*, (1918) 39 Madras 1031.
Bharasa Row v. *Sukhdeo*, (1926) A.I.R. Calcutta 1053.
Sheomangal Singh v. *Birendra Bahadur*, (1949) A.I.R. Allahabad 169.

G. T. Samarawickreme with *N. E. Weerasooriya (Jnr.)*, for the defendant-petitioner.

H. W. Jayawardene, Q.C., with *C. P. Fernando*, for the plaintiff-respondents.

TAMBIAH, J.

This is an application made by the defendant-petitioner by way of revision or restitution to set aside or vacate the order of this Court made on the 23rd of January, 1961, in S.C. Matara, 21360. It is common ground that the land, which is the subject-matter of this action, was owned by one L. Lewis, who by last will 2 D 1 of 1923, bequeathed his property to his son, Geeris. Geeris died leaving behind his widow, the 1st defendant, and his children, the 3rd, 4th, 5th, 6th and 7th defendants. Lewis also had an illegitimate son called Adiris, who is the 2nd defendant in this case. Adiris later married the 1st defendant, who by deed 3 D 2 of 1945, gifted the land in question to the 1st defendant, who by deed P 3 of 1947, sold the same to the 1st and 2nd plaintiffs. The plaintiffs instituted this action originally against the 1st and 2nd defendants and asked for declaration of title and for ejectment and damages. Answer was filed by the defendants in which they stated that the will, 2 D 1 of 1923, created a *fidei commissum* in favour of the children of Geeris. In view of the position taken in the answer, the 3rd-7th defendants were added as parties and the case proceeded against all defendants.

When the 3rd-7th defendants were added as parties, they were minors and the 2nd defendant was appointed as *guardian-ad-litem* over them. The plaintiffs' action was dismissed on the 30th of October, 1958. They appealed and, by judgment dated 23rd of January, 1961, this Court reversed the findings of the learned District Judge and gave judgment for the plaintiffs on the ground that the will, 2 D 1 of 1923 did not create a *fidei commissum* in favour of the 3rd-7th defendants.

The 5th defendant died on the 1st of November, 1945, and the 6th defendant, who is the defendant-petitioner in the present application, attained majority on the 2nd of January, 1958, so that when the judgment of the District Court was delivered, the defendant-petitioner had already attained majority, although this fact was not brought to the notice of the Court by him. The resulting position is that the defendant-petitioner was continuously represented by the 2nd defendant as *guardian-ad-litem*. The defendant-petitioner's contention is that a decree had been entered against the estate of the 5th defendant after his death and without a proper representative being brought on the record. The defendant-petitioner further contended that the Supreme Court decree against her is not binding as notice of appeal had not been served to her. She also stated that she was unaware of the fact that there had been an appeal. The plaintiffs have filed affidavit traversing these grounds. They state that they were unaware of the death of the 5th defendant but the defendant-petitioner was aware of the death of the 5th defendant and had deliberately not brought this fact to the notice of the Court. The funeral was not held in the village and there is no reason for us to reject the statement of the plaintiffs on this matter.

The plaintiff-respondents' counsel contended that at the time the judgment of the District Court was delivered, the defendant-petitioner had become a major and, further, he was represented by both counsel and proctor in the District Court

as well as in this Court. This contention is borne out by the journal entries in this case. The counsel, therefore, contended that if a minor, who is a defendant, after attaining majority, does not bring this fact to the notice of the Court and ask that his next-friend or guardian be released from the case, then he is bound by all orders made by the Court.

Although express provision is made in the Civil Procedure Code to enable a minor plaintiff, who has attained majority, to elect to proceed with the action [*vide* section 486 of the Civil Procedure Code (Cap. 101)], nevertheless no provision is made in it for a minor defendant, who has attained majority, to make an application electing to proceed with the case. The position is the same in India (*vide* Rules 12 and 13, Order 32 of the Indian Civil Procedure Code). Commenting on this, Zafar Ali, J., states in the case of *Umra* v. *Barkat Ali*, (1928) A.I.R. Lahore, p. 371, at 373, " The reason for this omission obviously is that while a plaintiff on becoming major can put an end to the litigation a defendant on attaining majority cannot do so and the case must proceed. He has notice of the case already and so no further notice of it need be given to him. It is absurd to say that the plaintiff or the Court should give notice to him that he had become major, a fact which he must know. If he should fail to take any action on attaining majority, the presumption is that he chose to allow the case to be conducted by his quondam guardian or by the counsel that was engaged by that guardian. It cannot in these circumstances be said that the Court had no jurisdiction to proceed with the case or that the decree passed by it was a nullity ".

In *Lanka Sanyasi* v. *Lanka Yerran Naidu and others*, (1928) A.I.R. Madras, p. 294, the Court held that the mere circumstance that a minor defendant had attained majority during the pendency of the suit and has not elected to continue the defence himself, is not sufficient to enable him to have declared as not binding on him the judgment duly pronounced by the Court. The learned judges who decided this case, following the decision of *Seshagiri Rao* v. *Jagannadham* (1918) 39 Mad., 1031, observed that " the minor defendant who comes of age may if he thinks fit come on the record and conduct the defence himself. If, however, he does not do so and allows the case to proceed as though he was still a minor without bringing to the notice of the Court the fact of his having attained majority, then he must be deemed to have elected to abide by the judgment or adjudication by the Court with respect to the matters in controversy on the basis of the suit at the time ". (*Vide* also *Umra* v. *Barkat Ali* (*supra*), at 373). It has been held in India that it is the duty of the minor to apply for the discharge of a *guardian-ad-litem* (*vide Bharasa Now* v. *Sukhdeo and others*, (1926) A.I.R. Calcutta, p. 1053), if he wishes to adopt such a course.

The reasoning is based on a sound principle and there is no reason why we should not follow it in Ceylon. We hold, therefore, that the defendant-petitioner was duly represented both in the District Court as well as in the Supreme Court. It is not open for him to ask for the relief which he claims in this application. The decree obtained is not a nullity (*vide Sheomangal Singh* v. *Birendra Bahadur*, (1949) Allahabad, p. 169, at 169 and 170), and cannot be set aside at the instance of the defendant-petitioner.

Further, even assuming that the defendant-petitioner was not given due notice of appeal in this Court, he could have still applied under section 771 of the Civil Procedure Code which afforded her relief. Even on this ground, revision by way of restitution does not lie on behalf of the petitioner since it is a well-known principle that these extraordinary remedies do not lie to a person who has another effective remedy at law.

The defendant-petitioner has averred that L. P. Gunapala, the 5th defendant, died leaving other lands to the value of Rs. 20,000/- and that the Supreme Court decree against her is a nullity. The question as to whether the 5th defendant died leaving property to the value of Rs. 20,000/- will depend on the question as to whether the will in question created a *fidei commissum*. Be that as it may, even assuming that he had left property over the value of Rs. 20,000/-, the proper person who could represent his estate would be the administrator or executor of his estate (*vide* section 547 of the Civil Procedure Code). The heirs of the 5th defendant, including the defendant-petitioner, were all present in the Supreme Court. The defendant-petitioner, who could have informed the Court of the death of the 5th defendant, cannot in these proceedings ask for a declaration that the estate of the 5th defendant is not bound by the order of the Supreme Court.

We dismiss the application with costs.

T. S. FERNANDO, J.
I agree.

Application dismissed.

IN THE COURT OF CRIMINAL APPEAL

Present : **Basnayake, C.J. (President), Weerasooriya, J., and de Silva, J.**

THE QUEEN *vs.* G. M. A. ABEYRATNE

Appeal No. 65 *with Application No.* 67 *of* 1961—*S.C. No.* 2, *M.C. Colombo, No.* 21126/*A.*

Argued on : 31st July and 1st, 2nd, 3rd, 4th and 21st August, 1961.
Decided on : March 26, 1962.

Court of Criminal Appeal—Accused convicted on charges relating to counterfeit notes—Hearsay evidence admitted without objection—Effect of such evidence—Failure to call material witnesses for prosecution though available—Evidence Ordinance, section 114*—Attention of jury to be invited to presumption drawn thereunder—Self-contradictory evidence of a material witness.*

Criminal Procedure Code, section 122*—Evidence led in contravention of—Failure on the part of the trial judge to invite attention of jury to such infirmities.*

Judge's power to question witnesses and parties—Limitation to section 165 *of the Evidence Ordinance.*

Held : (1) That even though no objection is taken to the admission of hearsay evidence, such admission is illegal.

Followed : *Lim Yam Hong & Co.* v. *Lam Choong & Co.*, (1928) A.I.R. (Privy Council) 127.

(2) (*a*) That the failure of the prosecution to call James Appuhamy a material witness, not only rendered the evidence of what he had said to the witness Strong, inadmissible, but also seriously affected the rest of Strong's evidence.

(*b*) That such failure entitled the defence to ask the jury not only to reject Strong's evidence about James Appuhamy, but also to presume that if the latter had, in fact, been called his evidence would have been unfavourable to the prosecution.

(3) That in the present case the prosecution had failed to establish that the accused knew or had reason to believe that the note P 1 was counterfeit and that he intended to use it as genuine. For this purpose it had relied only on the evidence of witness, Selvadurai, who proved himself to be an unreliable witness.

(4) That the learned trial Judge should have drawn the attention of the jury to the fact that Inspector Selvadurai (the Police officer on whose evidence the prosecution relied to prove the accused's knowledge that the notes were counterfeit) had contradicted himself on material points and that his evidence should be regarded as unreliable.

Followed : *Regina* v. *Golder*, (1960) 1 W.L.R. 1169; (1960) 3 A.E.R. 457

(5) That the failure of the prosecution to call the other police officer who was said to have been with Inspector Selvadurai when the accused's table was searched and whose name was on the back of the indictment—

(*a*) cast a further doubt on the veracity of Inspector Selvadurai especially as there were other witnesses who gave evidence to the effect that *only* Inspector Selvadurai and the accused were present when the table was searched ;

(*b*) gave rise to the presumption under section 114 of the Evidence Ordinance that the evidences of this witness would, if he had been called, been unfavourable to the prosecution. *The attention of the jury should have been drawn to this presumption.*

(6) That the words " in order to discover or to obtain proper proof or relevant facts " in section 165 of the Evidence Ordinance place a limitation on the powers of a judge to ask any question he pleases in any form of any witness or of the parties to a case.

Per BASNAYAKE, C.J.—" In the course of the trial the learned Commissioner used the information book in contravention of the provisions of section 122 (3) of the Criminal Procedure Code and permitted oral evidence to be given of the contents of other documents without the documents themselves being produced. Evidence of statements made by witnesses examined in the course of the investigation under Chapter XII of the Criminal Procedure Code was given by Selvadurai in contravention of the prohibition in section 122 (3). The learned Commissioner has in his summing-up failed to draw the attention of the jury to the many infirmities in the prosecution case and to put before them the points made by the defence."

Colvin R. de Silva with *Mangala Moonesinghe*, *N. S. A. Goonetilleke* and *E. B. Vannitamby* (*assigned*), for the accused-appellant.

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

BASNAYAKE, C.J.

The accused-appellant was indicted on the following three charges :—

" 1. That on or about the 23rd day of July, 1959, at Colombo in the division of Colombo, within the jurisdiction of this Court, you did have in your possession a counterfeit note to wit, a fifty-rupee note bearing No. A/71-38750 and No. A/71-38752 knowing or having reason to believe the same to be counterfeit and intending to use the same as genuine and that you have thereby committed an offence punishable under section 478C of the Penal Code.

" 2. That at the time and place aforesaid and in the course of the same transaction you did use as genuine the counterfeit currency note described in count 1 above knowing or having reason to believe the same to be counterfeit and that you have thereby committed an offence punishable under section 478B of the Penal Code.

" 3. That on or about the 24th day of July, 1959, at the place aforesaid you did have in your possession twelve counterfeit currency notes to wit, twelve fifty-rupee notes bearing numbers A/71-370417, A/71-95080, A/71-70558 and 870555, A/71-328019 and 28019, A/71-15102, A/71-20144, A/71-370406, A/71-81594, A/71-95092 and 95091, A/71-38835, A/71-95049 and A/71-325711, knowing or having reason to believe the same to be counterfeit and intending to use the same as genuine or that the same may be used as genuine and that you have thereby committed an offence punishable under section 478C of the Penal Code."

He was unanimously found guilty of all the charges by the jury and sentenced to undergo ten years' rigorous imprisonment on each count, the sentences to run concurrently.

The case against the accused rests mainly on the evidence of the witnesses, Jansen and Strong and Sub-Inspector Selvadurai (hereinafter referred to as Selvadurai). The accused was at the material time the personal Stenographer of the Chief Accountant of the Co-operative Wholesale Establishment at Rosmead Place (hereinafter referred to as the C.W.E.). He received a salary of Rs. 400/- with allowances and had been 12 years in the Establishment's service. Jansen and Strong were both clerks in the same establishment, the former over ten years in service and the latter about seven years.

Jansen who was a bachelor had taken leave about March, four and half months prior to the day in question, as he was suffering from tuberculosis. He had been at the Welisara Chest Hospital and was convalescing at a boarding house at 6, Symonds Road where the business of Victory Florists was also run. He received a salary of Rs. 315/- per mensem and was not well off although he had pledged his credit for obtaining a radiogram for Rs. 500/- for the accused from the C.W.E. He had only Rs. 16/- in cash with him on the date in question and Rs. 8/- in the Post Office Savings Bank. As the accused had failed to honour his obligation to pay the agreed amount monthly he says he 'phoned up the accused when he returned from hospital and asked him to make good his default as he had paid only two instalments in January and February.

Strong purported to deliver to Jansen a letter from the accused. When he opened the envelope he found a fifty rupee note with a covering letter. Jansen gave Strong the fifty rupee note and asked him to buy five packets of cigarettes and get change for the note as Strong wanted a loan of Rs. 2/-. It is not clear why he did that when he had Rs. 16/- from which he could have given so small a loan. Strong went to about six shops and boutiques in the neighbourhood but was unable to get change for the note. In a Chinese shop to which he went the shopkeeper actually took out five ten-rupee notes but changed his mind at the last moment and gave the note back. He went back to Jansen and informed him that as he was unable to change the note in that area he would try a man called James he knew at Avondale Road. As soon as James took the note into his hands and looked at it he said, " This is a bad note, don't try to change this ". He handed the note back and gave Strong Rs. 10/- without even being asked for money. Strong returned to Jansen's boarding with the fifty rupee note and handed it to him with an account of what had happened. Jansen refused to touch the note and asked Strong to return it to the accused. Strong then took the letter and envelope from Jansen and decided to go to the Maradana Police Station. When he was about to proceed thither he saw two police officers near by and went up to them. One of them was Selvadurai who took the note, the letter and the envelope he had with him. Strong was unable to say whether P 1 was the note he received from

Jansen as he had not paid any particular attention to it. The identity of the note he had with the note P 1 depends on the evidence of Selvadurai. In challenging its identity the defence laid great emphasis on the failure of Selvadurai to initial and date it immediately he got it into his hands, especially as other fifty rupee notes, both forged and genuine, were seized the next day in raids on certain houses. The letter which purported to come from the accused is undated and contains no address from which it was written. It reads as follows :—

" My dear Jansen,

I had to take my salary today to enable you to be paid this amount.

I know your difficulties and it is not that I have forgotten you but due to my very bad financial resources that my promises have not been kept.

Hope you will be well soon.

Yours sincerely,
GERALD."

The envelope which is an official envelope of the C.W.E. only bore the " H. D. Jansen, Esq." without any address.

Jansen admitted that he received the letter that Strong brought. He did not say from whom it was, but Jansen assumed it was from the accused as he thought that the letter and cover were in his handwriting. As it was undated he said he noted the date " 23.7.59 " on it in pencil. He admitted that he handed the currency note in the letter to Strong with a request to buy cigarettes and change it and that Strong returned after sometime and informed him that somebody had said it was a forged note. He also admitted that he then asked him to return it to the accused, and that about a minute or two after Strong had left his room Selvadurai, a sergeant, and a police constable arrived. When shown note P 1 at the trial he said, " I don't think that this is the note, because this is torn and all these marks are there. There are some colouring (indicates the yellow mark on the white circle)". Even in the Magistrate's Court when asked whether P 1 was the note he had received he said, " I cannot say ".

Selvadurai's evidence is that on receiving " information in connection with this case " he went to Symonds Road accompanied by Sergeant 3063 Silva. He met Strong at about 6.40 p.m. and questioned him, and he produced an envelope containing a letter addressed to Jansen, 6, Symonds Road, Maradana, with a Rs. 50/- note. He identified P 1, P 3 and P 4 as the currency note the letter and the envelope respectively. That night he recorded the statements of Jansen and Strong. On the next day he went to the accused's house in Piliyandala and searched him and his house, but found nothing incriminating. He then took him to his office which he reached at about 12.10 p.m. There the accused was taken to the room in which he worked. He says that the accused showed him a steel table at which he said he worked. It had three drawers one above the other on the left-hand side. He took a bunch of three keys from his trousers pocket and started opening the drawers one by one commencing from the lowest. There was nothing incriminating in the first two drawers ; finally he opened with a key the top drawer. In that drawer Selvadurai found an envelope on top of a book. In it he discovered twelve forged Rs. 50/- currency notes.

Two items of hearsay evidence were admitted. They both relate to statements by Strong. The first is his statement, " The accused did not give me the letter direct. The accused sent the letter to me through a peon ". When asked for his name he said it was Sugathan. That peon was called for the defence ; but was unable to recollect giving Strong a letter from the accused. The other is his statement that James Appuhamy told him, " This is a bad note, don't try to change this ". Although no objection was taken to the admission of the hearsay evidence of Strong, its admission is illegal. In this connection it will be useful to refer to *Lim Yam Hong & Co.* v. *Lam Choong & Co.*, ((1928) A.I.R. (Privy Council) 127) wherein Lord Darling observed—

" It is true that the evidence of what Ak Choon, who was not alleged to have any authority to represent the defendant, had said in his absence was not objected to by the defendant's counsel. but still the fault of an advocate cannot so alter the character of testimony as to convert into corroborative evidence that which the law regards as merely fit for rejection as hearsay."

James Appuhamy and Sugathan were not witnesses whose names were on the back of the indictment. Sugathan who was called by the defence did not support Strong and the prosecution has not explained why the evidence of such an important witness as James Appuhamy was not produced. The failure to call James Appuhamy not only renders Strong's evidence of what he said inadmissible, but it also seriously affects his other evidence.

In the instant case the hearsay was on a vital issue in the case for the prosecution. There are other infirmities in this part of the prosecution case. Strong had not been entrusted with letters by the accused before. He was not a particular friend of Jansen or the accused. Jansen does not say how the accused knew he was at 6, Symonds Road. The currency note which was in the envelope did not appear to be anything but genuine to either Jansen and Strong, especially the latter who went to over six shops and boutiques in his effort to obtain change for it. He would have had many opportunities of examining it more closely than Jansen. At least, when the Chinaman changed his mind he should have been put on inquiry. Strong's story that James Appuhamy gave him Rs. 10/- out of his liberality when informing him that the note was forged seems strange. Here was Strong seeking to borrow Rs. 2/- from Jansen and taking the trouble of going from boutique to boutique and shop to shop to obtain change when in Avondale Road was a friend of his prepared to give him Rs. 10/- without any prospect of getting it back. The defence was entitled to ask the jury not only to reject his evidence about James Appuhamy, but also to presume that if James Appuhamy had been called his evidence would have been unfavourable to the prosecution. The failure of Jansen to identify P 1 as the note that was in the envelope that Strong brought is a further infirmity in the prosecution case.

To establish the first charge the prosecution has not only to prove that the accused did have in his possession the counterfeit fifty-rupee note P 1, but also to prove that he did so knowing or having reason to believe it to be counterfeit and intending to use it as genuine. So that even if it were conceded, a fact which has not been established, that P 1 was the note in the envelope P 4 and that P 4 was sent with P 1 in it by the accused, the evidence of Strong and Jansen does not prove that the accused sent the note knowing or having reason to believe it to be counterfeit especially as the forgery was not apparent and baffled at least Jansen and Strong, two persons of the same status in life, to both of whom it seemed genuine.

The prosecution relies on the evidence on the third charge to prove that the accused knew or had reason to believe it to be counterfeit. The material evidence on this part of the charge is mainly that of Selvadurai. It is manifest from the transcript that he was an unreliable witness. In answer to learned Crown Counsel he said that when he met Strong in Symonds Road at 6.40 p.m., on 23rd July, he produced an open envelope containing a letter addressed to Jansen, 6, Symonds Road, Maradana, with a Rs. 50/- note. The envelope P 4 only bears the name " H. D. Jansen, Esq." The words " 6, Symonds Road, Maradana ", do not appear on it. This is not the only unsatisfactory feature of his evidence.

On 24th July having arrested the accused at his home in Piliyandala and searched him and his house he brought him in a jeep or van, it is not clear which, to the C.W.E. at 12.10 p.m. He said he proceeded upstairs with him and Sergeant Silva to the room in which the accused worked. The evidence of what occurred there is as follows :—

" 425. *Q.* Did the accused show you anything ?
A. Yes.

426. *Q.* What did he show you ?
A. He showed me his office table.

427. *Q.* Where was that ?
A. That was in a room.

428. *Q.* Downstairs or upstairs ?
A. Upstairs.

429. *Q.* Who told you it was his table ?
A. He told me.

430. *Q.* What sort of a table was it ?
A. It was a steel table.

431. *Q.* Did it have drawers ?
A. Yes.

432. *Q.* How many ?
A. There were 3 drawers.

433. *Q.* Were they all in one line or one under the other ?
A. One under the other.

434. *Q.* Were they on the right-hand side of the table as you sit or on the left ?
A. On the left.

.. ..

436. *Q.* Did he in your presence do anything ?
A. He pulled out a bunch of keys from his trousers which he brought from his house.

437. *Q.* Took it from his trousers' pocket ?
A. Yes.

438. *Q.* Then ?
A. And then started opening the drawers one by one commencing from the lowest.

439. *Q.* Commencing from the bottom drawer ?
A. Yes.

440. *Q.* Was there anything in the bottom drawer ?
A. There were some papers and letters and other office documents.

441. *Q.* Then what he do (*sic*) after that ?
A. He opened the other drawer.

442. *Q.* The middle drawer ?
A. Yes.

443. (*To Court :*
Q. How many keys did he use to open this ?
A. He brought a bunch of 3 keys).

.. ..

447. *Q.* Was there anything in that drawer ?
A. There were some documents, papers, letters.

448. *Q.* After that what did he do ?
A. He opened the top drawer.

449. *Q.* That was the last drawer he opened ?
A. Yes.

450. *Q.* How did he open it ?
A. He opened it with a key.

451. *Q.* The top drawer ?
A. Yes.

452. *Q.* And was there anything in it ?
A. There were books and some papers and letters, and on top of a book there was an opened envelope. I examined the the contents of that envelope and I found 12 Rs. 50/- forged notes."

In cross-examination this witness said—

" 585. *Q.* You say that on the 24th you found 12 notes inside the drawer of the C.W.E. table ?
A. From the table belonging to Mr. Abeyratne.

586. (*Court :*
Q. What do you mean by that ?
A. There were other private letters also addressed to Mr. Abeyratne inside that drawer).

587. *Q.* That is the table outside ?
A. Yes.

588. *Q.* Which drawer was it ?
A. The top drawer on the lift.

589. *Q.* The accused opened that drawer with a key ?
A. Yes.

590. *Q.* Where is that key ?
A. I did not take charge of the key.

In the course of his re-examination of the witness learned Crown Counsel moved to produce " the table " meaning thereby the table of the accused. Defence counsel had no objection and he marked it D 1. The Commissioner, both counsel, and the jury inspected the table both then and a second time later when the record-keeper of the C.W.E. was giving evidence. Thereafter the witness was asked the following questions. It is not clear who asked them, but as he was under re-examination it would appear that the questions were put by Crown Counsel.

" 627. *Q.* Can you say whether this table D 1 was the table the accused opened with a key on the 24th July 1959 ?

A. It is not the same table, but it was a table like this. It had an additional piece on the side which can be closed.

628. *Q.* Did you see a lock in this table ?
A. I did not see."

The record-keeper of the C.W.E., Warnakulasuriya Lionel Annesley Fernando, who gave evidence for the prosecution said that D 1 was the table given to the accused for his use in June. It was a steel table with four drawers controlled by one lock in a narrow wide drawer in the centre. When he handed it over to the accused the lock had no key, but later he supplied a key. He identified the table as D 1. When produced in Court the centre drawer had been detached and placed on top of the table and it was, therefore, not possible to demonstrate how it worked. Now Ranasinghe, Assistant Superintendent of Police, states that on 28th July he visited the C.W.E. office at about 11 a.m. and sought the Chief Accountant's permission to examine the accused's desk. As the office did not have the key he obtained a letter from the Chief Accountant authorising the accused to hand over the key to him. He went the next day with a locksmith to the Chief Accountant and said he wanted to force open the desk and got the locksmith to do so as he was unable to meet the accused. At this time the accused was on remand, and it is not clear why Ranasinghe says he could not meet the accused. Ranasinghe's belief is that it had only one lock and that, on the narrow drawer in the centre. The one lock controlled all the drawers. He took charge of four documents which were in the long drawer in the centre.

The evidence of the record-keeper of the C.W.E. and A.S.P. Ranasinghe shows that when Selvadurai spoke of the accused having a bunch of three keys with which he opened the three drawers on the left side of his desk one by one he was not speaking the truth. He specially mentioned his opening with a key the top side drawer in which he said he found the notes $P2_1$ to $P2_{12}$. The desk in Court was proved by the prosecution to be the accused's desk, but Selvadurai said that D 1 was not the table which the accused opened

and from which he took the notes $P2_1$ to $P2_{12}$. He also failed to take the key from the accused and to produce the envelope in which the impugned notes were. What is more, Selvadurai was admittedly a witness who was unreliable as would appear from the following evidence given by him in cross-examination :—

"492. *Q.* Did you say this to the Magistrate : 'When I searched the accused's drawer on 24.7.59 I found some personal documents of his and two post cards addressed to him. I took charge of these and I now produce them marked P9A-P9I.' ?
A. Yes.

493. *Q.* Is that correct ?
A. I made that statement.

495. *Q.* Is that correct ?
A. It is not correct.

495. *Q.* Did you say this to the Magistrate : 'I think I have made a mistake when I said I took charge of P9A to P9I' ?
A. That is correct.

496. *Q.* What is correct now, who took charge and when ?
A. These productions were produced by the prosecuting inspector in the wrong order.
.. ..

498. *Q.* Your evidence in the M.C. that you took charge of those documents on 24th July from this accused's drawer is not correct ?
A. It is not correct.

499. *Q.* What is correct now ?
A. They were taken charge by A. S. P. Ranasinghe.

500. *Q.* When ?
A. I cannot remember the date.

501. *Q.* Did you say this, 'I admit that I said in my evidence-in-chief that I took P9A-P9I from the drawer of this accused on the occasion of my search. That evidence is true' ?
A. That answer was made before I went through my notes.

502. (*To Court :*
Q. And that answer was made before you made the statement, 'I have made a mistake when I said I took charge of P9A-P9I'?
A. Yes).

503. *Q.* Will you kindly admit that you said so ?
A. Yes.

508. *Q.* Further did you say this, 'I took P9E from the custody of this accused on 24th July' ?
A. Yes.

509. *Q.* (Shown P9E). You were shown this letterhead in the M.C. and asked whether you took it from the custody of this accused on the 24th July and you said 'Yes' ?
A. Yes.

510. *Q.* P9E you now know was taken from the office of Proctor Modder by A. S. P. Ranasinghe ?
A. Yes.

511. (*To Court :*
Q. Earlier you have said, 'I did not take P9E from the custody of the accused?
A Yes).

512. *Q.* Next sentence : 'I admit that I said in my evidence-in-chief that I took P9A-P9I from the drawer of this accused on the occasion of my search. That evidence is true' ?
A. Yes.

513. *Q.* You were asked in the lower Court whether you had claimed in evidence-in-chief that at the time of the search you took in addition to these 12 documents certain other documents and you said 'Yes' ?
A. Yes. That was told before I checked up my notes.

514. *Q.* You stated on oath something which was not correct, you admit that ?
A. Yes."

Apart from the self-contradictory evidence of Selvadurai, the failure of the prosecution to call Sergeant Silva who was a witness whose name was in the list of witnesses on the back of the indictment, and who Selvadurai stated in his evidence was in the room when he carried out the search of the accused's table, gives rise to the presumption that the evidence of Sergeant Silva would have been unfavourable to the prosecution, especially as Selvadurai stated that Sergeant Silva was in the room from the very start and that he was on the right-hand side of the table and Sergeant Silva was on the left and the accused was in the centre, and that they were together in the room for about fifteen minutes.

In the instant case in view of the highly unsatisfactory evidence given by Selvadurai of the search of the accused's table the need to call Sergeant Silva was greater in order to establish the fact that the notes $P2_1$ to $P2_{12}$ were found in the accused's desk. The defence was rightly entitled in the circumstances to invite the jury to presume that Sergeant Silva's evidence would, if he had been called, have been unfavourable to the prosecution, especially as the prosecution did not even adopt the course of tendering him for cross-examination. The presumption that the Court may draw under section 114 of the Evidence Ordinance in respect of evidence which could be

and is not produced that such evidence would if produced be unfavourable to the person who withholds it is one to which the jury's attention should have been drawn in this case as the witness is a witness whose evidence was so vital to the prosecution case.

In the instant case there is a further doubt cast on the veracity of Selvadurai by the absence of Sergeant Silva from the witness-box. While Selvadurai asserted that Sergeant Silva was in the room right throughout the search of the accused's table, the peon Sugathan Singho, who was called by the defence both in the Magistrate's Court and at the trial, stated that only the accused and Selvadurai entered the room in which the accused's table was. He was asked to leave it in a loud tone by Selvadurai and the door was locked from inside by him. To do this he took the key which was on the outer-side of the shutter. Sugathan says that he did not see Sergeant Silva that afternoon, nor did he enter the accused's room at any time that day. Sugathan is supported by the prosecution witness, Annesley Fernando, the record-keeper of the C.W.E., who says that only Selvadurai and the accused went upstairs while Sergeant Silva was near the van on the road with Strong and another, and by the Chief Accountant, Kanagaratnam, who was called by the defence. He told Kanagaratnam when he returned after lunch that Abeyratne was brought by an Inspector of Police and that his drawers were searched and that he was roughly asked to get out of the room, and the door locked while the search was on. The absence of any explanation of Strong's presence near the police van and not in his office when Selvadurai went to search the accused's desk tends to support the defence claim that Strong was not a disinterested witness.

In the course of the trial the learned Commissioner used the information book in contravention of the provisions of section 122 (3) of the Criminal Procedure Code and permitted oral evidence to be given of the contents of other documents without the documents themselves being produced. Evidence of statements made by witnesses examined in the course of the investigation under Chapter XII of the Criminal Procedure Code was given by Selvadurai in contravention of the prohibition in section 122 (3). The learned Commissioner has in his summing-up failed to draw the attention of the jury to the many infirmities in the prosecution case and to put before them the points made by the defence.

The defence contention that the note P 1 was not the note Jansen received, supported as it is by the evidence of Jansen himself, was not brought to the notice of the jury and they were not invited by the trial Judge to decide the issue whether the evidence established that P 1 was the note that Jansen received in the envelope P 4. Instead he addressed them on the assumption that P 1 was the note Jansen received. He said—

> "I have told you that there is conclusive evidence that this is a forged currency note". Then is there any reason for you to hold that this was used as a genuine note in part-payment of what was due to Jansen ? . . . He was in need of money and Jansen being a sick man sent this note P 1 through Strong to be changed and also for him to buy cigarettes for Jansen."

His later statement—

> "Is there sufficient evidence to show that this identical note P 1 was the note he took charge of from Strong that evening, and, if that be so, was this the note that was sent with the envelope P 4 along with the letter P 3 to Jansen ? As I told you, these are questions of fact solely for your decision."

does not remedy the omission to point out to the jury the fact that the evidence of both Jansen and Strong does not establish that P 1 was the note in P 4. While Jansen rejects P 1 as the note he received on the ground that there were no yellow marks in it, Strong seeks to identify P 1 by those same yellow marks which make Jansen deny its identity.

Now although Selvadurai was proved by the defence to be a witness unworthy of credit the learned Commissioner failed to draw the attention of the jury to the fact that he had contradicted himself on material points and to direct them that his evidence should be regarded as unreliable (*Regina* v. *Golder*, (1960) 1 W.L.R. 1169). He also failed to draw their attention to the unsatisfactory nature of Selvadurai's evidence as to the discovery of the notes $P2_1$ to $P2_{12}$, his failure to identify the table, his evidence that the accused opened each drawer with a key, his denial that D 1 which was proved to be the accused's table was the table the drawers of which the accused opened on 24th July. He omitted to point out to the jury the failure of the prosecution to call Sergeant Silva. On the contrary it would appear from the summing-up that Selvadurai was held

up to the jury as a witness who had been wronged by the defence counsel and whose testimony could be acted on. The unsatisfactory features of Strong's evidence and his conduct should have been put to the jury as Strong's evidence was a very important link in the prosecution case. The fact that he was unsupported by James Appuhamy and Sugathan should have been pointed out to the jury.

In view of the many illegalities in the case and the failure of the learned Commissioner to give proper directions to the jury on material points the conviction is quashed and we direct that a verdict of acquittal be entered.

It would appear from the transcript that the learned Commissioner's attitude towards defending counsel was hostile and that whenever he made a point in cross-examination the learned Commissioner intervened with a leading question which removed the effect of the cross-examination or with a remark critical of the defending counsel or adverse to the defence.

The conclusion that the attitude of the learned Commissioner towards the defending counsel cannot but have prejudiced the defence is inescapable. Section 165 of the Evidence Ordinance undoubtedly empowers a Judge, in order to discover or to obtain proper proof of relevant facts, to ask any question he pleases in any form, at any time, of any witness, or of the parties about any fact relevant or irrelevant ; but in the instant case some of the questions put by the learned Commissioner do not seem to fall within the ambit of that section, which, wide as it is, has its limitation in the words " in order to discover or to obtain proper proof of relevant facts ". His interventions more often than not seem to have been designed to rehabilitate the prosecution case.

Appeal allowed.

Present : **Basnayake, C.J., Herat, J., and Abeyesundere, J.**

K. A. DON ALBERT *vs.* MUNICIPAL REVENUE INSPECTOR*

S.C. No. 646/59—*Colombo M.M.C., No.* 13.

Argued and decided on : October 26 and November 5, 1962.
Reasons delivered on : January 24, 1963.

Municipal Councils Ordinance, No. 29 *of* 1947, *section* 148 (*now* 147)—*Licensing of offensive and dangerous trades or businesses—By-laws made for the purpose—Charge under such by-law for storing of furniture in premises within Municipality—Accused a dealer in furniture carrying on that business at the premises in question with furniture bought from suppliers—Stocks held in reserve to replace articles sold.*

Interpretation of Statutes—Application of "noscuntur a sociis" rule—Meaning and content of expression " trade or business" in section 147—*What was prohibited by this section—Meaning of words "the following trades or business" in the relevant by-law—What is prohibited by the by-law—Not storing of furniture "per se" but storing of furniture for others for gain—Can conviction be sustained.*

The appellant was charged with using certain premises in Colombo for the business—

(*a*) of storing of furniture ;
(*b*) of manufacture of furniture ;
(*c*) of manufacture and storing of furniture, without a licence from the Commissioner, Municipal Council, Colombo, in contravention of section 148 (1) [now 147 (1)] of the Municipal Councils Ordinance, No. 29 of 1947, read with the by-laws made thereunder and published in *Gazette*, No. 10697 of 30th July, 1954.

The relevant by-law reads as follows :—

" The following trades or businesses are hereby declared to be offensive trades or businesses for the purposes of section 148 (now 147) of the Municipal Councils Ordinance, No. 29 of 1947."

The 39th item in the list of trades or businesses appended to the above by-law reads : " Manufacture or storing of furniture or manufacture and storing of furniture ".

* For Sinhala translation, see Sinhala section, Vol. 6 part 4, p. 15

The appellant had been a dealer in furniture carrying on that business at the premises in question for 14 years. He did not make furniture but bought from various suppliers. His business premises consisted of a show-room in which the furniture was displayed, and as they were sold, they were replaced from stocks held in reserve in a room behind.

The learned Magistrate acquitted the appellant on charges (*b*) and (*c*), but convicted him on (*a*), following the decision in *David* v. *Municipal Sanitary Inspector*, 59 N.L.R. 81, although he was inclined to follow the decisions in *Gunasekere* v. *Municipal Revenue Inspector*, 53 N.L.R. 229, and *De Silva* v. *Kurunegala Co-operative Stores, Ltd.*, 59 N.L.R. 430.

In view of these conflicting judgments this appeal was referred to a Bench of three Judges.

Held : (1) That applying the well-known rule of interpretation that the meaning of a word in a particular context has to be determined by reference to that context, especially the words associated with it (*noscuntur a sociis*), the words " trade or business " in section 147 must be understood in their cognate sense. The word " business " is coloured by the word " trade". The context, therefore, should be regarded as excluding all other meanings of the word " business ", except those that are compatible with its associate trade.

(2) That the Council has no power to declare an activity which is not a trade or business within the meaning of section 147 to be an offensive or dangerous trade or business.

(3) That the word " storing " in the by-law signifies stocking for some length of time and not stocking for the day to day needs of a retail business.

(4) That the prohibition in the by-law does not apply to storing of furniture *per se*. It applies only to the storing of furniture of others for gain. Hence the conviction of the appellant could not be sustained.

Per BASNAYAKE, C.J.—(*a*) "But the judgments of the Court of Appeal emphasize the fact that in deciding whether a particular activity is a business or not you have to examine its object and scope and consider what is the substance of the transaction, and the mere fact that gain results from a particular arrangement or activity does not make that arrangement or activity a business. Those judgments also emphasize the importance of the principle that in interpreting words in a given context importance must be attached to the sense in which they are used in that context ".

(*b*) "Whether a business consisting of many ancillary activities is one business or a number of separate businesses under one direction has to be determined by an examination of the various activities. In the instant case the activities of stocking, polishing, touching-up, assembling, repairing where necessary such damage as occurred in transit, were all parts of one business—dealing in furniture."

Overruled : *David* v. *Municipal Sanitary Inspector*, 59 N.L.R. 81.
Followed : *Gunasekere* v. *Municipal Revenue Inspector*, 53 N.L.R. 229.
Chairman, M.C. Colombo v. *Silva*, 4 C.W.R. 150.
De Silva v. *Kurunegala Co-operative Stores, Ltd.*, 57 N.L.R. 430.
Referred to : *Smith* v. *Anderson* (1880) 15 Ch. D. 247.
Jayasekera v. *Silva*, 5 C.W.R. 255.

H. W. Jayawardene, Q.C., with *L. W. de Silva, S. S. Basnayake* and *D. C. W. Wickremasekera*, for the accused-appellant.

H. V. Perera, Q.C., with *H. Wanigatunga* and *H. Mohideen*, for the complainant-respondent.

BASNAYAKE, C.J.

This appeal comes up for hearing before a Bench of three Judges on a reference made under section 48 of the Courts Ordinance in consequence of an order made under section 48A of that Ordinance in view of the conflict of judgments on the question arising for decision herein. At the end of the hearing we allowed the appeal and stated that we would deliver our reasons on a later date. We accordingly do so now.

The only question for decision on this appeal is whether the conviction of the appellant, for a breach of the by-law which prohibits a person from carrying on, without a licence in that behalf, the trade or business of storing of furniture, is right.

The appellant was tried on three charges all couched in the same phraseology except for the description of the specific act alleged in each of them. They read—

" You are hereby charged that you did, within the jurisdiction of this Court, on the 30th day of December, 1958, at No. 615, Maradana Road, Colombo, within the Municipal Limits of Colombo, without a licence from the special Commissioner, Municipal Council, Colombo, in contravention of section 148 (1) of the Municipal Council's Ordinance, No. 29 of 1947, read with the by-laws made thereunder and published in Government

Gazette, No. 10697 of 30th July, 1954, use premises No. 615, Maradana Road, Maradana, Colombo, for the business of (here is specified the nature of the use by the appellant) and thereby commit an offence punishable under section 148 (3) of the said Ordinance."

The different uses alleged in the charges are :—

(*a*) CHARGE 1—" for the business of storing of furniture " ;

(*b*) CHARGE 2—" for the business of manufacture of furniture " ;

(*c*) CHARGE 3—" for the business of manufacture and storing of furniture ' .

He was acquitted of the charges of using the premises in question—

(i) for the business of manufacture of furniture, and

(ii) for the business of manufacture and storing of furniture ;

but convicted on the charge of using the premises No. 615, Maradana Road, " for the business of storing of furniture ".

Although the learned Magistrate was inclined to follow the decisions in *Gunasekera* v. *Municipal Revenue Inspector* (53 N.L.R. 229) and *De Silva* v. *Kurunegala Co-operative Stores, Ltd.* (57 N.L.R. 430), he held against the appellant as he felt he was bound to follow the case of *David* v. *Municipal Sanitary Inspector* (59 N.L.R. 81).

Briefly the material facts are as follows :— The appellant was a dealer in furniture residing at No. 65, Avondale Road, Maradana, and carrying on business at No. 615, Maradana Road, under the business name of Albert & Co. His sign-board was displayed on the front wall with the addition of the words " Furniture Dealers ". He had been carrying on that business at the premises in question for the last 14 years. He did not make furniture himself, but he bought from those who made furniture and sold them at his shop. His suppliers were at Wellampitiya, Nugegoda and Moratuwa. He had a staff of five men—three to load and unload the furniture and assemble such furniture as reached him unassembled, and two to touch up any blemishes caused to the furniture in transit. Appellant's business premises consisted of a show-room facing the road, a small partly enclosed verandah behind it, and a room beyond the verandah. The show-room and the room behind had doors leading to the enclosed verandah. The furniture was displayed in the show-room, and as and when they were sold they were replaced from stocks held in reserve in the room behind. Revenue Inspector Vaz stated that on the occasion of his visit on 30th December, 1958, he observed unrattaned chairs and unpolished furniture. The appellant denied it. There is no precise finding on this point.

Section 148 of the Municipal Councils Ordinance, No. 29 of 1947, now section 147 of the Municipal Councils Ordinance in the Revised Edition of the Legislative Enactments, (hereinafter referred to as section 147) deals with a variety of matters. It prohibits the using, except under a licence from the Council, of any place within the Municipality for any of the following purposes, viz. :—

(*a*) for boiling offal or blood ; or

(*b*) as a soap-house, oil-boiling house, dyeing-house, tannery, brick, pottery or lime kiln, sago manufactory, gunpowder manufactory, manufactory of fireworks ; or

(*c*) as a place of business from which either offensive or unwholesome smells arise ; or

(*d*) for any purposes which are calculated to be dangerous to life ; or

(*e*) as a yard or depot for hay, straw, wood, coal, cotton, bones, or inflammable oil ; or

(*f*) for any other trade or business which the Council may, by means of by-laws, declare to be an offensive or dangerous trade or business for the purposes of the section.

We are here concerned not with the prohibitions imposed by the statute but with the by-laws declaring certain trades or businesses to be offensive or dangerous trades or businesses. The by-law making power is limited in the sense that the Council may declare only *trades or businesses* to be offensive or dangerous trades or businesses. It has no power to declare an activity which is not a trade or business to be an offensive or dangerous trade or business. If it does so the by-law would be *ultra vires*. Three by-laws have been made by the Municipal Council and published in *Gazette*, No. 10697 of 30th July, 1954. The first of them declares 51 trades or businesses specified therein to be offensive trades or businesses ; the second declares 34 trades or businesses specified therein to be dangerous trades or businesses ; and the third declares three trades or businesses specified therein to be dangerous and offensive trades or businesses. The by-law that calls for attention in the instant case is the first of them which reads—

> "The following trades or businesses are hereby declared to be offensive trades or businesses for the purposes of section 148 (now 147) of the Municipal Councils Ordinance, No. 29 of 1947 (now Municipal Councils Ordinance)."

The 39th item in the list of trades or businesses appended to the above by-law reads : "Manufacture or storing of furniture or manufacture and storing of furniture".

The first question to be decided is the meaning and content of the expression "trade or business" in section 147. Each of these words according to the dictionary has a variety of meanings. The meaning of a word in a particular context has to be determined by reference to that context, especially the words associated with it. *Noscuntur a sociis* is a well-known rule of interpretation. This rule is thus stated in Maxwell on Interpretation of Statutes (10th Edition) at p. 332 :

> "When two or more words which are susceptible of analogous meaning are coupled together *noscuntur a sociis*. They are understood to be used in their cognate sense. They take, as it were, their colour from each other, that is, the more general is restricted to a sense analogous to the less general."

Here the words "trade or business" are coupled together and the meaning of the word "business" is coloured by the word "trade". The context should be regarded as excluding all other meanings of the word except those that are compatible with its associate trade.

Learned counsel for the appellant contended that storing of furniture *per se* was not prohibited but what was prohibited was storing of furniture as a trade or business such as the storing of the furniture of others for gain. He submitted that the words "the following trades or business" in the by-law indicated that the declaration applied only to specified activities carried on as a trade or business. He relied on the cases of *Gunasekera* v. *Municipal Revenue Inspector* (*supra*) and *De Silva* v. *Kurunegala Co-operative Stores, Ltd.* (*supra*). It is common ground that the appellant did not store furniture for others for gain.

Learned counsel for the respondent contended that any activity carried on for the purpose of earning profits would come within the ambit of the expression "business" in section 147, and that although the appellant did not store furniture for others for gain, as the appellant's business involved the storing of furniture prior to sale for however short a time, the act of storing fell within the ambit of the expression "business" even though that activity by itself produced no profit. He relied on the following words of Jessel, Master of the Rolls, in *Smith* v. *Anderson* (15 Ch.D. 258) :—"Anything which occupies the time and attention and labour of a man, for the purpose of profit is business". The Master of the Rolls was merely adopting the definition of the word in the Imperial Dictionary which he described as a very good dictionary. In applying the dictionary meaning of a word to a given context due regard must be paid to the context in which it occurs. *Smith* v. *Anderson* was an action to have the Submarine Cable's Trust wound up on the ground that the trustees and the holders of Stock Certificates issued by them were carrying on business without being registered as a company under the Companies Act, 1862. The question for decision was whether the Trustees were carrying on business within the meaning of that expression in that Act. The Master of the Rolls held that they were. In appeal his finding was reversed. James, L.J., said—

> "With all deference to the very clear opinion of the Master of the Rolls, I cannot concur in the construction which he has put upon the 4th section of the Companies Act 1862."

He proceeds later on in his judgment to say—

> "But supposing that the certificate holders do constitute an association, it appears to me that it cannot, in any practical sense of the word "business", in any sense in which any man of business would use that word, be said that the association was formed for the purpose of carrying on any business, either by themselves or by any agent." (p. 275).

James, L.J., was supported by both Brett, L.J. and Cotton, L.J., in his disapproval of the meaning given to the word "business" in that context. The question whether separate activities which were parts of a large organisation conducted for the purpose of gain were by themselves businesses did not arise for consideration in *Smith's* case. But the judgments of the Court of Appeal emphasise the fact that in deciding whether a particular activity is a business or not you have to examine its object and scope and consider what is the substance of the transaction, and the mere fact that gain results from a particular arrangement or activity does not make that arrangement or activity a business. Those judgments also emphasize the importance of the principle that in interpreting words in a given context importance must be attached to the sense in which they are used in that context.

In the instant case it appears to have been assumed that the act of maintaining stocks of more than one unit of the same article of furniture for the purpose of replacing those sold from time to time, or to meet a demand for a number of pieces of furniture of the same kind, comes within the ambit of the expression "storing". But where stocks of goods are maintained by a trader for the purpose of meeting the day to day demands of his trade, it seems inappropriate to describe the maintaining of such stocks as "storing". The word "storing" signifies stocking for some length of time and not stocking for the day to day needs of a retail business.

The number of activities that goes to make up a business would depend on its nature. A retail trader would have to buy, transport, stock, and sell his goods. He may even import direct some of the goods he sells. Similarly as in the instant case a furniture dealer would buy, transport, stock and sell his furniture. Even if he improved the furniture he bought by giving them a better polish than the manufacturer gave them or improved the upholstery, the act of polishing or improving the upholstery would not be a business so long as the polishing and upholstering are ancillary to the main business. Whether a business consisting of many ancillary activities is one business or a number of separate businesses under one direction has to be determined by an examination of the various activities. In the instant case the activities of stocking, polishing, touching-up, assembling, repairing where necessary such damage as occurred in transit, were all parts of one business—dealing in furniture. We uphold the submission of counsel for the appellant that the prohibition in the by-law does not apply to storing of furniture *per se*. It applies only to the storing of furniture of others for gain.

The question whether an ancillary activity falls within the ambit of the expression business in section 147 was considered in the case of *The Chairman, M.C., Colombo* v. *Silva* (4 C.W.R. 150). In that case the accused was a building contractor who carried on business on a large scale. He was charged with—

(1) keeping a timber yard, and
(2) keeping a timber sawing depot

in breach of the Ordinance and its by-laws. In his premises he had a large yard 200 feet by 150 feet in extent with several sheds built upon it. In the yard and the sheds he prepared the material needed for the buildings he had contracted to construct, and a considerable amount of carpentry work was involved. There were two steam-driven saws and a platform for hand-sawing. He had timber all over the yard, in the sheds and near the sawing benches. There were also finished door and window frames. It was not disputed that all these were activities ancillary to the accused's business of building contractor. This Court held that those activities did not fall within the prohibition. The question whether a *business* ancillary to a *main business* fell within the ambit of section 147 appears to have come up for consideration in the case of *Jayasekera* v. *Silva* (5 C.W.R. 255) and it was held that an ancillary business did ; but that case did not decide the point that was decided in *The Chairman, M.C., Colombo* v. *Silva* (*supra*) whether ancillary or subsidiary activities which *per se* are not trades or businesses but are only activities feeding the business admittedly carried on falls within the ambit of the expression "business". In *Jayasekara's* case (*supra*) Bertram, A.C.J., does not appear to have considered the previous case of *The Chairman, M.C., Colombo*, v. *Silva*, nor does it appear that he gave his mind to the question of ancillary operations which are not independent businesses in themselves, for, he says :

> "I do not think it is necessary to consider whether any particular *business* is the *main business* carried on upon the premises or is only a subsidiary *business*."

The Chairman, M.C. Colombo, v. *Silva* does not appear to have been cited at the argument of *David* v. *Municipal Sanitary Inspector* (*supra*) which is in conflict not only with that case but also with the case of *Gunasekara* v. *Municipal Revenue Inspector* (*supra*) and *De Silva* v. *Kurunegala Co-operative Stores, Ltd.* (*supra*). With deference to my brother Weerasooriya I wish to say that in adopting Jessel's definition of business he appears to have not only overlooked

the *noscuntur a sociis* rule but also not taken into account the opinions of the Lord Justices of Appeal who disagreed with the interpretation of Jessel, M.R.

In our opinion the case of *David* v. *Municipal Sanitary Inspector* has been wrongly decided and the cases of *The Chairman, M.C., Colombo,* v. *Silva* ; *Gunasekera* v. *Municipal Revenue Inspector*, and *De Silva* v. *Kurunegala Co-operative Stores, Ltd.*, have been rightly decided and should be followed.

HERAT, J.
I agree.

ABEYESUNDERE, J.
I agree.

Appeal allowed.

Present : **Abeyesundere, J.**

G. B. PERERA *vs.* DISSANAYAKE, P.S. 1763, Gampola Police

S.C. 57/'63

Application for the transfer of case No. 9263 *of the Magistrate's Court of Gampola to another Court.*

Argued and decided on : April 2, 1963.

Courts Ordinance, section 42—*Application to transfer a case from one Magistrate's Court to another —Affidavit by Proctor for accused that Magistrate omitted to record a relevant answer given by a witness— Invitation to Court to rectify omission—Refusal by Magistrate—Should application be granted.*

Where a Magistrate refused to record the answer given by a witness to a question put to him in cross-examination without recording that such evidence is inadmissible—

Held : That for the purpose of securing a fair trial it was necessary that the case should be tried in another Magistrate's Court as the Magistrate was not legally entitled to refuse to record such answer.

S. Sharvananda, for the accused-petitioner.

G. P. S. de Silva, Crown Counsel, for the Attorney-General.

ABEYESUNDERE, J.

This is an application by G. B. Perera, the accused, in case No. 9263 of the Magistrate's Court of Gampola, for an order under section 42 of the Courts Ordinance to transfer that case from the Magistrate's Court of Gampola to any other Court on four grounds, three of which are not sustainable. The fourth ground as stated in his affidavit by Mr. A. M. I. Gunaratne, Crown Proctor of Gampola, who appeared for the accused in the proceedings in the Magistrate's Court of Gampola, is as follows :—

" On 7th January, 1963, when evidence of V. P. Gunasekera was being recorded the Court failed to record a very relevant answer given by the witness, viz., ' that he did not insure the car as it was in the garage '. When the Court's attention was drawn to this fact and the Court was invited by me to have the answer recorded the Court refused to do so."

There is no affidavit filed by the Proctor who appeared for the prosecution in this case contradicting the aforesaid averment. I have no reason to disbelieve the statement made by Mr. Gunaratne. The Magistrate was not legally entitled to refuse to record the answer given by the witness, Gunasekera, to a question put to him in cross-examination unless he held that such evidence was inadmissible. The record of the proceedings does not disclose that the Magistrate had ruled such evidence to be inadmissible. I think that for the purpose of securing a fair trial of the case it is necessary that the case should be heard in another Magistrate's Court. Crown Counsel who appears for the Attorney-General does not oppose the application for the transfer of the case to another Magistrate's Court. I order that case No. 9263 of the Magistrate's Court of Gampola be transferred to the Magistrate's Court of Kandy.

Allowed.

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

THE QUEEN *vs.* M. I. M. IBRAHIM & OTHERS

S.C. No. 14-17/1963—*D.C.* (*Crim.*) *Batticaloa*, 126.

Argued on : 22nd May, 1963.
Decided on : 7th June, 1963.

Criminal Procedure Code, sections 178, 179, 180 *and* 184—*Joinder of charges—Several accused—Charges of unlawful assembly against some—Charges based on common intention against others—Joinder of these charges in one indictment—Is such joinder legal* ?—*Penal Code, sections* 140, 146 *and* 32.

Criminal Procedure Code, section 425—*Court of Criminal Appeal Ordinance, proviso to section* 5 (1)—*Applicability in such a case.*

Several accused were indicted in this case on 13 charges. Some of these charges were based on the allegation that they were members of an unlawful assembly and the remainder were on the basis of common intention.

On their being convicted, the accused appealed. Relying on the case of *Don Marthelis et al* v. *The Queen*, 64 C.L.W. 30, counsel for the appellants contended that the joinder of these two sets of charges in the same indictment, was illegal.

After analysing the various provisions of sections 178, 179, 180 and 184 of the Criminal Procedure Code and supporting his interpretation thereof with practical illustrations, His Lordship—

Held : That the joinder of the said charges in one indictment is not illegal.

Per H. N. G. FERNANDO, J.—" In a single count of an indictment charging five persons with the murder of *X* the joinder of persons is authorised by section 184 of the Criminal Procedure Code because all five are *accused of jointly committing the same offence* in pursuance of a common intention. If in addition there is evidence that the same five were in the course of the same transaction members of an unlawful assembly, a second count may be added for the offence against section 140 of the Penal Code, for the reason that the joinder of persons is authorised by section 184 and the joinder of charges authorised by section 180 (the two sections can apply in combination, cf. section 178). For the same reason, *i.e.*, the application of sections 184 and 180 in combination, a third count for the distinct offence against section 146 read with section 296 of the Penal Code may be added against all five persons, for all are here jointly *accused of committing the same offence* (section 184), and *more offences than one were committed by the same persons in the course of the same transaction* (section 180 (1)). Indeed, a further application of section 184 would authorise a fourth count charging only one of the five with some *different offence* such as theft or indecent assault *committed in the same transaction* ".

Referring to the decision of the Court of Criminal Appeal in *Heen Baba's* case, His Lordship states :

" The opinion that the two offences are distinct was fundamental to the decision . . . But even if it can be thought that the two offences are not distinct, but are the same then all that is unusual in an indictment containing both the charges is that the same persons are twice charged in one indictment for the same offence. If then they are convicted . . . is any failure of justice involved or rather is there merely a technical irregularity which has no prejudicial consequence ? . . . Even, therefore in this contrary view, which I consider untenable, section 425 of the Criminal Procedure Code must be applied . . . Again, why in such circumstances should not the Proviso to section 5 (1) of the Court of Criminal Appeal Ordinance be applied ? "

Cases referred to : *Khan* v. *Ariyadasa*, LXIV C.L.W. 24 ; 65 N.L.R. 29.
The Queen v. *Heen Baba*, 51 N.L.R. 265 ; XLII C.L.W. 26
Barendra Kumar v. *Emperor*, (1925) A.I.R. (P.C.) 1.
Renzaddi v. *Emperor*, (1912) 13 Cr. L. J. 502.

Not followed : *Don Marthelis and Others* v. *The Queen*, 65 N.L.R. 19 ; LXIV C.L.W. 30.

Colvin R. de Silva with *A. R. Mansoor*, for the accused-appellants.

P. Colin Thome, C.C., for the Attorney-General.

H. N. G. FERNANDO, J.

Several accused were indicted in this case on 13 charges, seven of which were based on the allegation that they were members of an unlawful assembly, and the remainder of which could have resulted in a conviction of two or more of the accused only if the offences charged had been committed in pursuance of a common intention. Counsel for the accused argued at the appeal that there had been a misjoinder of these two sets of charges, relying upon the unreported judgment of

two Judges of this Court (Abeysundere, J., with Herat, J., agreeing) in the case of *The Queen* v. *Don Marthelis and Others* (S.C. 5-10 of 1962, S.C.M. of 19th March, 1963)* In a brief judgment, the point was thus decided :—

> ". . . Counts (1) to (5) were based on the allegation of unlawful assembly and counts (6) to (9) which related to the offences of causing simple hurt and committing mischief were based on common intention. Section 178 of the Criminal Procedure Code requires every charge to be tried separately except in the cases mentioned in sections 179, 180, 181 and 184 of that Code. Crown Counsel who appeared for the Attorney-General conceded that none of the four last-mentioned sections applied to the counts in the indictment in this case. The joinder of the two sets of charges referred to above is, therefore, not according to law. Consequently the indictment is invalid . . ."

Counsel who argued the present appeal had himself argued the case of *Don Marthelis*, and was, therefore, able to explain why the unreported judgment does not set out reasons and contains no examination of the provisions of the Criminal Procedure Code which are or may be relevant to the question of misjoinder. It appears from Counsel's statement to us that the same question was argued in the Court of Criminal Appeal within recent months, in an appeal in which the appellants were acquitted by that Court upon the conclusion of arguments, and that it is anticipated that the reasons for that acquittal when delivered by the Court of Criminal Appeal will constitute or include a decision that it is illegal to join together in an indictment two sets of charges depending respectively on section 146 and section 32 of the Penal Code. Nevertheless, until reasons are, in fact, delivered in that appeal, there is yet no judgment of the Court of Criminal Appeal to which I can refer for guidance or which precludes me from considering the validity of Counsel's arguments. In view also of the lack of a statement of reasons in the judgment in *Don Marthelis*' case, I feel free as a member of a Bench of two Judges to re-consider the point there decided. The fact that my brother Fernando, whose familiarity with questions of this nature is well known, has disagreed with that decision (*vide* S.C.M. of 6th May, 1963, *Khan* v. *Ariyadasa*, S.C., Nos. 707-11 of 1962),** is another reason why the point appears to me worthy of re-consideration.

In my own attempt to decide whether or not the joinder in the present case was legal, I find it convenient to consider the relevant provisions of law in the same way as would a Crown Counsel engaged in the task of framing an indictment upon facts which are at first simple and which become complex only in stages.

Suppose that the evidence in non-summary proceedings discloses—

(1) that *A* shot at *X* with a gun at close range ;

(2) that the gun-shot injury resulted in *X*'s death ; and

(3) that a Jury may reasonably infer a " murderous intention " on the part of *A*.

On these facts there must undoubtedly be framed a count that *A* committed murder by causing the death of *X*.

If in addition the evidence also discloses—

(4) that, at the time of the shooting, *A* had been a member of an assembly together with five or more other persons of unknown identity having the common object of causing the death of *X*, and

(5) that *A*. in all probability fired at *X* in prosecution of that common object,

can there be properly added a second count charging *A* with an offence under section 146 of the Penal Code ?

Firstly, there would be no doubt that an offence under section 146 had been committed, for, in terms of the requirements in section 146,

(*a*) an offence was committed by a member of the unlawful assembly,

(*b*) the offence was committed in prosecution of the common object, and

(*c*) *A* was at the time of the commission of that offence a member of the assembly.

A is therefore guilty of " that offence ", namely, the offence of murder, and the appropriate count against him on this score would be under section 146 and section 296 read together.

Secondly, will section 180 of the Criminal Procedure Code permit the joinder of the two charges against *A* in one indictment ? Under subsection (1), the joinder would be valid, if (*a*) the

* 64 C.L.W. 30 : 65 N.L.R. 19
** 64 C.L.W. 24 ; 65 N.L.R. 29

series of acts formed the same transaction, a matter on which there would be no room for doubt, and (*b*) more offences than one were committed by *A* in the course of that transaction. Under sub-section (3) of section 180, the joinder would be valid if *some of the acts* constitute one offence, and *all the acts* taken in combination constitute a different offence. The Crown Counsel would therefore ask himself whether *A* did, indeed, commit two different offences, *i.e.*, whether the offence under section 146 is distinct from the offence under section 296. This question is affirmatively answered by the Privy Council in *Barendra Kumar* v. *Emperor* (1925 A.I.R., P.C. 1), and by our Court of Criminal Appeal in *Heen Baba's* case (51 N.L.R. 265) in opinions cited by my brother Fernando in *Khan* v. *Ariyadasa*. It is nevertheless useful to understand for oneself why that answer is correct. It is technically correct that, on the facts as assumed, the charge which may be framed against *A* under section 146 of the Penal Code would be one of murder. But in truth the acts which render *A* guilty of the offence under section 146 are distinct from the acts which constitute murder within the definition in sections 293 and 294 of the Penal Code. The offence under section 146 consists in *A's* having been a member of an unlawful assembly, having the common object of causing *X's* death, at a time when some member of that assembly actually caused the death in prosecution of that common object. The ingredients of this offence are, surely, different from those nvolved in the offence of murder under section 296. The ingredients which I have numbered (1), (2) and (3) earlier in this judgment completely satisfy the definition of murder ; it is only because of the existence, *in addition*, of the ingredients (4) and (5) that *A.* becomes guilty of the offence created by section 146. If I may try to state the distinction quite simply : A person is guilty of the offence of murder defined in section 294 *because HE caused death with the requisite intention*, but a person is guilty of the offence (of murder) created by section 146 for an entirely different reason, the principal reason with reference to himself being *because he was a member of a particular unlawful assembly* at a time when murder was committed in prosecution of the common object.

It seems to me then that two different offences were, in fact, committed, and that sub-sections (1) and (3) of section 180 of the Criminal Procedure Code, if not also sub-section (2), render perfectly legal the joinder of two charges, under section 296, and section 146 with section 296, respectively, against *A* upon the supposed facts I realise, of course, that in such a case where only one person is to be charged, such a joinder would not be made in practice, upon grounds of redundancy or superfluity. But we are here concerned only with the argument as to legality and both precedent and reason lead me to the conclusion that the joinder of the two charges against *A* is authorised by the Criminal Procedure Code. The opinion has often been expressed that section 149 of the Indian Penal Code (which is equivalent to our section 146) creates a *vicarious* or constructive liability ; and a joinder of a count charging *A* with murder against section 296 with a count charging *B.*, *C*, *D* and *E* and *A himself* with the offence against secton 146 read with section 296 may appear to be inconsistent with that opinion. But the commonest case of the application of section 146 is one where the very member who commits the offence of murder in prosecution of the common object of an unlawful assembly is charged and convicted of the offence under section 146 read with section 296. Thus where an unlawful assembly is alleged to have consisted only of five named persons, and all five are charged with the offence under section 146 read with section 296, the very basis of the charge is that *one of the five* did commit the murder. The ground for his conviction is not the fact that HE committed murder, and is not different from the ground for the conviction of the other four members ; the ground in each case being membership of the assembly at a time when *some member* committed the murder in prosecution of the common object.

In *Renzaddi* v. *Emperor*, (1912) 13 Cr. L.J. 502, it was recognised as " settled law that when a person is charged by implication under section 149 he cannot be convicted of the substantial offence ". In considering and accepting this proposition, our Court of Criminal Appeal (51 N.L.R. 265, at 271) observed that when a person is acquitted of the offence under section 149 " he cannot be convicted of having committed the offence by his own acts *in the absence of a charge that he did so* ", thus implying, not only that the two charges are distinct, but also that if the substantive charge is framed in addition to the charge under section 149, there may be a due conviction on the former, despite an acquittal on the latter charge.

I do not doubt, therefore, that a count charging *A* with murder under *section* 146 can be lawfully

joined with a count charging him directly with murder under section 296.

Let me now introduce into the supposed facts before the Crown Counsel one further element, namely, that according to the evidence, *B*, *C*, *D* and *E* are also identified as having been members of the unlawful assembly at the time when *A* caused the death of *X*. Can Crown Counsel now add, in an indictment charging *A* with the murder of *X* under section 296, a second count charging *A*, *B*, *C*, *D*, and *E* with murder under section 146 ? It will now be necessary to examine section 184 of the Criminal Procedure Code. In the same transaction, *A*, *B*, *C*, *D*, and *E* all committed an offence (under section 140 of the Penal Code) of being members of an unlawful assembly ; so also they committed the offence under section 146 of being members of that assembly at the time when one of its members committed murder in prosecution of the common object. They are thus *accused of jointly committing the same offences*, as contemplated in section 184, and they may be charged together for offences under section 140 and section 146 of the Penal Code. But in addition, in the course of the same transaction, *A* alone committed the offence of murder defined in section 294 of the Penal Code, which has been shown above to be different from the offence he himself committed under section 146.

Section 184 of the Criminal Procedure Code authorises joinder of persons " when more persons than one are accused of jointly committing the same offence or of different offences committed in the same transaction ". This language may at first sight give the impression that the words " jointly committing " govern both " the same offence " as well as " different offences ". But a closer reading shows that two different cases are here contemplated.:—

(*a*) Where more persons than one are accused of *jointly committing the same offence* ; and

(*b*) Where more persons than one are accused of *different offences committed in the same transaction*. (There is here no requirement of *joint* commission).

Under the first head are cases in which persons jointly commit the same offence ; under the second are cases such as those mentioned in illustrations (*b*) and (*c*) to the section, in which several persons may have committed different offences, but in the same transaction. Upon the facts which I am supposing, the charges against *A*, *B*, *C*, *D* and *E* for the offences against sections 140 and 146 of the Penal Code would fall under the first head. Those charges may be tried together with the charge against *A* alone for the offence against section 296, because, under the second head, that was a different offence committed by him in the same transaction.

I have tried thus far to explain why in my opinion it would be legal, upon appropriate facts to join together a charge against one person for an offence against section 296 with charges against the same person and others for offences against sections 140 and 146. If such joinder is legal, it follows quite reasonably that a charge against two or more persons for the offence against section 296 may be joined to charges under sections 140 and 146 against the same persons.

In a single count of an indictment charging five persons with the murder of *X*, the joinder of persons is authorised by section 184 of the Criminal Procedure Code because all five are *accused of jointly committing the same offence* in pursuance of a common intention. If in addition there is evidence that the same five were in the course of the same transaction members of an unlawful assembly, a second count may be added for the offence against section 140 of the Penal Code, for the reason that the joinder of persons is authorised by section 184 and the joinder of charges authorised by section 180 (the two sections can apply in combination, cf. section 178). For the same reason, *i.e.*, the application of sections 184 and 180 in combination, a third count for the distinct offence against section 146 read with section 296 of the Penal Code may be added against all five persons, for all are here *jointly accused of committing the same offence* (section 184) *and more offences than one were committed by the same persons in the course of the same transaction* (section 180 (1)). Indeed, a further application of section 184 would authorise a fourth count charging only one of the five with some *different offence* such as theft or indecent assault *committed in the same transaction.*

In *Heen Baba's* case, 51 N.L.R. 265, the Court of Criminal Appeal decided that where an indictment charges several persons with an offence alleged to have been committed on the basis of their membership of an unlawful assembly, it is illegal for the Jury to convict them of that offence on the basis of a common intention. The opinion

that the two offences are distinct was fundamental to the decision, and, with respect, my own consideration of the matter has led me to the same opinion. But even if it can be thought that the two offences are not distinct but are the same, then all that is unusual in an indictment containing both the charges is that the same persons are twice charged in one indictment with the same offence. If then they are convicted, whether on one such charge or on both of them, is any failure of justice involved, or rather is there merely a technical irregularity which has no prejudicial consequence ? If both offences are the same, then both charges are also the same, and the indictment is only as defective as an indictment in which there are quite accidentally two counts each in identical terms charging one person with the identical offence. Even, therefore, in this contrary view which I consider untenable, section 425 of the Criminal Procedure Code must be applied. It is important to bear in mind the somewhat per emptory terms of section 425 :—

> " No judgment passed by a Court of competent jurisdiction *shall* be reversed . . . on appeal . . . on account of any error . . . or irregularity . . . in the charge . . . unless such error . . . has occasioned a failure of justice."

Again, why in such circumstances should not the Proviso to section 5 (1) of the Court of Criminal Appeal Ordinance be applied ? Even if the point raised in the appeal must succeed, can it be said that any " *substantial* miscarriage of justice has actually occurred ? "

For the reasons stated, I must disagree with the decision in the recent case of *Don Marthelis* and I hold that the indictment in the present case was lawful. On the facts, I see no reason to interfere with the convictions and sentences. I would, therefore, dismiss the appeals.

T. S. FERNANDO, J.

As I have recently expressed my own opinion on the question of law raised on these appeals, I have nothing to add. I agree with my brother that the appeals fail both on the question of law and on the facts.

Appeals dismissed.

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

TAOS LIMITED *vs.* P. O. FERNANDO & OTHERS

Application for a " Writ of Certiorari " on P. O. Fernando and three others.
(Application No. 127/62)

Argued on : February 14 and 15, 1963.
Decided on : February 15, 1963.

Industrial Disputes Act, section 33—*Award made in pursuance of reference under section* 4(2)—*Compensation awarded to workmen—Whether such order can be made without decision as to reinstatement—Order for compensation to be an alternative to reinstatement.*

Held : That the Industrial Court had no power to make an order for the payment of compensation unless there is a decision as to reinstatement. The decision as to payment of compensation to a workman must be an alternative to a decision as to his reinstatement.

H. W. Jayawardene, Q.C., with *L. Kadirgamar* and *L. C. Seneviratne*, for the petitioner.

R. S. Wanasundere, Crown Counsel, for the respondents.

BASNAYAKE, C.J.

This is an application by Taos Limited for a mandate in the nature of a writ of *certiorari* and relates to an award made by the 1st respondent, P. O. Fernando, a member of the panel appointed by the Governor-General in terms of section 22 of the Industrial Disputes Act, to whom an industrial dispute between the petitioner and the United Engineering Workers' Union was referred by the Minister for Labour and Nationalised Services under section 4 (2) of the Industrial Disputes Act in the following terms :—

> " I, Chandradasa Wijesinghe, Minister of Labour and Nationalised Services, do, by virtue of the powers vested in me by section 4 (2) of the Industrial Disputes Act,

No. 43 of 1950, hereby refer the aforesaid dispute for settlement to an Industrial Court which shall be constituted in accordance with the provisions of section 22 of that Act. Statement of matter in dispute : The matter in dispute between the *United Engineering Workers' Union* and *Taos Limited*, Kew Road, Colombo 2, is whether the non-employment of the following workers is justified and to what relief they are entitled . . . "

In the award made in pursuance of that reference and published in *Gazette*, No. 12662 of 15th September, 1961, the 1st respondent stated—

" It is clear that the Company had very little work to give its employees and the management appears to have taken this opportunity to get rid of its employees without paying them any relief. Ordinarily they would be entitled to reinstatement and I would have ordered reinstatement but for the fact that I was informed that the Company had practically lost all orders from the Fisheries Department and would have to close down in the near future. The Company was started a few years ago and none of the employees have been there for a long period. Considering all the circumstances of the case I consider the employees should be granted relief by the payment of two months' salary as compensation. But in the case of those who had already been given notice of discontinuance at the end of December, 1960, I consider it would be sufficient if they were paid one month's salary as they have already been given one month's notice of discontinuance."

It is submitted by the petitioner—

" (*a*) that in his award the 1st respondent had not considered and/or has failed and/or omitted to take into account a vital and relevant matter, namely, whether the action of the aforesaid workers referred to in paragraph 4 (*a*) above in quitting work on the 27th December, 1960, and refusing to return to work for a number of days thereafter amounted, in fact, and/or in law to a " strike " within the definition of that term under the Trade Unions Ordinance ;

(*b*) that, therefore, the 1st respondent has committed an error of law on the face of the record ;

(*c*) that in his award, the 1st respondent has not considered and/or has failed and/or has omitted to take into account a vital and relevant matter, namely, whether the misconduct and misbehaviour of the workers referred to in paragraph 4 (*a*) above from the 27th December, 1960, to the 30th December, 1960, referred to in paragraph 5 (*a*) above justified the petitioner in law in not re-employing the said workers ;

(*d*) that the award and the determination of the 1st respondent acting in pursuance of the aforesaid reference is null and void and of no effect in law."

Learned counsel submitted that the Industrial Court, particularly the 1st respondent being a Judge exercising judicial power, had not been properly appointed, as the office held by him was a judicial office and that under the constitution such appointment is vested in the Judicial Service Commission. It is not necessary to decide this point in the instant case as there is a vital defect in the award itself which strikes at the root of the matter.

Section 33 of the Industrial Disputes Act, provides that an award may contain decisions on the following matters—

" (*a*) as to wages and all other conditions of service including decisions that any such wages and conditions shall be payable or applicable with effect from any specified date, which may, where necessary, be a date prior to the date of the award, and decisions that wages shall be payable in respect of any period of absence by reason of any strike or lockout ;

(*b*) as to the reinstatement in service, or the discontinuance from service, of any workman whose dismissal or continuance in employment is a matter in dispute, or who was dismissed or ceased to be in service at the commencement or in the course of any strike or lockout arising out of the industrial dispute ;

(*c*) as to the extent to which the period of absence from duty of any workman, whom the arbitrator or Industrial Court has decided should be reinstated, shall be taken into account or disregarded for the purposes of his rights to any pension, gratuity or retiring allowance or to any benefit under any provident scheme ;

(*d*) as to the payment by any employer of compensation to any workman as an alternative to his reinstatement, the amount of such compensation or the method of computing such amount, and the time within which such compensation shall be paid."

In the instant case there was no decision as to reinstatement and the Industrial Court had no power to make a decision for payment of compensation. The power to make an order for compensation is confined to a case in which there is a decision as to reinstatement. The decision as to payment of compensation to a worker must be an alternative to a decision as to his reinstatement.

Without a decision as to reinstatement there can be no decision as to compensation. The order of the Industrial Court is *ultra vires* and must be quashed. We accordingly do so.

The petitioner is awarded costs.

ABEYESUNDERE, J.
I agree.

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

Application allowed.

Privy Council Appeal, No. 30 of 1962.

Present : **Viscount Radcliffe, Lord Evershed, Lord Morris of Borth-Y-Gest, Lord Devlin, Sir Kenneth Gresson**

ALUTHGE DON HEMAPALA *vs.* THE QUEEN

From
THE SUPREME COURT OF CEYLON

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

DELIVERED THE 27TH MAY, 1963.

Criminal Procedure Code, section 165 B—Right of accused to be tried by the panel of jurors selected by him—Election by accused to be tried by English-speaking jury—Foreman stating in answer to judge that the jury were conversant with Sinhala—Part of the trial conducted in Sinhala—Whether this was a procedural irregularity vitiating the trial.

Court of Criminal Appeal Ordinance, section 5—Applicability to facts of present case.

At the Kalutara Assizes the two accused elected to be tried by an English speaking jury. After the jury were empanelled, the trial judge asked the members of the jury whether they were sufficiently conversant with Sinhala to understand well the questions put to witnesses and the answers given by them, if this were done in Sinhala. He also inquired whether they could understand the address of Counsel if this was in Sinhala. To both these questions the Foreman of the jury answered in the affirmative. The judge thereupon inquired from defence Counsel whether he could follow proceedings in Sinhala, and Counsel answered in the affirmative. The judge then stated that he (Counsel) would be free to put any question at any stage in English, and would also be able to follow the translation which the interpreter would make for the benefit of the stenographer.

The first witness gave his evidence in English, but the others gave their evidence in Sinhala. Though such evidence would necessarily be translated into English for the purposes of the record, it was not clear that this was done in such a way as to ensure that the jury heard the translation. Crown Counsel made his closing address in Sinhala, but it was not clear from the record whether Defence Counsel made his address in English or Sinhala. The summing-up by the learned Judge was in English. The first accused was found guilty of murder and sentenced to death, while the second accused was acquitted and discharged.

On appeal, the matter came up before five Judges of the Court of Criminal Appeal. Two judges held that the trial was irregular, that there had been a departure from well established rules of procedure, and that the conviction should be quashed and a new trial ordered. Two judges held that the trial was irregular, but that the appeal should be dismissed as there had been no substantial miscarriage of justice. One judge held that there had been no irregularity, and that, therefore, the appeal should be dismissed. The appeal was, therefore, dismissed by a majority of three to two.

Held : (1) That there had been a departure from the provisions of the Code with no certainty that such a departure did not operate to the disadvantage of the appellant and that, therefore, the case must be regarded as one in which there had been a miscarriage of justice necessitating the quashing of the conviction.

(2) That the provisions of the Criminal Procedure Code under which the appellant was tried contemplate that where there has been an election to be tried by an English speaking jury, the trial will be conducted throughout in the English language.

(3) That while ordinarily where a conviction has to be quashed and the sentence set aside because of procedural irregularities a new trial would be directed, yet the discretion as to whether there should be

a new trial after so great a lapse of time should be exercised by the Court of Criminal Appeal of Ceylon.

Case referred to : *R.* v. *Neal*, (1949) 2 K.B. 590; (1949) 2 All E.R. 438.

E. F. N. Gratiaen, Q.C. with *T. O. Kellock* and *Manouri de Silva*, for the accused-appellant.

M. Littman, Q.C. with *Dick Taverne*, for the Crown.

SIR KENNETH GRESSON

This was an appeal *in forma pauperis* by special leave from the judgment and order of the Court of Criminal Appeal of Ceylon, dated 25th October, 1961, whereby the appellant's appeal against his conviction and sentence of 20th December, 1960, by the Supreme Court at Kalutara, was dismissed. The appellant had been found guilty of murder and sentenced to death. He had together with one Babbu Singho been indicted on a charge that on 27th June, 1960, he had murdered Mahawattage Don Carolis and that the said Babbu Singho had abetted the murder. On their committal for trial by the Magistrate's Court the accused elected to be tried by an English-speaking jury under section 165 B of the Criminal Procedure Code. The Code gives an accused person a right to be tried by a jury drawn from any one of three panels. The Fiscal is charged with the duty of preparing three lists of persons who, as well as having certain property or income qualifications can respectively speak, read and write : (*a*) the English language ; (*b*) the Sinhalese language ; (*c*) the Tamil language. The accused elected to be tried by a jury drawn from the panel the members of which could " speak, read and write the English language ". Such a jury was empanelled accordingly. But the learned Judge who was presiding at the trial thereupon interrogated the jury in these terms :—

" May I ask you, gentlemen of the jury, whether you are sufficiently conversant with Sinhala to be able to understand well the questions put to witnesses and answers given by them ? "

Foreman : " Yes, My Lord ".

" And also address of Counsel if it is made in Sinhala ? "

Foreman : " Yes ".

" Mr. Tampoe (who was Defence counsel), are you able to follow the proceedings in Sinhala ? "

Mr. Tampoe : " Yes, My Lord ".

" You are at liberty to put any question in English at any stage of the case if you so desire and you will also be able to follow the translation which the interpreter will make for the benefit of the stenographer."

The Crown Counsel opened his case in Sinhala. Thereafter the testimony of the witnesses was taken. The first of these gave his evidence in English. But apparently the evidence of other witnesses was given in Sinhalese and though it would necessarily be translated into English for the Record it is not clear that it was done in such a way as to ensure that the jury heard the translation. It was assumed that the closing address of the Crown Counsel was in Sinhala ; the Record was silent as to whether Counsel for the defence addressed in English or Sinhala. The summing up by the learned Judge was in English.

The appellant was found guilty of murder and sentenced to death ; the second accused was acquitted and discharged.

On appeal from the conviction it was contended that since the accused had elected to be tried by an English-speaking jury the conduct of the case partially in Sinhalese was a contravention of the Criminal Procedure Code. The Court of Criminal Appeal—comprising five Judges—were not altogether in agreement. Basnayake, C.J. and L. B. de Silva, J. held that there had been an essential departure from the well-established Rules of procedure—that the trial had not been " according to law " and accordingly that the conviction should be quashed and a new trial ordered. Weerasooriya, J and Gunasekara, J., held the trial to have been irregular but there to have been no substantial miscarriage of justice and that the appeal should, therefore, be dismissed. H. N. G. Fernando, J. held there had been no irregularity and that the appeal should be dismissed. In the result the appeal was dismissed by the majority of three to two. Special leave to appeal to Her Majesty in Council was granted on 30th July, 1962.

The crucial question is whether the accused having elected to be tried by an English-speaking jury the conduct of the trial so contravened the Criminal Procedure Code as to vitiate the trial or, at the least, to amount to a miscarriage of

justice. The Criminal Procedure Code provides (section 165 B) that an accused person having elected, he "shall be bound by and may be tried according to his election, subject, however, in all cases to the provisions of section 224". Section 224 (1) enacts that "the jury shall be taken from the panel elected by the accused unless the Court otherwise directs". There was no direction otherwise.

The Court of Criminal Appeal Ordinance in a set of provisions dealing with appeals against conviction enacts in section 5 that—

> "The Court of Criminal Appeal on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the Court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal : Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred."

A provision in similar terms to this enactment is to be found in many jurisdictions, *e.g.*, in the English Criminal Appeal Act of 1907. There have been many cases in which its application has been discussed.

It has often been held that the adoption of a procedure other than that authorised by the Code under which an accused person is being tried can constitute a miscarriage of justice ; but it is a well-established principle that this Board will not recommend Her Majesty to review or interfere with the course of Criminal proceedings unless there has been such a disregard of the procedure laid down as to occasion substantial injustice. The question is whether there was, in the trial of the appellant, such a departure from the normal or proper procedure as to amount to a miscarriage of justice.

Their Lordships do not think that the trial in this case can be said to have been a nullity because of the course followed, but there are good grounds for holding that the way in which it was conducted may have resulted in withdrawing from the accused a protection which the Code was designed to secure. As was said by Lord Goddard in *R.* v. *Neal*, (1949) 2 K.B. 590 ; (1949) 2 All E.R. 438 :—

> There is no doubt that to deprive an accused person of the protection given by essential steps in criminal procedure amounts to a miscarriage of justice and leave the Court no option but to quash the conviction."

The provisions of the Criminal Procedure Code under which the appellant was tried contemplate that where there has been an election to be tried by an English-speaking jury (as was the case) the trial will be conducted throughout in the English language. Though the evidence of the witnesses who testified in Sinhala was translated for the purposes of the Record this may not have been heard by the jury, or all of them, and as to the addresses of counsel it is not certain that they were translated at all. The course the learned Judge took was based upon an interrogation of the jury conducted by himself. He accepted an assurance from the foreman that the jury understood Sinhala. But this falls short of establishing that each and every one of the jury had such an understanding. There was a complete absence of any sort of assent by the accused to the course being followed.

There are provisions in the Code which emphasise the importance of the trial being had in a language which the jury is able to understand, *e.g.*, section 225 under which objection may be taken to a juror on the ground, "(*c*) of his inability to understand the language of the panel from which the jury is drawn" and section 229 which authorises where "it appears that any juror is unable to understand the language in which the evidence is given", the substitution of a new juror or the discharge of the jury. The assurance given by the foreman of the jury to which the other members of the jury gave no more than a mute assent does not, in Their Lordships' opinion provide a sufficiently solid foundation upon which to assume that all the members of the jury were, in fact, able to understand and appreciate evidence not given in English and the addresses of the defence counsel. Accordingly Their Lordships hold that there having been a departure from the provisions of the Code with no certainty that such a departure did not operate to the disadvantage of the appellant the case must be regarded as one in which there has been a miscarriage of justice necessitating the quashing of the conviction.

Ordinarily in such a case as this where a conviction has to be quashed and the sentence set aside because of procedural irregularities a new trial would be directed. But Their Lordships think that the discretion as to whether there should be a new trial after so great a lapse of time should be exercised by the Court of Criminal Appeal of Ceylon. Their Lordships, therefore, do no more as they have done, than humbly to tender to Her Majesty advice that the Appeal should be allowed, the dismissal of the appeal by the Court of Criminal Appeal of Ceylon be reversed leaving that Court to exerise a discretion whether there should be new trial.

Appeal allowed.

Present : **Weerasooriya, S.P.J.**

J. MIHIRIGAMAGE *vs.* S. BULATHSINHALA

S.C. No. 162—*M.C. Gampaha, No.* 64757.

Argued on : 24th August, 1962, and 3rd September, 1962.
Decided on : 3rd September, 1962.

Maintenance Ordinance, section 2—Application by an ex-wife who had already obtained decree for divorce against her husband—Can she maintain claim against such husband—Does such an ex-wife come within the meaning of the word "wife" in section 2.

Held : (1) That an application for maintenance made under section 2 of the Maintenance Ordinance by a married woman against her ex-husband after a decree for dissolution of marriage had been entered by a competent Court, could not be entertained.

(2) That the word "wife" in section 2 of the Maintenance Ordinance could not be given an extended meaning so as to include an ex-wife who, as a result of a decree of competent Court, had ceased to be the wife of the respondent.

Cases referred to : *Peiris* v. *Peiris*, 45 N.L.R. 18.
Aryanayagam v. *Thangammah*, 41 N.L.R. 169; XVI C.L.W. 33
Fernando v. *Amarasena*, 45 N.L.R. 25; XXVI C.L.W. 81
Francis Fernando v. *Vincentina Fernando*, 59 N.L.R. 522; LV C.L.W. 111
Meniki v. *Siyathuwa*, 42 N.L.R. 53; XIX C.L.W. 37
Subramaniam v. *Pakkivaledchumy*, 55 N.L.R. 87.
Shah Abu Ilyas v. *Ulfat Bibi*, Indian Decisions (New Series) 9 Allahabad 33.
In re Mohamed Rahimullah and another, (1947) A.I.R. Madras 461.
Janni Bibi v. *Mohamed Abdul Rahman*, ((1955) A.I.R. Andhra 1.

F. W. Obeysekere, for the applicant-appellant.

J. C. Thurairatnam with *M. T. M. Sivardeen*, for the defendant-respondent.

WEERASOORIYA, S. P. J.

This is an appeal from an order of the Magistrate refusing an application by the applicant-appellant against the respondent for maintenance of herself and her child. In the application which was made on the 13th May, 1961, under the provisions of section 2 of the Maintenance Ordinance (Cap. 91), the appellant described herself as the lawful wife of the respondent. The application in so far as it concerned the maintenance of the child was not proceeded with, as the child died on the 23rd September, 1961, during the pendency of the proceedings.

It appears from the document A 1 that on the 30th August, 1960, a *decree nisi* had been entered in the District Court of Gampaha for the dissolution of the marriage between the applicant and the respondent on the ground that the respondent was guilty of malicious desertion. By the same decree the respondent was ordered to pay to the applicant Rs. 50/- per month as alimony and Rs. 20/- per month as maintenance for the child. This decree was made absolute on the 20th December, 1960, so that at the time when the applicant made the application for maintenance in the present proceedings she was no longer the wife of the respondent. The description of the

* For Sinhala translation, see Sinhala section, Vol. 6 part 6, p. 21

applicant as the lawful wife of the respondent in the application made by her is, therefore, not correct. The Magistrate after inquiry refused the application on the ground that as the applicant had at the date of the application ceased to be the wife of the respondent, she was not entitled to an order of maintenance under section 2 of the Ordinance.

Section 2 confers power on a Magistrate to make an order for maintenance against any person who "having sufficient means neglects or refuses to maintain his wife or his legitimate or illegitimate child unable to maintain itself". The expression "wife" is not defined in the Ordinance and in the absence of a definition it would have to be construed as meaning a lawfully married wife unless there are any grounds for giving to the expression an extended meaning. Mr. Obeysekere who appeared for the appellant relied on certain decisions of this Court on the strength of which he submitted that the expression "wife" in section 2 should be construed so as to include an ex-wife who prior to the making of the application for maintenance had ceased to be a wife as a result of a decree of a competent Court dissolving her marriage with the person against whom the order for maintenance is sought to be obtained. The first of these cases is *Peiris* v. *Peiris*, 45 N.L.R. 18. The facts of this case are as follows : The appellant had sued the respondent for a decree of judicial separation and was successful in obtaining it along with the custody of the child of the marriage. It would appear that an order for alimony in her favour had also been made, but in order to avoid payment of the alimony the respondent had subsequently got himself adjudicated an insolvent. The wife thereafter made an application against the defendant under the Maintenance Ordinance for maintenance for herself and her child. The Magistrate following a decision of de Kretser, J., in *Ariyanayagam* v. *Thangammah*, 41 N.L.R. 169, by which he considered himself bound, dismissed the application of the wife on the ground that there was already a decree of a civil Court in favour of the wife for the payment to her of alimony. In appeal Soertsz, J., held that the decree for alimony, as long as it was not complied with, was not a bar to an application under section 2 of the Maintenance Ordinance and that in such an application it was open to the Magistrate to make an order for maintenance if there is proof that the husband having sufficient means had neglected or refused to maintain his wife or child. It is to be noted that the applicant in that case was still the wife of the respondent.

The conflicting views expressed by Soertsz, J. and de Kretser, J., led to the subsequent case of *Fernando* v. *Amarasena*, 45 N.L.R. 25, being referred to a Bench of two Judges of this Court. It would appear that in that case the appplicant for maintenance had previously obtained a divorce from her husband, the respondent, who had in the same action been ordered to pay Rs. 50/- as alimony and maintenance for the applicant and the child of the marriage. No payment had, however, been made by the respondent in terms of that order, and the applicant thereafter applied to the Magistrate's Court for an order of maintenance in favour of the child only. She refrained from making an application for maintenance in her favour presumably because she had ceased to be the wife of the respondent. It was held that where all that is shown is the existence of a decree of a civil Court for payment of alimony, such decree is no bar to the exercise of jurisdiction by the Magistrate under the provisions of the Maintenance Ordinance. No occasion arose in that case for the Court to consider the question whether it was competent for the "wife", once she had ceased to be the wife of the respondent, to make an application under the Maintenance Ordinance for maintenance of herself.

The third case relied on by Mr. Obeysekere is the case of *Francis Fernando* v. *Vincentina Fernando*, 59 N.L.R. 522. In that case the applicant had obtained an order for maintenance of herself under the provisions of the Maintenance Ordinance. Subsequently she obtained a decree in the District Court dissolving her marriage with the respondent and also an order for payment of alimony in a sum of Rs. 80/-. Apparently the order for payment of alimony was not complied with and the applicant then applied under section 10 of the Maintenance Ordinance for enhancement of the maintenance that had been ordered in her favour prior to the divorce proceedings. Sinnetamby, J., held on a consideration of the language of section 10 that it was open to the applicant, even after she had ceased to be the wife of the respondent, to apply under section 10 for the enhancement of the maintenance ordered prior to her change of status. Sinnetamby, J., while expressing that view, contrasted the language of section 10 with that of section 2, and he observed that for the purposes of section 2 an applicant "has to be a *wife* in order to succeed", but he did not think it necessary for the purposes of that case to decide whether a "wife" who had obtained a decree for divorce can thereafter apply for maintenance under section 2.

The view taken by Sinnetamby, J., that it is open to an ex-wife to apply under section 10 for enhancement of maintenance ordered under section 2 at a time prior to her change of status, seems to run counter to the decision in the earlier case of *Meniki* v. *Siyathuwa*, (42 N.L.R. 53,) which was not considered by him, and in which it was held that where a wife had obtained an order for maintenance against her husband under the provisions of the Maintenance Ordinance, it would not be open to her to recover maintenance in terms of the order as from a date subsequent to that on which her marriage with the respondent was dissolved under the provisions of the Kandyan Marriage Ordinance, No. 3 of 1870.

It seems to me that the question decided in *Francis Fernando* v. *Vincentina Fernando* (*supra*) and in the other two cases relied on by Mr. Obeysekere was different from that arising in the present appeal. A case which is more in point, and to which Mr. Sivardeen appearing for the respondent drew my attention, is *Subramaniam* v. *Pakkiyaledchumy*, (55 N.L.R. 87,) where Rose, C.J., in considering the language of section 2 observed that the section permits a "wife" to make an application against her husband in the event of his failure to maintain her. He stated further "The duty is cast on the husband to provide only for his wife and if the alleged marriage of an applicant for maintenance is invalid by reason of some legal impediment which makes her stand in a somewhat lesser relationship to the alleged husband than as wife, it would seem to be plain from the wording of the section that she is not entitled to claim maintenance for herself under the Ordinance".

Section 2 of our Maintenance Ordinance is substantially the same as section 448 (1) of the Indian Code of Criminal Procedure (Act, No. 5 of 1898). It would appear to be the view of the Indian Courts "that it is only on proof of the existence of conjugal relations between a man and a woman that the man can under section 488 be ordered to provide for the woman's support"—*per* Aikman, J., in *Shah Abu Ilvas* v. *Ulfat Bibi*, Indian Decisions (New Series) 9 Allahabad 33. See also *In re Mohamed Rahimullah and another*, (1947) A.I.R. Madras 461 ; and *Janni Bibi* v. *Mohamed Abdul Rahaman*, (1955) A.I.R. Andhra 1.

In the present case, too, I do not think that in construing the expression "wife" in section 2 of the Maintenance Ordinance it is permissible to give it an extended meaning so as to include an ex-wife who, as a result of a decree of a competent Court, had ceased to be the wife of the respondent.

In my opinion, the order of the Magistrate refusing the application of the appellant is a correct order and I, therefore, dismiss the appeal.

Appeal dismissed.

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

T. M. JAYAWARDENE *vs.* R. ALUVIHARE, SUB-INSPECTOR OF POLICE

S.C. 728/1962—*M.C. Colombo*, 5960/*B*.

Argued on : 6th December, 1962, and 24th and 25th January, 1963.
Decided on : 27th February, 1963.

Criminal Procedure Code, sections 171, 425—*Poisons, Opium and Dangerous Drugs Ordinance* (*Cap.* 172), *sections* 32, 76—*Charge of possessing raw opium—Charge erroneously referring to possession without a licence from the Minister of Health, when it should be from the Director of Medical and Sanitary Services—Does such error make charge illegal ?—What facts should Appeal Court consider in determining whether there has been failure of justice ?*

Sentence, failure to appeal from—Does that debar Supreme Court from interfering with sentence—Criminal Procedure Code, section 347.

Where an accused was convicted on a charge of possessing raw opium without a licence from the Minister of Health, when it should have stated without a licence from the Director of Medical and Sanitary Services—

Held : (1) That the error in the charge did not constitute an illegality.

(2) That in deciding whether there has, in fact, been a failure of justice, the Appeal Court is entitled to take the whole case into consideration and determine for itself whether there has been a failure of justice in the sense that a guilty man has been acquitted or an innocent man has been convicted.

(3) That the fact that neither the Attorney-General nor the accused has appealed against the sentence does not debar the Supreme Court from interfering with it.

Case referred to : *Abdul Rahim* v. *Emperor*, A.I.R. 33, (1946) Privy Council 82.

Colvin R. de Silva with *A. C. M. Ameer* and *D. S. Wijesinghe*, for the accused-appellant.

P. Colin Thome, Crown Counsel, for the complainant-respondent.

SRI SKANDA RAJAH, J.

The complaint in this case was filed on 1st September, 1961, though the detection was made by the officials of the Customs on 16th February, 1957.

The accused was charged as follows :—

". . . did, *without a licence from the Minister of Health*, have in your possession about 120 pounds of raw opium in contravention of section 32 read with section 76 (1) (*a*) of the Poisons, Opium and Dangerous Drugs Ordinance (Cap. 172) and you have thereby committed an offence punishable under section 76 (5) (*a*) of the said Ordinance."

After trial the accused was convicted and fined Rs. 500/- and in default to six months' rigorous imprisonment.

The appellant's counsel raised three points :—

(1) There was no valid charge for the reason that it refers to a licence from the Minister of Health and not to a licence from the Director (of Medical and Sanitary Services) as required by section 32.

(2) Inadmissible evidence was admitted at the trial.

(3) The prosecution has failed to prove beyond reasonable doubt that the accused had guilty knowledge.

Crown Counsel argued that the error in the charge was so trivial that it would be covered by sections 171 and 425 of the Criminal Procedure Code as the accused was not misled and there was no failure of justice occasioned by it.

I cannot agree that there was no valid charge. The error does not constitute an illegality.

The facts as found by the magistrate are as follows :—

On information received by Customs Officer Ponniah, a raid was organised, led by Speldewinde, Chief Preventive Officer. Ponniah fetched the accused from the Municipality where he was employed. In his house the accused opened a cupboard with a key. In it was found a parcel which contained six packets, each containing 20 lbs. of raw opium—Speldewinde, who had considerable experience in identifying raw opium identified the 120 lbs. as raw opium.—The accused told Ponniah that his brother, Emil Jayawardene, an air pilot had dumped the parcel there and, at another stage, that one Rodrigo had brought the parcel in a taxi one night and left it in the cupboard, which accused pointed to Rodrigo. Speldewinde's evidence is that the accused opened the cupboard and said that there were six parcels and that when he asked the accused whether he had a permit to possess opium he said that he had no permit. The accused's evidence, which has rightly been rejected, is that he did not know what the parcel contained and did not even attempt to find out what it contained, through Rodrigo had never before brought a parcel to his house.

On this evidence the magistrate could not have come to any other conclusion than that the accused knew that the parcel contained opium. Therefore, the third submission fails.

The evidence objected to as inadmissible is that of Speldewinde and reads thus :—" I asked the accused whether he had a permit to possess opium, he said no ". The basis of the objection was that this was oral evidence of a statement recorded by Speldewinde, who was authorised by law to record it on oath and, in fact, did so. The written statement itself should have been produced. The record gives no indication at all that this was part of what Speldewinde reduced to writing. Therefore, the second objection, too, fails.

Even if this was part of what Speldewinde reduced to writing and the objection is valid there was sufficient other evidence to justify the decision ;

for, section 167 of the Evidence Ordinance which runs thus :—

> "The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case if it shall appear to the Court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision or that if the rejected evidence had been received it ought not to have varied the decision."

applies in this case. For this reason, too, the second objection fails.

Section 171 of the Criminal Procedure Code runs thus :—

> "No error in stating either the offence or the particulars required to be stated in the charge and no omission to state the offence or these particulars shall be regarded at any stage of the case as material, unless the accused was misled by such error or omission."

The relevant portion of section 425 of the Criminal Procedure Code reads as follows :—

> ". . . no judgment passed by a Court of competent jurisdiction shall be reversed or altered on appeal or revision on account—
>
> (*a*) of any error, omission or irregularity in the . . . charge, . . .
>
> unless such error, omission, irregularity, . . . has occasioned a failure of justice."

The petition of appeal does not state that the accused-appellant was misled by this error. His defence was based on *mens rea* alone. The substance of the offence had been correctly set out. So were the relevant sections. Therefore, it cannot be seriously contended that the accused-appellant had been either misled or prejudiced.

This Court in deciding whether there has, in fact, been a failure of justice is entitled to take the whole case into consideration and determine for itself whether there has been a failure of justice in the sense that a guilty man has been acquitted or an innocent man has been convicted : *Abdul Rahim* v. *Emperor*, A.I.R. (33) 1946, Privy Council, 82. Having taken the whole case into consideration as indicated by Their Lordships of the Privy Council, I hold that there has been no failure of justice.

For these reasons, the first submission, too, fails.

At the conclusion of the argument I invited counsel to address me on the question of sentence and appellant's counsel submitted :—

(*a*) The accused has not appealed on the question of sentence. Nor has the Crown done so, though entitled to. Therefore, this Court cannot interfere with the sentence.

(*b*) The magistrate has considered the question of sentence carefully.

(*c*) There was long delay in launching the prosecution and accused has suffered in consequence.

Crown Counsel said that the Crown did not file appeal as regards the sentence because the "delay did disturb the mind of the Attorney-General."

The delay was due to the Customs authorities taking steps against the accused, his brother Emil and one Nadarajah and imposing a fine of Rs. 200,000/- on each of them on the basis that they were concerned in smuggling the opium into Ceylon. There was apparently insufficient evidence of such smuggling. Therefore, no steps could be taken for recovering those fines. Thereafter it was that this matter was handed over to the police, who launched this prosecution.

It is an astonishing proposition to submit that simply because the Attorney-General has not thought that this was a fit case for appealing regarding the sentence and/or because the accused too, has not appealed against the sentence this Court is prevented from interfering with the sentence. To push this proposition to its logical conclusion : in spite of the express provisions of section 347 of the Criminal Procedure Code enabling this Court, in an appeal from a conviction, to increase or decrease the sentence, it cannot decrease the sentence because the accused himself has no complaint in respect of the sentence ! It would also mean that this Court cannot even interfere with the default sentence of six months' rigorous imprisonment passed by the magistrate in this case, though he could have lawfully imposed only a maximum of three months' rigorous imprisonment, in default, *i.e.*, one-fourth of the maximum sentence of imprisonment of one year fixed for the offence (*Vide* section 312 (1) (*c*) of the Criminal Procedure Code). Therefore, I would reject submission (*a*) (*supra*) as untenable.

The only reason that prevents me from sentencing the accused to imprisonment is the in-

ordinate delay, though the quantity of opium was large, illicit profit accruing from it, if undetected, would have been immense and such offences are very difficult of detection. But, the fine imposed is inadequate and it should be increased to Rs. 1,000/-.

For these reasons, I would dismiss the appeal subject to the alteration that the conviction should be recorded as for the commission of the offence charged "without a licence from the Director" and enhance the fine to one of Rs. 1,000/-, but reduce the default sentence to three months' rigorous imprisonment.

Appeal dismissed.

Present : **Sansoni, J. and L. B. de Silva, J.**

A. DON NORIS APPUHAMY *vs.* S. A. NERIS SINGHO & ANOTHER*

S.C. No. 619/'60—*D.C. (F) Panadura, No.* 7058.

Argued and decided on : 15th May, 1963.

Minors—Whether deed of transfer executed by minor void or voidable—Is ratification by minor necessary to pass title.

Held : (1) That a deed of transfer executed by a minor is voidable and not void. Such a deed would confer title on the vendee without any ratification by the minor until such time as the minor took steps to have it set aside.

(2) That there was no conflict of decisions on this point.

(3) That in the present case, the 2nd defendant could not have acquired title to the land by prescription as he had been admittedly possessing on behalf of his minor sons who had now transferred their shares to the plaintiff.

A. C. Gooneratne, with *N. S. A. Goonetilleke* and *Y. H. Gunaratne,* for the plaintiff-appellant.

No appearance for the defendants-respondents.

SANSONI, J.

The plaintiff brought this action to be declared entitled to lot G of a land called Mahawatta described in the plaint. It has been proved that under a final decree in a partition action two persons, Karunaratne and Karunasena, became the owners of this land. They transferred their respective shares to the plaintiff by two deeds in 1956 and 1958, respectively, when they were both minors. There are two defendants to the action, of whom the 2nd defendant is the father of the two minors and the 1st defendant is a tenant under him.

The learned District Judge has held that the two deeds executed by the minors in favour of the plaintiff are void in spite of clear decisions of this Court which have held that a deed executed by a minor is voidable and not void. The learned District Judge seems to have thought that there was some conflict between those decisions and another decision which held that a guardian of a minor cannot alienate a minor's property without the sanction of the Court. There is no conflict at all and the learned District Judge should have held that until the minors took steps and had the deeds executed by them set aside they were valid and conferred title on the plaintiff. The learned District Judge also seems to have thought that in the absence of express ratification by the minors after they had executed the deeds, no title passed to the plaintiff. That again is an unsound view.

It is difficult to understand what the learned District Judge has meant when he answered the issue of prescription by holding that the 2nd defendant acquired title by prescription to the land. The 2nd defendant had admitted that he possessed this land on behalf of his minor sons. There was, therefore, no question of his acquiring title by prescription against those sons, and since ten years have not elapsed since the minors transferred their shares to the plaintiff, no question of prescription as against the plaintiff could arise.

* For Sinhala translation, see Sinhala section, Vol. 6, part 6, p. 24

We, therefore, set aside the judgment under appeal and give judgment for the plaintiff as prayed for with costs against both defendants, save that damages will be as agreed.

L. B. DE SILVA, J.

I agree.

Appeal allowed.

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

W. JUSTIN BOTEJUE *vs.* A. D. MISSIE NONA

S.C. No. 127 *of* 1960—*C.R. Kandy,* 15909.

Argued on : 11th October, 1961.
Decided on : 24th October, 1961.

Landlord and tenant—Monthly tenancy—When rent in arrears—No stipulation in tenancy that rent should be paid in advance—Rent payable at the end of month—Agreement to accept rent three months behind time—Agreement not pleaded in answer—No issue raised regarding existence of agreement.

The plaintiff sued the defendant on the basis that the latter was his monthly tenant and was in arrears of rent. The defendant, in her answer, admitted being a tenant on a monthly tenancy, but contended that rent had been tendered every month to the plaintiff who had refused to accept the rent so tendered. There was no stipulation that the rent should be paid in advance. The learned Commissioner held that there was an agreement between the plaintiff and defendant to accept rent three months behind time.

Held : (1) That, in the case of a monthly tenancy, where there is no stipulation that the rent should be paid in advance, the rent must be paid at the end of the month.

(2) That, inasmuch as the agreement found to exist by the learned Commissioner had neither been expressly pleaded in the answer, nor an issue raised in regard to its existence, no inference adverse to the plaintiff should have been drawn on account of his failure to produce any written notice given to the defendant that rent will not be accepted unless paid at the end of the month in respect of which it was due.

Case referred to : *Adamjee Lukmanjee & Sons, Ltd.* v. *Ponniah Pillai,* (1959) 61 N.L.R. 181; LVII C.L.W. 62

Vernon Jonklaas, for the plaintiff-appellant.

No appearance for the defendant-respondent.

T. S. FERNANDO, J.

The appeal in this case has to be allowed. The plaintiff sued the defendant for ejectment on the basis that the latter was his monthly tenant and was in arrears of rent. By her answer the defendant admitted being a tenant on a monthly tenancy, but contended that rent had been tendered every month to the plaintiff who had refused to accept rent so tendered. The only issue therefore at the trial was whether the defendant was in arrears of rent.

As has been held in *Adamjee Lukmanjee and Sons, Ltd.* v. *Ponniah Pillai,* (1959) 61 N.L.R. 181, in the case of a monthly tenancy, where there is no stipulation that the rent should be paid in advance, the rent must be paid at the end of the month. Applying this rule, it is undeniable that the defendant had fallen into arrears of rent. The learned Commissioner has held that there was an agreement between the plaintiff and the defendant to accept rent three months behind time. Such an agreement had not been expressly pleaded in the answer which had admitted the monthly tenancy, nor was an issue raised regarding its existence. In these circumstances no inference adverse to the plaintiff should, in my opinion, have been drawn on account of his failure to produce any written notice given to the defendant that rent will not be accepted unless paid at the end of the month in respect of which it was due.

The order made in the Court of Requests on 9th September, 1960, is hereby set aside, and I direct that judgment be entered in favour of the plaintiff as prayed for in his plaint. The defendant must pay to the plaintiff his costs in both Courts. Some monies appear to have paid into Court by the defendant after action was filed. Account will, no doubt, be taken of the payment of these monies at the stage of execution.

Appeal allowed.

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

M. D. S. RATNEWEERA, LABOUR OFFICER *vs.* K. ARULAMPALAM

S.C. 897/1962—*M.C. Colombo,* 15579/*A.*

Argued on : 11th March, 1963.
Decided on : 9th May, 1963.

Employees' Provident Fund Act, No. 15 *of* 1958—*Accused carrying on business of manufacturing tobacco or tobacco products—A covered employment within the meaning of section* 8 (1) *read with regulation* 2 (1) *of Regulations made under the Act—Accused's failure to pay as employer to the Employees' Provident Fund from the earnings of the employees contributions to the Fund—Contravention of section* 15 *of the Act—Charges under sections* 34 (*a*) *and* 37 *of the Act—Evidence that accused was doing cigar business—Acquittal of accused on the ground that the prosecution failed to prove that "cigars" made out of tobacco—Appeal from acquittal.*

The appellant was acquitted of three charges under sections 34 and 37 of the Employees' Provident Fund Act, No. 15 of 1958, in which he was accused of contravening the provisions of section 15 of the Act by failure to pay to the Employees Provident Fund certain contributions in respect of three persons employed by him in his cigar factory.

Paragraph 10 of the Schedule in a *Gazette Extraordinary* enumerated the business of manufacturing tobacco or tobacco products as one of the covered employments to which the Act is applicable.

After the close of the prosecution case the learned Magistrate acquitted the accused on the ground that the prosecution failed to prove that the business carried on by the accused was the manufacturing of tobacco or tobacco products holding,

(*a*) that there was no reference to tobacco in the oral evidence led for the prosecution ;

(*b*) that there was no reference to tobacco in the declaration produced by the prosecution and which had been furnished by the accused under regulation 8 of the Regulations of 29th October, 1958, giving particulars of employees in the accused's cigar factory ;

(*c*) that there are cigars in the market which are not made of tobacco.

The complainant appealed with the sanction of the Attorney-General.

Held : That the meaning of the English word "cigar" as given in the Oxford Dictionary is a roll of tobacco leaf for smoking, and the furnishing of the particulars of his cigar industry by the accused prior to the date material to the charge as required by regulation 8 of the Regulations of 29th October, 1958, therefore established the case for the prosecution.

L. B. T. Premaratne, Senior Crown Counsel, for the Attorney-General.

No appearance for the accused-respondent.

G. P. A. SILVA, J.

The accused-respondent in this case, hereinafter referred to as the accused, was charged on three counts with having contravened the provisions of section 15 of the Employees' Provident Fund Act No. 15 of 1958. On the 1st count he was charged as follows :—

That he, being the employer of P. Ponnadurai, a person to whom the Employees' Provident Fund Act, No. 15 of 1958 (hereinafter referred to as "the said Act") applied in that he was a male over the prescribed age of 14 years and under the age of 55 and was employed in the service of an undertaking in which five or more persons are employed and which is established for the purpose of carrying on wholly or partly the business of manufacturing tobacco or tobacco products, to wit : Arulampalam Cigar Factory, Kurumbacity, Tellipalai, which is a covered employment within the meaning of section 8 (1) of the said Act read with regulation 2 (1) (*a*) of the Employees' Provident Fund Regulations hereinafter referred to as "the said regulations") published in the Government *Gazette*, No. 11,573 of October 31, 1958,

For Sinhala translation, see Sinhala section, Vol. 6 part 7, p. 25

did, in contravention of section 15 of the said Act, fail to pay in Colombo, before the last day of November, 1960, to the Employees' Provident Fund from the earnings of the said employee for whose benefit there was no Provident Fund or a contributory Pension Scheme approved under the provisions of section 27 of the said Act, his contributions for the month of October, 1960, for the payment of which the said employee became liable under section 10 (1) read with order made under section 10 (3) of the said Act and published in the Government *Gazette*, No. 11,924 of 26th October, 1959, and that the accused-respondent is thereby guilty of an offence under section 34 (*a*) of the said Act punishable under section 37 of the said Act.

In the 2nd and 3rd counts he was charged with the same offence in respect of two other persons N. Kandavanam and N. Arulambalam.

The prosecution led evidence of the following facts :—

(*a*) that the accused-respondent was the proprietor of Arulampalam Cigar Factory, and that the nature of business of the said factory was the manufacture of cigars ;

(*b*) that the accused-respondent was the employer of P. Ponnadurai, N. Kandavanam and N. Arulambalam, who were males over the age of 14 years and under the age of 55 ;

(*c*) that the said employees were employed at Arulampalam Cigar Factory ;

(*d*) that there was no approved contributory Pension Scheme or Provident Fund for the benefit of the said employees ;

(*e*) that in October, 1960, there were 70 persons employed at Arulampalam Cigar Factory ;

(*f*) that the accused-respondent failed to pay before the last day of November, 1960, to the Employees' Provident Fund the contributions for October, 1960, in respect of the said P. Ponnadurai, N. Kandavanam and N. Arulambalam.

After the close of the prosecution case, when the Magistrate called upon the accused for his defence, counsel for the accused called no evidence but submitted that the prosecution failed to prove that the business carried on by the accused was the manufacture of tobacco or tobacco products. The Magistrate upheld this contention and acquitted the accused stating *inter alia* :—

> " It is, therefore, essential for the prosecution to prove that the business of the accused was the manufacture of tobacco or tobacco products. There is no reference to tobacco at all in the oral evidence called by the prosecution. Even in P 2, the declaration given by the accused, the nature of the business was given as a cigar business. There, too, there is no reference to tobacco. Cigars, no doubt, are normally manufactured of tobacco but it cannot be denied that there are cigars in the market which are not made of tobacco. Since this is a criminal case I think the prosecution should prove conclusively such facts which will bring it within the definition of para. 10 of P 3. Failure to prove that cigars were made of tobacco is, therefore, in my view fatal to this case."

The Labour Officer, Colombo, who was the complainant in this case in the Magistrate's Court, has, with the sanction of the Attorney-General, appealed against this order on the ground that the learned Magistrate was wrong in holding that the prosecution failed to prove that the business carried on by the accused was the manufacture of tobacco or tobacco products and that there is no evidence on record that in Ceylon cigars are made by any substitute other than tobacco.

Mr. Premaratne, Senior Crown Counsel, who appeared for the appellant in this case has placed several arguments before me in support of his contention that the Magistrate has misdirected himself in his order. In the first place he referred me to the meaning of " cigar " in the Oxford Dictionary which says that it is a roll of tobacco-leaf for smoking and has submitted that, when a person is charged in the English language with having committed an offence as proprietor of his cigar factory, one should be guided by the Oxford Dictionary meaning of " cigar " which does not permit the meaning contended for it. Section 8(1) of the Employees' Provident Fund Act, 15 of 1958, provides that any employment including any employment in the service of a corporation whose capital or part of whose capital is provided by the Government may, by regulation, be declared to be a covered employment and Subsection 8 (3) provides that every person over a

prescribed age who is employed by any other person in any covered employment shall be an employee to whom this Act applies. Regulation 2 (1) of the Regulations published by the Minister of Labour Housing and Social Services by virtue of the powers vested in him by section 46 of the Employees' Provident Fund Act, No. 15 of 1958 and published in the Government *Gazette* of 1st January, 1958, makes every employment specified in the First Schedule to these Regulations a covered employment and according to this First Schedule a covered employment means every employment other than employment : (*a*) under the Government of Ceylon ; (*b*) under any local authority ; or (*c*) under the Local Government Service Commission established under the Local Government Service Ordinace, No. 3 of 1945. Section 10 of the Act sets out the liability of an employee and employer to pay a monthly contribution to the Fund and sub-section 3 of this section empowers the Minister by order published in the *Gazette* to fix the date of commencement of the contribution in respect of covered employments. In pursuance of these powers the Minister of Labour made an order of 26th October, 1959, published in a *Gazette Extraordinary* of the same date specifying in a schedule the covered employments to which the above provisions were applicable. Para. 10 of this schedule enumerated the business of manufacturing tobacco or tobacco products as one of the covered employments.

As to whether the accused was liable for the contributions in terms of the provisions of this Act in respect of the employees mentioned in the charges if the accused's business was a covered employment there was hardly any dispute. It was proved in evidence, as stated earlier, that the accused was the employer of Ponnadurai, Kandavanam, and Arulambalam who were over the age of 14 years and under the age of 55 and that there was no approved contributory pension scheme or provident fund which had been established in the accused's business prior to the Act which would have had the effect of exempting the accused from making contributions required by this Act. The only question at issue, therefore, was whether the cigar factory of the accused was a covered employment under the Act. While the accused's counsel contended at the trial that there was no proof that the cigars turned out in the accused's factory were out of tobacco the prosecution had produced in evidence particulars of employees in the accused's cigar factory which the accused had furnished on 15th February, 1960, prior to the material date in the charge, as required by regulation 8 of the Regulations of 29th October, 1958. Crown Counsel strongly relied on the conduct of the accused in sending this form furnishing particulars of his cigar business which the accused would only have done on the basis that his cigar business was engaged in manufacturing tobacco or tobacco products to which the order of 26th October, 1959, made by the Minister under section 10 (3) of the Act applied. If his cigar business was engaged in manufacturing cigars not out of tobacco or tobacco products but out of some other leaf or material there was no obligation on his part to comply with the order dated 26th October, 1959, by the Minister. It appears to me that the date on which the accused forwarded this form, namely, 15th February, 1960, is material as it is approximately three months after the publication of the Minister's order imposing an obligation on the employer of an undertaking established for the purpose of carrying on the business of manufacturing tobacco or tobacco products to forward such particulars.

I am of the view that the meaning of the English word " cigar " as given in the Oxford Dictionary and the furnishing of the particulars of his cigar industry by the accused in the circumstances of this case have sufficiently established the case for the prosecution and that the Magistrate should have convicted the accused. I feel certain that if the submissions that were placed before me were made to the Magistrate he would have had no hesitation in finding the accused guilty.

I, therefore, set aside the order of acquittal of of the Magistrate and convict the accused of the charges laid against him and sentence him to a fine of Rs. 100/- on each count and to a further fine of Rs. 5/- on each count for each day on which the offence is continued after the decision of this Court is communicated to the accused, and I remit the case to the Magistrate to take necessary action in terms of section 38 of the Act to recover such sums as may be found by the Magistrate to be due from the accused by way of his contributions under the Act.

Acquittal set aside.

Present : **Sansoni, J. and L. B. de Silva, J.**

I. L. S. ABIDEEN HADJIAR *vs.* M. AIYSHA UMMA

S.C. 16/'61 (*Inty.*)—*D.C. Matale, Case No. P.* 600.

Argued on : 13th March, 1963.
Decided on : 20th March, 1963.

Compensation for improvements—Husband effecting improvements on property owned by wife—Improvements effected for benefit of wife and children—Right to claim compensation from heirs of deceased wife.

A woman subject to Muslim law died leaving as heirs her father, the plaintiff, her mother, the defendant, her husband, the 2nd defendant and her children, the 3rd to 7th defendants. The plaintiff filed a partition action against the defendant for a sale under the Partition Act, of a land which had devolved on him and the defendants as heirs of the deceased. The 2nd defendant who had improved the land during the lifetime of the deceased for her benefit as well as that of the 3rd to 7th defendants, claimed compensation for that improvement from the plaintiff and the 1st defendant waiving his claim against the 3rd to 7th defendants.

Held : That as the 2nd defendant had improved the land for the benefit of the owner who was his wife and not for his own benefit, he could not after her death claim compensation from her heirs for that improvement.

Followed : *Hassanally* v. *Cassim*, 61 N.L.R. 529; LVII C.L.W. 100

C. Ranganathan, for the plaintiff-appellant.

N. R. M. Daluwatte, for the 2nd—7th defendants- respondents.

L. B. DE SILVA, J.

One Ajibanoon was entitled to the two properties in suit upon deed No. 681 of 1945 (P2) from her mother, Aysha Umma. She died leaving as her heirs, her father, the plaintiff, her mother, the first defendant, her husband, the 2nd defendant and her children, the 3rd to the 7th defendants. The parties are governed by the Muslim law and there is no dispute to the title to this land. The plaintiff is seeking a sale of the land under the Partition Act.

The second defendant is seeking compensation for improvements effected by him to the two houses on the said lands. These improvements were effected when 2nd defendant's wife was the owner and when she was alive. The 2nd defendant is claiming compensation only from the plaintiff and the 1st defendant and has waived his claim as against his children. The learned District Judge has held that the 2nd defendant has effected considerable improvements to the two houses that existed on these two lands at his own expense. It is not necessary for the purposes of this appeal to consider the correctness of that finding though he has erred on an important point in arriving at his decision.

The 2nd defendant admitted in his evidence that he effected the improvements in the interests of his wife and children. He is making his present claim because his wife had since died and certain shares have devolved on her parents.

In the case of *Hassanally* v. *Cassim*, 61 N.L.R., at p. 532, Viscount Simonds stated in the Privy Council, "the right of the improver to compensation rests on the broad principle that the true owner is not entitled to take advantage, without making compensation, of the improvements effected by one *who makes them in good faith believing himself to be entitled to enjoy them whether for a term or in perpetuity*".

He also cited with approval the following passage from Wille's, "Principles of South-African Law", 4th edition, at page 479 :—

"A very common application of the doctrine of unjust enrichment occurs in cases where improvements or additions to landed property have been made, without the express or implied consent of the owner of the property, by a person in possession of the property. A person who expends money or labour in improving property *with the intention of doing so for his own benefit* whereas, in fact, he had no right or title to the property, in consequence of which the improvements are acquired

by the owner of the property by virtue of accession is entitled to claim from the latter the amount by which the property has been enhanced in value."

The principle of unjust enrichment has no application where the improver effected the improvements for the benefit of the owner. The essence of a claim for compensation is that the improver expected to enjoy the benefit of the improvements for a term or in perpetuity. In this case, apart from any presumption of advancement in favour of the wife, the 2nd defendant has expressly stated that he effected the improvements in the interests of his wife and children, that is, for their benefit. He cannot put forward his claim after the death of his wife when he had no intention at the time he effected the improvements, to make any such claim against his wife.

The 2nd defendant's position is no different even if he effected the improvements with the express or implied consent of his wife, the owner, because he did so for her benefit.

Counsel for the 2nd defendant-respondent urged that the 2nd defendant was entitled to claim compensation on the footing that he has effected useful improvements to dotal property during the pendency of the marriage. He relied on "The Selective Voet—the Commentary on the Pandects", translation by Percival Gane—Volume 4, p. 341, Book XXV, Title I. The translator notes that no instance has been noticed of this title ever having been quoted in a South-African judgment, though it has been approved at one point in a legal writing.

Counsel pointed out that the deed P 2 was executed on the day of the marriage between the 2nd defendant and his wife, Ajibanoon, and the marriage certificate D 4 refers to the land conveyed on the deed P 2 under the cage "Amount of Stridanam". Stridanam was a gift to a woman on the occasion of her marriage.

The claim by the 2nd defendant for compensation for improvements, was not put forward in the trial Court on the basis of a claim to compensation for beneficial improvements to dotal property under Roman-Dutch Law. Many other questions of fact and law may have arisen for consideration if the claim to compensation was based on this footing in the trial Court. We regret that we cannot consider the 2nd defendant's claim to compensation on the basis put forward by his Counsel in this appeal.

We accordingly allow this appeal with costs and set aside the award in the Decree in favour of the 2nd defendant for compensation for improvements.

SANSONI, J.

I agree.

Appeal allowed.

Present : **Abeyesundere, J.**

Application No. 42/'63 *for Writ of Quo Warranto and Writ of Mandamus.*

P. SAMARAWICREMA *vs.* A. A. JOSEPH (Asst. Commissioner of Local Government) & ANOTHER

Argued on : April 8, 1963.
Decided on : April 22, 1963.

Village Councils Ordinance, as amended by Act No. 60 of 1961, section 17—Notice of first meeting—Mode of service—Whether mandatory or directory.

Section 17 (1) of the Village Councils Ordinance as amended by Act No. 60 of 1961, requires the first meeting of the Village Council to be convened by notice and provides as follows :—

"Such notice shall, at least five days before the date fixed for the meeting—

(*a*) be published in the *Gazette* and in one or more Sinhala newspapers circulating in Ceylon, if the language in which proceedings are conducted in that Council is Sinhala, or in one or more newspapers in Sinhala and Tamil circulating in Ceylon, if the language in which proceedings are conducted in that Council is Tamil ; and

(*b*) be despatched by registered post to each elected member of that council."

Section 17 (2) requires a notice under section 17 (1) to " specify the date, time and place of the meeting ".

Counsel for the petitioner submitted that in the present case—

(*a*) It was discovered after notice had been duly published in accordance with section 17 (1) (*a*) that it did not correctly describe the place of the meeting. An amended notice was then sent to the members, but was not published in the *Gazette* or in the newspapers.

(*b*) The notice was not despatched by registered post as required by section 17 (1) (*b*), but was served personally on the members of the Council.

Held : That the provisions of section 17 relating to the service of the notice are mandatory. Therefore, since the notice was served otherwise than in the manner prescribed by law, the said meeting was not legally convened.

(*Per* ABEYESUNDERE, J.) :—" Where the law has prescribed the mode of doing an act, a public officer whose legal duty it is to do that act has no right to substitute for that mode another mode of doing that act. Such substitution is an illegality and not an irregularity, and that illegality nullified the act done otherwise than in accordance with the law. "

M. T. M. Sivardeen with *A. H. Mendis* and *N. M. S. Jayawickrema*, for the petitioner.

H. Deheragoda, Crown Counsel, for the 1st respondent.

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

ABEYESUNDERE, J.

The petitioner, Premadasa Samarawickrema, was elected as member for Ward No. 1 of Udapalatha Village Council (hereinafter referred to as the Village Council) at the general election help on December 29, 1962. The 2nd respondent, Yaman Sapuge Minoris, was elected as member for Ward No. 9 of the Village Council at the said general election. There were in all eleven elected members of the Village Conucil. The 1st respondent, A. A. Joseph, Assistant Commissioner of Local Government, Eastern Region (Lower), Batticaloa, was the officer whose duty it was under sub-section (1) of section 17 (old section 25) of the Village Councils Ordinance, as amended by Act No. 60 of 1961, to convene the first meeting of the Village Council at which the members of the Village Council were required to elect one of their number to be the Chairman of the Village Council.

Sub-section (1) of the said section 17 (old section 25), as amended by Act No. 60 of 1961, requires the first meeting of the Village Council to be convened by notice and provides as follows:—

" Such notice shall, at least five days before the date fixed for the meetng,—

(*a*) be published in the *Gazette* and in one or more Sinhala newspapers circulating in Ceylon, if the language in which proceedings are conducted in that Council is Sinhala, or in one or more newspapers in Sinhala and Tamil circulating in Ceylon if the language in which proceedings are conducted in that Council is Tamil; and

(*b*) be despatched by registered post to each elected member of that Council."

Sub-section (2) of the said section 17 (old section 25) requires a notice under sub-section (1) of that section to " specify the date, time and place of the meeting ".

The 1st respondent issued a notice dated 3rd January, 1963, for convening the first meeting of the Village Council for the purpose of electing the Chairman of that Council. The date, time and place of the meeting specified in the notice were as follows :—

" 19th day of January, 1963, at 11.15 a.m., at the BT Mandur Government Sinhalese Mixed School.'

The notice was published as provided in paragraph (*a*) of sub-section (1) of the said section 17 (old section 25) as amended by Act No. 60 of 1961. The 1st respondent caused the notice to be served personally on the petitioner, the 2nd respondent and the other elected members of the Village Council. He did not despatch the notice by registered post to each elected member of the Village Council as required by sub-section (1) of the said section 17 (old section 25). The place of the meeting was incorrectly described in the notice. The 1st respondent, therefore, sent by registered post to each elected member of the Village Council a letter dated January 12, 1963, informing him as follows :—

" BT/Mandur Government Sinhalese Mixed School where the election of Chairman, V.C., is to be held is in G.O.D.B. Unit, No. 28 Gonagola, Uhana. "

The first meeting of the Village Council was held on January 19, 1963, at the place described in the 1st respondent's letter of January 12, 1963. Eight of the elected members of the Village Council including the 2nd respondent were present at the meeting. The three other elected members of the Village Council did not attend the meeting. The petitioner was one of those three. The meeting was presided over by the 1st respondent. At the meeting the 2nd respondent was unanimously elected as the Chairman of the Village Council and the 1st respondent declared the 2nd respondent as the duly elected Chairman of the Village Council. The 2nd respondent functioned as the Chairman at the meeting of the Village Council held on January 28, 1963.

The petitioner filed his petition dated 1st February, 1963, together with an affidavit, praying for a writ of *quo warranto* on the 2nd respondent for the purpose of obtaining a declaration of this Court that the election of the 2nd respondent as the Chairman of the Village Council is invalid, and for a writ of *mandamus* on the 1st respondent for the purpose of obtaining a direction of this Court to the 1st respondent to convene a meeting of the Village Council for electing anew the Chairman of that Council.

The learned counsel for the petitioner argued that the notice dated 3rd January, 1963, issued by the 1st respondent was invalid as it did not correctly describe the place of the meeting and that, although the description of the place of the meeting was amended by the 1st respondent by his letter dated January 12, 1963, the amendment was not published in the Ceylon Government *Gazette* and in the newspapers in like manner as the notice dated 3rd January, 1963. He also contended that, as the notice was served otherwise than in the manner prescribed by law, there was no legal service of notice. The learned Crown Counsel who appeared for the 1st respondent argued that, although the 1st respondent had failed to comply with certain provisions of the law, the 2nd respondent's election as the Chairman should not be declared invalid upon a writ of *quo warranto* as the fact that the 2nd respondent was unanimously elected as the Chairman by the eight members of the Village Council present at the meeting on January 19, 1963, indicated that it was unlikely that the result of the election would be affected by a fresh election. There were three members of the Village Council absent from the said meeting. It is not possible to say what would have been the result of the election if those three members were present. One or more of them could have sought election as the Chairman and the influence of any one or more of them could have affected the voting at the election. There is no evidence to support either the view that the result of the election might have been present at the said meeting or the view that the result of the election might not have been affected if those members had been present. It is, therefore, not correct to assume that the result of the election will not be affected if a fresh election is held.

It was also argued by the learned Crown Counsel that the provisions of the said section 17 (old section 25) relating to the notice convening a meeting for the election of the Chairman were directory and not mandatory as they referred to the despatch and not to the service of the notice. Subsection (1) of the said section 17 (old section 25), before it was amended by Act, No. 60 of 1961, required the notice to be served upon each member and provided that, where for any reason service of the notice could not be effected personally on any member, the notice shall be deemed to have been duly served if it was left at that member's last known place of abode. Act No. 60 of 1961, altered the law relating to the service of the notice by substituting, for the aforesaid provisions relating to the service of the notice, the new provision that the notice shall be published in the manner specified in such new provision and shall be despatched by registered post to each member. I do not agree with the learned Crown Counsel in regard to his aforesaid contention. I hold that the law requires the mode of service of the notice to be by despatching it by registered post to each member and that the provisions of the said section 17 (old section 25) relating to the service of the notice are mandatory.

A further argument of the learned Crown Counsel was that, as the object of notifying the date, time and place of the meeting for the election of the Chairman to the members of the Village Council was achieved by the 1st respondent's notice dated 3rd January, 1963, and his letter dated January 12, 1963, the 1st respondent's failure to comply with the law was not a good ground for declaring the election of the 2nd respondent as the Chairman to be invalid and ordering a new election to be held. The notice issued by the 1st respondent was imperfect in its contents and was delivered to the members of the Village Council otherwise than in the manner prescribed by law. Although the notice was

published as required by law, its amendment by the 1st respondent in regard to the place of the meeting was not so published. Where the law has prescribed the mode of doing any act, a public officer whose legal duty it is to do that act has no right to substitute for that mode another mode of doing that act. Such substitution is an illegality and not an irregularity, and that illegality nullifies the act done otherwise than in accordance with the law.

The 2nd respondent has filed an affidavit admitting the facts averred by the petitioner. According to that affidavit, the 2nd respondent is holding the office of Chairman of the Village Council by virtue of his election to that office at the meeting held on January 19, 1963. The learned counsel for the 2nd respondent associated himself with the arguments urged on behalf of the 1st respondent.

I hold that the service of the notice convening the meeting of the Village Council for the election of the Chairman was not in the manner prescribed by law and that the notice as amended by the 1st respondent's letter dated January 12, 1963, being the correct notice, was not published as required by law. The 1st respondent has not given legal notice of the meeting for the election of the Chairman. Therefore, the meeting held on January 19, 1963, was not legally convened. Consequently the election of the 2nd respondent at that meeting as the Chairman of the Village Council is invalid.

I also hold that the 1st respondent has failed to perform his duty to convene according to law a meeting of the Village Council for the purpose of electing the Chairman of that Council. Therefore, I issue a writ of mandamus directing the 1st respondent to convene a meeting of the Village Council for the purpose of electing the Chairman of that Council. The date for the meeting shall be the earliest possible date before the end of June, 1963, and shall be determined by the 1st respondent. Where for any reason the meeting is not held on the date specified in the notice convening the meeting, the 1st respondent shall, by such further notice or notices as may be necessary, convene the meeting for any other date, but that other date shall be within the period terminating on June 30, 1963. Sub-section (6) of the said section 17 (old section 25) relating to the person who shall preside shall apply to the meeting convened in accordance with the direction herein given. The notice convening the meeting shall specify the date, time and place of the meeting and shall, at least, five days before the date fixed for the meeting,—

(i) be published as provided in paragraph (*a*) of sub-section (1) of the said section 17 (old section 25) as amended by Act, No. 60 of 1961, and

(ii) be despatched as provided in paragraph (*b*) of that sub-section.

The 1st and 2nd respondents shall pay the petitioner his costs of the proceedings in this Court which I fix at Rs. 210/-.

Application allowed.

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

THE QUEEN *vs.* S. E. W. SILVA & ANOTHER

S.C. 54-55/'62—*D.C.* (*Crim.*) *Kegalle*, 2828/*M.C.* 27824.

Argued on : 25th day of October, 1962.
Decided on : 13th November, 1962.

Criminal Procedure Code, sections 202, 165 (*F*), 179, 180, 217—*Trial on indictment before District Court—Misjoinder of charges—Withdrawal by prosecuting counsel of 2nd and 3rd charges in the indictment—Trial and conviction of accused on remaining charge an illegality and not a mere irregularity which can be cured.*

Criminal Procedure Code, section 202—*Term " indictment " in section* 202 *not synonymous with the term " charge ".*

In a trial before the District Court on three counts of the indictment, the addition of the 2nd and 3rd counts was found to be a misjoinder of charges by the District Judge. Thereupon the Crown Counsel withdrew those counts and the accused was tried on the surviving first count of the indictment, found guilty and convicted.

Held : (1) That in view of the express provisions of section 202 of the Criminal Procedure Code, it was not permissible for prosecuting counsel to withdraw some of the charges in an indictment before a District Court. He could only withdraw the whole indictment, whereupon all proceedings should be stayed, and the accused discharged.

(2) That the trial of the accused on the surviving first count of the indictment not being warranted by the express provisions of section 202 of the Criminal Procedure Code was an illegality and not a mere irregularity in procedure that could be cured, and that the conviction must be quashed.

(3) That the term "indictment" in section 202 of the Criminal Procedure Code is not synonymous with the term "charge".

Followed : *Ramachandran* v. *The Queen*, 64 N.L.R. 512.

Referred to : *Rex* v. *Subramania Aiyar*, (1902) I.L.R. 25, Madras 61 (P.C.).
Pulukuri Kottaya v. *Emperor*, (1947) A.I.R., P.C. 67.

No appearance for the accused-appellants.

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

M. M. Kumarakulasingham as *amicus curiae*.

TAMBIAH, J.

The appellants, along with one S. M. Velarian Fernando, were indicted in the District Court of Kegalle as follows :—

"That between the 25th day of August, 1959, and the 23rd day of September, 1959, at Kegalle in the division of Kegalle within the jurisdiction of this Court you, the first and second accused abovenamed, did deceive one Kuruppu Arachchige Don James Kuruppuarachchi by falsely representing to him that you could secure for him employment in the Ceylon Transport Board and did thereby intentionally induce the said Kuruppu Aratchige Don James Kuruppu Aratchi to deliver to you a sum of Rs. 180/- which act he would not have done if he had not been so deceived and which act caused loss to the said Kuruppu Aratchige Don James Kuruppu Aratchi and you have thereby committed an offence punishable under section 400 of the Penal Code.

"2. In the course of the same transaction you, the third accused abovenamed, did on or about the 23rd day of September, 1959, at Kegalla, within the jurisdiction of this Court attempt to cheat by personation the said Kuruppu Aratchige Don Jamis Kuruppu Aratchi by dishonestly representing to him that you were an officer in the Criminal Investigation Department engaged in investigating allegations of bribery of officials in the Ceylon Transport Board and that you would help him out of being charged with the offence of bribery if he, the said Kuruppu Aratchige Don Jamis Kuruppu Aratchi paid to you a sum of Rs. 100/- which act was likely to cause damage to the said Kuruppu Aratchige Don Jamis Kuruppu Aratchi and you have thereby committed an offence punishable under section 402 read with section 490 of the Penal Code.

"3. In the course of the same transaction you, the first and second accused abovenamed did abet the commission of the offence set out in count 2 above which said offence was committed in consequence of such abetment and you have thereby committed an offence punishable under section 402 read with section 490 and section 102 of the Penal Code."

When the trial was taken up on 11th January, 1962, the appellants, who were the first and second accused, and S. M. Velarian Fernando, who was the third accused, severally pleaded not guilty. Mr. Wickremasinghe, who appeared on behalf of the first and second accused, raised the preliminary objection that there was a misjoinder of charges. He submitted that the offence referred to in Count 1 is a separate and distinct offence in which the third accused did not figure at all. The offence, in respect of which the third accused was charged, namely, count 2, was in respect of personation. He also submitted that the second count in the indictment was only against the third accused and this count is entirely in respect of a different transaction, namely, one of personation. He urged that the two counts were distinct and therefore, there was a misjoinder of charges.

He also submitted that the first and second accused were prejudiced in their defence in respect of count 1 if they were also charged on count 3 in the same case. The learned judge agreed with this contention and held that there was a misjoinder of charges. An examination of these charges make it abundantly clear that there was a clear misjoinder of charges at this stage, and

the whole trial would have been illegal had the learned judge chosen to proceed with the trial on those charges (vide *Rex* v. *Subramania Aiyar*, Indian Law Reports, 25 (Madras), p. 61 P.C.).

On 22nd May, 1962, the Crown Counsel moved that trial against the first and second accused on count 1 should be taken up on that day. He also moved that the trial against the third accused on count 2 and against the first and second accused on count 3 be fixed for another date. The case was again refixed for the 4th of June, 1962. On that day, the charges were again read to all three accused and they severally pleaded not guilty. At this stage, Crown Counsel moved to withdraw count 2 of the indictment against the third accused and count 3 of the indictment against the first and second accused. The learned judge discharged the third accused on count 2 and the first and second accused on count 3. He proceeded to trial against the first and second accused on count 1 and convicted them on that count. The appellants have appealed to this Court against this conviction. At the hearing of the appeal, the appellants were neither present nor were they represented.

Mr. Pullenayagum, who appeared for the Crown, brought to our notice the ruling in *Ramachandran* v. *The Queen*, 64 N.L.R. 512. In that case, His Lordship, the Chief Justice, (with whom Abeyesundere, J., agreed), held that it was not permissible for a prosecuting counsel to withdraw some of the charges contained in an indictment which has been filed in the District Court. They held that, in view of the express provisions of section 202, a prosecuting counsel could withdraw any indictment, and thereupon all proceedings should be stayed and the accused discharged. The Court also held that it was not permissible for a prosecuting counsel to withdraw some charges in the indictment.

The learned Crown Counsel submitted that the term "indictment" in section 202 of the Criminal Procedure Code is synonymous with the term "charge". He, therefore, urged that it was permissible for the prosecuting counsel, with the permission of the District Judge, to withdraw any charge in an indictment before the District Judge and invite the District Judge to proceed with the other charges of the indictment.

Section 202 of the Criminal Procedure Code reads thus :

> "The Attorney-General may at any time before the verdict is recorded withdraw any indictment and the prosecuting counsel may also with the permission of the District Judge at any time before the verdict is recorded withdraw any indictment, and thereupon all proceedings thereon shall be stayed and the accused shall be discharged."

It is significant that the word "charge" is not mentioned in section 202 of the Criminal Procedure Code. An examination of section 156 (F) (i) ; section 179, 180, 202 and 217 of the Criminal Procedure Code makes it abundantly clear that a charge is not synonymous with an indictment.

An "indictment" has been defined as "a bill or declaration in forme of law, exhibited by way of accusation against one for some OFFENCE either criminal or penal, and preferred unto jurors and by their verdict found presented to be true before a judge or officer that hath power to punish or certify the offence" (*vide* Termes de la ley, Enditement ; Strouds Judicial Dictionary, Vol. 2, Third Edition, p. 1435). This definition could be applied, *mutatis mutandis*, to an indictment presented before a judge. In the legal phraseology used in the Criminal Procedure Code, a clear distinction is made between an indictment and a charge. A comparison of sections 202 and 217 of the Criminal Procedure Code makes this distinction clear. Section 217 states as follows :—

> (1) At any stage of a trial before the Supreme Court under this Code, before the return of the verdict, the Attorney-General may, if he thinks fit, inform the Court on behalf of Her Majesty that he will not further prosecute the accused *upon the indictment or any charge therein*, and thereupon *all proceedings on such indictment or charge as the case may be against the accused* shall be stayed and he shall be discharged of and from the same.

The phrase "charge therein" means charge in the indictment.

In the Supreme Court, it is permissible for the Attorney-General to withdraw any charge on an indictment with the permisson of the presiding judge. But, in the District Court, such a procedure is not warranted by the provisions of section 202 of the Criminal Procedure Code.

The learned Crown Counsel contended that if it is not legal for a prosecuting counsel to adopt this procedure, then any charges, which were withdrawn, were still before the learned District Judge and that the position is the same as if no evidence has been led on those charges. There-

fore, he contended that the appeal should be dismissed. I cannot agree with this contention. As stated earlier, before the charges were withdrawn, there was misjoinder of charges. Any trial on those charges would have been illegal.

In the instant case, I fail to see how the taint of illegality could be removed by the introduction of another illegal procedure. When a trial is conducted in a manner different from that prescribed by the Criminal Procedure Code, the trial is bad, and no question of curing an irregularity arises ; but if the trial is conducted substantially in the manner prescribed by the Code, but some irregularity occurs in the course of such conduct, the irregularity can be cured and nonetheless so because the irregularity involves, as must nearly always be the case, a breach of one or more of the very comprehensive provisions of the Code (*vide*—*Pulukuri Kottaya and others* v. *Emperor*, (1947) A.I.R. (P.C.), p. 67, at 69, *per* Sir John Beaumont, L.J.). In the instant case, the trial was conducted in a manner different from that prescribed by the Criminal Procedure Code and, therefore, is illegal.

Mr. M. M. Kumarakulasingham, who appeared as *amicus curiae*, at the invitation of the Court, stated that as the trial was illegal, the conviction should be quashed. The learned judges in *Ramachandran* v. *The Queen* (*supra*), acquitted and discharged the accused. If the indictment was withdrawn, the accused should have been acquitted. But, in this case, only certain charges were withdrawn and the trial on the charges, on which the accused was convicted, is illegal. I think the proper order to make in this case is to quash the conviction. For these reasons, I quash the conviction and set aside the sentence passed on the accused-appellants.

G. P. A. SILVA, J.

I agree.

Convictions quashed.

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

SATHASIVAM *vs.* MANIKARETAN

S.C. 510/1962—*M.C. Kalmunai, No.* 4625.

Argued on : 5th November, 1962 and 23rd November, 1962.
Decided on : 23rd November, 1962.

Maintenance Ordinance, sections 2, 3, 4—*Wife's application for maintenance—Husband's offer to take her back—Refusal on ground of husband's adultery—Offer must be made " bona fide "—Quantum of maintenance—Whether wife's income can be considered.*

Questions by trial Judge—Whether Judge to take position of umpire only.

Held : (1) That when an applicant for maintenance refuses under section 3, an offer by her husband to live with him, on the ground of his living in adultery, it must be shown on a balance of probability that he was living in adultery at the time he made his offer

(2) That the " offer " referred to in section 3 should be a *bona fide* offer and even where adultery is not proved, if it appears that the husband's invitation to his wife has not been made in good faith, the former cannot resist a claim for maintenance

Held further : That the income of the wife should not be taken into consideration when the quantum of maintenance is determined.

Per SRI SKANDA RAJAH, J.—" Before I part with this case, I wish to refer to a matter which transpired on the first day of the argument, namely, the submission that the Magistrate had ' descended into the arena '. Reference was made to para G of the petition of appeal and Kirihamy's evidence in re-examination regarding the Magistrate forcing him to speak the truth. At that stage of the argument I intervened and said that a Judge is not bound to take the position of an umpire. This view which I have always taken is supported by the following passage in the judgment of Sir Anton Bertram, C.J., with whom another eminent Judge, Justice Garvin, agreed : S.C. 441, D.C., Negombo, No. 15956, S.C. Minutes 2nd July, 1924*:—

> ' It is a great pity, I think, that Judges, when they see two sides fencing with one another and manouevring for position, should conceive themselves merely as umpires in a game of strategy and should not themselves determine that the truth must be ascertained and themselves call witnesses, who for strategic reasons or through misconception are withheld by either party '."

*See 65 C.L.W. 1

Cases referred to : *Ebert* v. *Ebert*, 22 N.L.R. 310.
Thangachi v. *Mohamadu Lebbe*, 3 Criminal Appeal Reports (Ceylon) 43.
Fernando v. *Fernando*, 62 N.L.R. 550; LIX C.L.W. 95
Sivasamy v. *Rasiah*, 44 N.L.R. 241; XXV C.L.W. 43
Sunderam Pulle v. *Kathirasepulle*, LXV C.L.W. 1

Colvin R. de Silva with *Sooriya Wickremasinghe*, for the defendant-appellant.

S. Sharvananda, for the applicant-respondent.

SRI SKANDA RAJAH, J.

This is an application for maintenance by the wife from her husband. The provisions that are applicable are sections 2, 3 and 4 of the Maintenance Ordinance, Chapter 91. The relevant portions of section 2 run thus :

> "If any person having sufficient means neglects or refuses to maintain his wife, . . . the Magistrate may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife . . . at such monthly rate, not exceeding a hundred rupees . . ."

Sections 3 and section 4 must be reproduced in full.

> SECTION 3 : "If such person offers to maintain his wife on condition of her living with him, the Magistrate may consider *any grounds of refusal stated by her*, and may make an order under section 2, notwithstanding such offer, if the Magistrate is satisfied that such person is living in adultery, or that he has habitually treated his wife with cruelty".

> SECTION 4 : "No wife shall be entitled to receive an allowance from her husband under section 2 if she is living in adultery, or if, *without any sufficient reason refuses to live with her husband*, or if they are living separately by mutual consent".

It is also necessary for the purpose of the decision in this case to refer to the actual income of the applicant as well as that of the defendant. The applicant is a teacher who has an income of Rs. 212/- per mensem. The defendant himself is a teacher and his monthly income is Rs. 254/-.

It would appear that the defendant became a teacher in 1952 ; but, from 1953 till the end of April, 1959, he was a teacher at the Rye Government School at Aliarawa in Balangoda. In front of this school lived Kirihamy and his four unmarried daughters. The defendant was a paying-guest in Kirihamy's house. The evidence is overwhelming that he became intimate with one of Kirihamy's daughters, namely, Kusumawathie, though the defendant himself has made very unsuccessful but deliberate attempts to deny this.

On 30th April, 1959, he was transferred to a school in Haputale. When he was teaching at Haputale he got married to this applicant, who was a teacher at Karativu, in the Kalmunai area. On 1st September, 1959, the defendant was transferred to Mandur, also in the Kalmunai area. The parties lived together till 15th March, 1960. But even during this time, he appears to have been anxious to get away from the school at Mandur. He told his wife that he was going to Colombo to work up a transfer from Mandur and he obtained money from his wife for that purpose. Thereafter, after going to Colombo he went to Balangoda on his way to Mandur. He sent a telegram, admittedly, from Balangoda to the wife to re-direct a registered letter. That registered letter was written by Kusumawathie to the defendant.

Undoubtedly, in this case certain inadmissible evidence has been led, *e.g.*, the annonymous letter P 3 A and another letter P 2 A. In my view, that has not caused material prejudice and the provisions of section 167 of the Evidence Ordinance would apply. They only served to unfold the narrative.

The result of the intimacy between Kusumawathie and the defendant is shown even by the photograph that has been produced in this case, viz., P 3 B, the negative of which P 3 C, has been produced by calling the Manager of the Studio. This photograph was taken on 10th June, 1960.

I am constrained to remark that the defendant is such a brazen-faced liar as to deny all relationship between him and Kusumawathie. He had even been the informant about the birth of the child on his lap in the photograph P 3 B. Kusumawathie and her sister are the other two in it. He tried to make out that he did not know about the registration of the birth of that child till he tried to get the birth certificate for the purpose of this case though he was the informant (*vide* P 9). Ultimately he got the transfer back to Balangoda on 1st January, 1961, to the Rye School. One has to ask oneself, what was the magnetic attrac-

tion for him to get back to Balangoda but his mistress, Kusumawathie and his child ? Of course, there is no direct evidence that this man is still continuing, at the time of this application, to live in adultery with Kusumawathie. It is submitted that, at best, it can be said that there is only proof that till June, 1960, he was carrying on an illicit relationship with Kusumawathie.

The Headmaster of, and another teacher, in the same school were called to show that this man was continuing to live in adultery ; but, it appears to have been difficult for the Headmaster and the other fellow-teacher to let down their colleague. One can understand their reluctance to speak the truth. But, are there sufficient circumstances to indicate that this defendant is still living in adultery with Kusumawathie ?

Mr. Sharvananda cited the case in 22 N.L.R., page 310, *Ebert* v. *Ebert*, where certain quotations from two English cases have been referred to, to show that there was adultery between the parties in those cases. In that case, the question whether the parties were " living in adultery " was not considered. It was in subsequent cases that the words " living in adultery " were interpreted to mean " continuing to live in adultery ".

Now, this defendant, though he was transferred to Mandur from 1st September, 1959, had gone back to Kusumawathie on the pretext of going to Colombo, and then he got a transfer back to the same school in front of which Kusumawathie lives with the child born to this man. He also speaks of Kusumawathie now being married and carrying a child. But Kusumawathie's father, Kirihamy, in his evidence says that Kusumawathie is not married. The defendant tried to make out that she was now married to one Ponnusamy. No such question was put to Kirihamy. These are all circumstances tending to show, on the balance of probability, that this defendant is living in adultery with Kusumawathie.

But, even on the footing that he was not living in adultery at the time he made this offer to the applicant to come back to him and live with him, one has to consider whether the offer was *bona fide*. Now, it is submitted that section 3 of the Maintenance Ordinance, which I have quoted above, refers to an offer and it would not be proper to import *bona fides* into the word " offer ". In fact, at the resumption of the argument today, I referred to sections 3 and 4 and indicated that the question of *bona fides* of the offer may arise and invited arguments on this aspect. Thereafter, Mr. Sharvananda brought to my notice the case of *Thangachi* v. *Mohamadu Lebbe* 3 Criminal Appeal Reports (Ceylon) 43, which is a decision of Justice Akbar, decided on 31st March, 1930. I pointed out to the words " any grounds of refusal stated by her ", in section 3 and to the words " without any sufficient reasons ", in section 4. The case decided by Akbar, J., was a case in which the husband, who was sued for maintenance, offered to maintain her on condition of her living with him and the learned Judge pointed out that the offer must be tested to find out whether it is a *bona fide* offer. In my view the word, " offer " in the section should be a *bona fide* offer and, if it is not genuine, then the defendant cannot successfully resist the claim for maintenance. In order to test whether the offer is *bona fide* or not, one has to examine all the circumstances of the case. Undoubtedly, in the report of the case decided by Akbar, J., the facts of the case are not given. But in this case the facts I have related so far, show that the defendant was anxious to get back to his mistress and child and was even unwilling to go and see the applicant when she gave birth to a still-born child and his having refused three attempts on three successive days by the applicant to get him back, his having made no attempt whatsoever till after he was sued in this case for maintenance to get the wife back, all go to prove that this offer is a mere attempt to get over the difficult situation in which he finds himself because of the illicit intimacy between him and Kusumawathie. His past conduct was that of a blackguard. In my view, the offer was not made *bona fide*.

> " A defendant who offers to take the wife back should provide a fitting abode for the wife and should be prepared to maintain her with the dignity and consideration which befit a wife."

—at page 44, 3 Criminal Appeal Reports (Ceylon).

These are not referred to in that section. These are also, like *bona fides*, implied in the word " offer " used in section 3. Therefore, in my view, this is not a *bona fide* offer and the defendant is liable to pay maintenance to the applicant.

I was addressed on the quantum of maintenance. I have already indicated, the income of each of the parties. Mr. Sharvananda refers me to the case of *Mrs. S. V. Fernando* v. *J. R. L. Fernando*, 62 N.L.R., page 550, where it was held that the Court should not take into account the means of a wife, when fixing the quantum of maintenance

payable under section 2 of the Maintenance Ordinance. The learned Judge who decided that case has considered the Divisional Bench case of *Sivasamy* v. *Rasiah*, 44 N.L.R. 241. In that case the Magistrate had dismissed the application on the ground that the wife had sufficient means. That case was sent back to the Magistrate to fix maintenance as he thought fit, having regard to the means of the husband. There, the learned Judges did not indicate that the income of the wife also should be taken into account. In my view Rs. 50/- is not too large an amount.

Before I part with this case, I wish to refer to a matter which transpired on the first day of the argument, namely, the submission that the Magistrate had " descended into the arena ". Reference was made to para G of the petition of appeal and Kirihamy's evidence in re-examination regarding the Magistrate forcing him to speak the truth. At that stage of the argument I intervened and said that a Judge is not bound to take the position of an umpire. This view which I have always taken is supported by the following passage in the judgment of Sir Anton Bertram, C.J., with whom another eminent Judge, Justice Garvin, agreed : S.C. 441, D.C. Negombo, No. 15956, S.C. Minutes, 2nd July, 1924* :

> " It is a great pity, I think, that Judges, when they see two sides fencing with one another and manoeuvring for position, should conceive themselves merely as umpires in a game of strategy and should not themselves determine that the truth must be ascertained and themselves call witnesses, who for strategic reasons or through misconception are withheld by either party."

In this connection, I would like to quote an eminent Jurist, who, as far back as 1906, in his address at the Annual Convention of the American Bar Association " On the Causes of Popular Dissatisfaction with the Administration of Justice ", made certain observations. The eminent Jurist I refer to is Dean Roscoe Pound of the Harvard Law School. Said he :

> A no less potent source of irritation lies in our American exaggerations of the common law contentious procedure. The sporting theory of Justice, the " instinct of giving the game fairplay ", as Professor Wigmore has put it, is so rooted in the profession in America that most of us take it, for a fundamental legal tenet. But it is probably only a survival of the days when a law suit was a fight between two clans in which change of venue had been taken to the forum. So far from being a fundamental fact of jurisprudence, it is peculiar to Anglo-American law ; and it has been strongly curbed in modern English practice. With us, it is not merely in full acceptance, it has been developed and its collateral possibilities have been cultivated to the furthest extent. Hence in America we take it as a matter, of course, that a judge should be a mere umpire, to pass upon objections and hold counsel to the rules of the game, and that the parties should fight out their own game in their own way without judicial interference. We resent such interference as unfair, even when in the interest of justice. The idea that procedure must of necessity be wholly contentious disfigures our judicial administration at every point. It leads the most conscientious judge to feel that he is merely to decide the contest, as counsel present it, according to the rules of the game, not to search independently for truth and justice. It leads counsel to forget that they are officers of the Court and to deal with the rules of law and procedure exactly as the professional football coach with the rules of the sport. It leads to exertion to " get error into the record " rather than to dispose of the controversy finally and upon its merits. It turns witnessses, and especially expert witnesses, into partisans pure and simple. It leads to sensational cross-examinations " to affect credit ", which have made the witness stand " the slaughter house of reputations ". It prevents the trial Court from restraining the bullying of witnesses and creates a general dislike, if not fear, of the witness function which impairs the administration of justice It keeps alive the unfortunate exchequer rule, dead in the country of its origin, according to which errors in the admission or rejection of evidence are presumed to be prejudicial and hence demand a new trial. It grants new trials because by inability to procure a bill of exceptions a party has lost the chance to play another inning in the game of justice. It creates vested rights in errors of procedure, of the benefit whereof parties are not to be deprived. The inquiry is not, What do substantive law and justice require ? Instead the inquiry is, Have the rules of the game been carried out strictly ? If any material infraction is discovered, just as the football rules put back the offending team five or ten or fifteen yards, as the case may be, our sporting theory of justice awards new trials, or reverses judgments, or sustains demurrers in the interest of regular play.
>
> The effect of our exaggerated contentious procedure is not only to irritate parties, witnesses and jurors in particular cases, but to give to the whole community a false notion of the purpose and end of law. Hence comes, in large measure, the modern American race to beat the law. If the law is a mere game, neither the players who take part in it nor the public who witness it can be expected to yield to its spirit when their interests are served by evading it. And this is doubly true in a time which requires all institutions to be economically efficient and socially useful. We need not wonder that one part of the community strain their oaths in the jury box and find verdicts against unpopular litigants in the teeth of law and evidence, while another part retain lawyers by the year to advise how to evade what to them are unintelligent and unreasonable restrictions upon necessary modes of doing business. Thus the Courts, instituted to administer justice according to law, are made agents or abettors of lawlessness.

In this case, the Magistrate has not acted improperly in making Kirihamy, who was giving palpably false evidence favourable to the defendant, speak the truth.

I dismiss the appeal with costs.

Appeal dismissed

*See 65 C.L.W. 1

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

M. M. JAWATH *vs.* A. L. M. PACKEER MOHAMED AND ANOTHER

S.C. 71/1961—*C.R. Colombo, No.* 77086 (*R.E.*)

Argued and decided on : 27th November, 1962.

Rent Restriction (Amendment) Act, No. 10 *of* 1961—*Scope of section* 13—*Action pending on day immediately preceding the date of commencement of Amending Act deemed null and void—Whether action pending.*

By virtue of section 13 (3) of Act No. 10 of 1961, where an action for ejectment has been instituted after the 20th July, 1960, on grounds other than those under section 13 (1) of Amending Ordinance, No. 10 of 1961, and it is pending on the day immediately preceding the date of commencement of the Amending Act, such action is null and void.

Held : That an appeal for a decree for ejectment is deemed to be a continuation of the original action, and if the appeal is " pending " at the relevant date, the whole action is deemed to be pending and is, therefore, null and void under section 13 (3) of the Amending Act.

Cases referred to : *Salt* v. *Cooper*, (1880) 16 Ch. D. 544 ; 43 L.T. 682 ; 50 L.J. Ch. 529.
Schlesingher v. *Schlesingher*, (1958) 3 A.E.R. 20

A. Sivagurunathan, for the defendant-appellant.

C. Ranganathan wiht *M. T. M. Sivardeen*, for the plaintiff-respondent.

SRI SKANDA RAJAH, J.

This is an action for rent and ejectment and was filed on the footing that the 1st defendant had sublet the premises to the 2nd defendant. The action was filed on the 9th August, 1960. At the time this action was filed the landlord was entitled to sue the tenant for ejectment if he had sublet the premises without the consent of the landlord. Decree for ejectment was entered on the 24th April, 1961. An appeal was filed in this case by the 1st defendant tenant on the 24th April, 1961.

The law in this respect was altered by the Rent Restriction (Amendment) Act, No. 10 of 1961, which came into force on the 1st of May, 1961. The relevant section is as follows :—

" 13 (1) Notwithstanding anything in the principal Act, the landlord of any premises to which this Act applies shall be entitled to institute any action or proceedings for the ejectment of the tenant of such premises only on any one or more of the following grounds :—

(*a*) that the rent of such premises has been in arrear for three months ;

(*b*) that such premises have been used by such tenant or by any person residing or lodging with him or being his sub-tenant for an immoral or illegal purpose ;

(*c*) that such tenant or any person residing or lodging with him or being his sub-tenant has caused wanton destruction or damage to such premises.

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

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

It will also be seen that the conditions referred to in section 13 (1) (*a*) or (*c*) were not relied upon for bringing this action, *i.e.*, this sub-tenant was using this premises for immoral or illegal purpose or was causing wanton destruction to the premises. As I have already pointed out judgment was entered while this Act had not come into force and the appeal also had been filed while this Act had not come into force. The Act came into operation only after the petition of appeal was filed, but retroactively from 20th July, 1960.

The question for determination here is whether the action was *pending* on the date immediately preceding the date of the commencement of the Act. The commencement of the Act was on 1st May, 1961. Therefore, the date preceding it would be the 30th April, 1961.

Various submissions were made regarding the jurisdiction of the Court of Requests and the jurisdiction of the Supreme Court when an appeal is filed and whether the case was pending in the original Court or the appellate Court. In my view all these arguments need not be considered

In *Salt* v. *Cooper*, (1880) 16 Ch. D. 544 C.A., *per* Jessel, M.R., at 551 : " A cause is still pending even though there has been final judgment given, and the Court has very large powers in dealing with a judgment until it is fully satisfied. It may stay proceedings on the judgment, either wholly or partially, and the cause is still pending ; therefore, for this purpose, as it appears to me, and must be considered as pending although there may have been final judgment given in the action, provided that judgment has not been satisfied ". In *Schlesingher* v. *Schlesingher*, (1958) 3 A.E.R., page 20, at 23, reference is made to the case of *Loveden* v. *Loveden*, in which Sir John Nicholl stated, " On principle I think it is due from the day of the appeal. The *appeal suspends the sentence but the suit still continues* ". This was a matrimonial action where an order for the payment of alimony was made.

Section 207 of the Civil Procedure Code reads as follows :—

" All decrees passed by the Court shall, subject to appeal, when an appeal is allowed, be final between the parties ; . . ."

Undoubtedly this section deals with *res adjudicata ;* but, it gives an idea as to what is final. Until the appeal is decided the judgment or decree will not be final. Therefore, in my view until a decision is reached on the appeal the action is still pending. That being so section 13 (3) would cover this case.

As I indicated earlier, this action was " pending " on the date immediately preceding the date of the commencement of the amending Act, the appeal having been filed on 24th April, 1961. Therefore, this action should be deemed at all times to have been null and void. Under the circumstances of this case I do not propose to order costs. All proceedings are declared null and void.

Appeal allowed.

Present : **Herat, J.**

ALBIN *vs.* S. I. POLICE, PANNALA

S.C. 41/'63—*M.C. Kuliyapitiya,* 14096.

Argued and decided on: February 15, 1963.

Sentence, severity of—Conviction of 19*-year-old accused under section* 315 *of the Penal Code.*

The accused-appellant, aged 19, of previous good character, had, acting under provocation, caused hurt with a pen knife. He was sentenced to six months rigorous imprisonment, and in addition, under the Knives Ordinance, to receive six strokes with a rattan.

Held : That the sentence was far too severe. The Supreme Court deleted the sentence of the Magistrate and acting under section 325 of the Criminal Procedure Code, conditionally discharged the accused, under a bond in a sum of Rs. 250/- with two sureties, to be of good behaviour for one year.

P. O. Wimalanaga, for the accused-appellant.

R. A. Obeysekera, Crown Counsel, for the Attorney-General.

HERAT, J.

The accused-appellant was convicted under section 315 of the Ceylon Penal Code with having inflicted hurt on one Haramanis with a pen-knife, and sentenced to six months' rigorous imprisonment and also under the Knives Ordinance to receive six strokes with a rattan or cane.

I see no reason to interfere with the finding of the learned Magistrate but I am of opinion that the sentence passed is far too severe considering the circumstances of the case and in particular the fact that the accused-appellant is only 19 years of age. He has borne a good character. The evidence also discloses certain extenuating circumstances in which the offence was committed. The evidence shows that there was provocation given by the injured man Haramanis and his friends to the accused and his party at the time of the incident. I, therefore, delete the sentences imposed by the learned Magistrate and acting under section 325 of the Criminal Procedure Code, without proceeding to conviction, order the accused to enter into a bond in a sum of Rs. 250/- with two sureties, to be of good behaviour for one year. A condition of that bond will be that he will be called upon, if he commits any breach of the terms of the bond, to show cause why sentence should not be passed on him for the offence dealt with in the case under appeal.

Subject to this variation the appeal is dismissed.

Varied.

END OF VOLUME LXIV

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පිටපත් ලබාගත හැක්කේ නෝ: 50/3, සිරිපා පාර, හැව්ලොක් ටවුම—කොළඹ 5, යන ස්ථානයෙනි.

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අපරාධ නඩු විධාන සංග්‍රහය

අපරාධ නඩු සංවිධාන සංග්‍රහය, 413 වෙනි ඡේදය —අපරාධ චෝදනාවක් සම්බන්ධයෙන් උසාවියට ඉදිරිපත් කළ දේපලක් ගැන සුදුසු නියෝගයක් කිරීමට මහෙස්ත්‍රාත්තුමාට ඇති බලය—චිත්තිකරු වරදකරුවෙකු නොවූවිට එම බලය කෙසේ යෙදිය යුතු ද?—සොරකමක් නොවන අන්වැරදි මාර්ගයකින් එය ලබාගත්තාට වැරදිකරුවුවත් පළමු අයිතිකාරයාට එය හිමි වේද?—බඩු විකිණීමේ ආඥා පණත, 24 (2) වෙනි ඡේදය—මහේස්ත්‍රාත්වරයකුගේ අභිමතය අනුව (discretion) කළ නියෝගයක් වෙනස් කිරීමට ශ්‍රේෂ්ඨාධිකරණයට ඇති බලය.

තීන්දුව : (1) සාපරාධි චෝදනාවක් සම්බන්ධ ව උසාවියට ඉදිරිපත් කළ දේපලක් එය අයිතිකාරයා වෙත පත්කිරීම පිණිස තමාගේ අභිමතය ලෙස නියෝගයක් කිරීමට අපරාධ නඩු සංවිධාන යේ 413 වෙනි ඡේදය අනුව මහෙස්ත්‍රාත්වරයෙකුට බලය ඇති වුවත්, එය සුදුසු අන්දමින් කර තිබේ දැයි පරීක්ෂා කර අවලංගු කිරීමට ධුවත් ශ්‍රේෂ්ඨාධිකරණයට අයිති පරිශෝධන බලයෙන් හැකිවේ.

(2) එම දේපල සම්බන්ධ චෝදනා ලැබූ අය වරදකරුවෙකු බවට තීරණය නොවී නිදහස් වුවොත්, අපරාධ නඩු සංවිධාන සංග්‍රහයේ 413 වෙනි ඡේදය යටතේ මහේස්ත්‍රාත්වරයාට අභිමත නියෝගයක් ඒ දේපල ගැන කළ නොහැක. එසේ වූ විට ඒ දේපල භුක්තියේ තිබුන අයටම පත්කළ යුතුයි.

(3) තවද, බඩු විකිණීමේ ආඥා පණතේ 24 (2) වෙනි ඡේදය අනුව එම දේපල වංචාවෙන් හෝ සොරකමක් නොවන අන්කිසි වැරදි විදියකින් යම් කෙනෙකුගෙන් ලබාගත්තේ ද එම අයට චෝදනා ලැබූ අය වරදකරුවෙක් වූ පමණින්ම ඒ දේපල අයිති නොවේ. මේ ඡේදය ද මේ නඩුවට අදාල වන්නේ වග-උත්තරකරු මේ දේපල සිය කැමැත්තෙන්ම දී තිබෙන නිසාය. එබැවින් වග-උත්තරකරුගේ වාසියට දේපල භාරදීමේ නියෝගයක් කළ නොහැකිය.

පෙරේරා එ. සීමාසහිත ටකර් සහ සමාගම 1

අධිකරණ ආඥා පණත

සර්ටියෝරේරයි සහ තහනම් ආඥා (Writs of Certiorari and Prohibition)—ණය සහණ ලබා දීමේ ආඥා පණත (8 වෙනි පරිච්ඡේදය) වෂී 1959, අංක 5 පණතින් සංශෝධන වූ—පොරොන්දු සිත්නක්කරය—ආපසු පැවරීමේ පොරොන්දු කාලය ඉක්මෙන්ට පෙර 19 ඒ සහ 19 බී ඡේද යටතේ යහණය ඉල්ලා සිටීම—ඉල්ලීමේ නිවේදනය මුදල් හිමියාට ප්‍රමාදකර මණ්ඩලයේ නියෝගයක් නොමැතිව ලේකම්වරයා යැවීම—මුදල් හිමියා එම පොරොන්දු කාලය ඉක්ම ගිය පසු අන්කෙනෙකුට විකිණීම—ඒ විකිණීම අවලංගු යයි මණ්ඩලය තීරණය කිරීම—එම තීරණයට විරුද්ධව ඉඩම් මිලයට ගත් අය සර්ටියෝරේරයි සහ තහනම් ආඥා සුප්‍රීම් උසාවියෙන් ඉල්ලීම.

වෂී 1957 මාර්තු 18 වන දින මෙම පෙත්සමෙහි 7 වෙනි වගඋත්තරකරු විසින් 8 වන වගඋත්තරකරුට රු. 6,000/ක ඉඩම් කොටසක් විකුණන ලදී. මෙම මුදල් විකුණු දින සිටවෂී තුනක් (3) ඇතුලත සියයට 15 පොලියකුත් සමග ආපසු දුනහොත් එය නැවත ආපසු පවරා දිය යුතු බවට කොන්දේසියක් ද එහි විය.

7 වෙනි වගඋත්තරකරු 15.2.60 දරණ දින වෂී 1959, නෝ: 5 දරණ පණතින් සංශෝධනය කරණ ලද ණය සහණය දීමේ ආඥා පණතේ 19 'ඒ' සහ 19 'බී' යන ඡේදයන්ට අනුව ණය සහණය දීමේ මණ්ඩලයෙන් ගනු දෙනුව බේරා දීමට ඉල්ලීමක් කළේය.

මෙම ඉල්ලීම් එදිනම, එනම් 19 (ඒ) (1) දරණ ඡේදයෙන් කියවෙන පරිදි වෂී 3 ගතවීමට 30 දිනකට කලින් මණ්ඩලය විසින් ලබන ලදී.

7.4.60 දරණ දින මණ්ඩලයෙහි ලේකම් තැන විසින් 7 වන වගඋත්තරකරු මෙසේ ඉල්ලීමක් කර ඇතැයි 8 වන වගඋත්තරකරුට නිවේදනයක් යවන ලද නමුත් එයට ඉල්ලීමේ පිටපතක් ඇමිණී නොතිබිණ. මෙම නිවේදනය 10.4.60 දරණ දින ලැබූ බව නෝ සලකා 8 වන වගඋත්තරකරු එම ඉඩම් 16.4.60 දරන දින මෙම නඩුවෙහි පෙත්සම්කරුට වික්කේ ය.

20.2.62 දරණ දින මෙම ඉල්ලීම විභාග කළ මණ්ඩලය 16.4.60 දරණ යටොක්ත දින කරණ ලද විකිණීම් ආඥා පණතේ 19 බී (2) දරණ ඡේදයට

අනුකූලව බලන කල නීති විරෝධී බව ප්‍රකාශ කරණ නියෝගයක් නිකුත් කළේය. මෙම නඩු-වෙහිදී තහනම් නියෝගයක් සහ සර්ටියොරේරයි (Certiorari) ආඥාවක් ඉල්ලමින් එම නියෝ-ගය අභියෝගයට භාජන කරයි.

මෙකී නිවේදනය යැවීමේදී මණ්ඩලය රැස්වී එය කල්පනාවට භාජන නොට ඒ සඳහා ලේකම් තැන නොයොදවන ලද බව තමන් පිළිගෙන ඇති බව නිවේදනයෙහිම සඳහන්ව තිබේ.

තීන්දුව : (1) 7 වන වගඋත්තරකරුගේ ඉල්ලීම මණ්ඩලය විසින් කල්පනාවට භාජන කොට භාර නොගන්නා ලදුව එහි ලේකම් තැන තමා විසින් ම පමණක් පියවර ගැනීම නිසා 8 වන වග-උත්තරකරු ලත් නිවේදනය ආඥා පණතේ හැටි-යට නීත්‍යානුකූල නිවේදනයක් නොවේ.

(2) එබැවින් 19 'බී' (1) ඡේදයට අනුව පනවන ලද අත්සතු කිරීම හෝ වෙන අයුරකින් පවරාදීම හෝ තහනම් කිරීම ඉඩම පිළිබඳ සලකන කල වළංගු නැත. මේ නිසා පෙත්සම්කරුට එය විකි-ණීම නීති යුක්ත ය.

(3) 19 (ඒ) (1) ඡේදය අනුව ඉල්ලීමක් පිළි-ගැනීම කෘත්‍ය විධියක් පමණක් නොවේ. 49 වන ඡේදයෙන් ආරක්ෂා වන්නේ මණ්ඩලය විසින් කරණ ලද කටයුතු විනා යම් යම් අනිකුත් පුද්ගල-යන් විසින් කරණ ලද කටයුතු නොවේ.

සයිමන් සිල්වා එ. නය සහන ලබාදීමේ මණ්ඩලය සහ තවත් අය 5

අයාල ආඥා පණත

අයාල ආඥා පණත—එම පණතේ 4 (සී) වෙනි ඡේදය යටතේ චෝදනාවක්—තම ශරීරයේ රහසඟ අශ්ලීල විලාශයෙන් ඕනෑකමින් ම පෙන්වා සිටීම—එම ඡේදයේ ඇති "වෙන යම් තැනක" යන වචනවල තේරුම.

තීන්දුව : අයාල ආඥා පණතේ 4 (සී) ඡේදයේ ගැබ්වී ඇති පාඨය අනුව "වේදිය, පාර, මහා මාර්ග, මහජනයා ගැවසෙන ස්ථානය හෝ වෙනයම් තැනක" යන වචන සමාන ගණයකට ඇතුලත් නොවේ. එමනිසා එහි අර්ථ කථනයෙහි සමාන ගණය (ejusdem generis) පිළිබඳ ප්‍රඥප්තිය එයට අදාල කළ නොහැකිය. මහාජනයා ගැවසෙන තැනකට අතිරේක වශයෙන් ගැනෙන තැනක් ලෙස එය තේරුම් ගත යුතුයි.

චාර්ලිස් අප්පුහාමි එ. සෙනෙවිරත්න, පොලිස් ස්ථානාධිපති, මාදම්පෙ 13

ඉඩම්හිමි සහ බදුකරු

ඉඩම්හිමි සහ බදුකරු—බදුකරුගේ මරණින් පසුව ගොඩනැගිල්ලේ පදිංචිව සිටින ඔහුගේ පුතා නෙරපීමට පැවරූ නඩුවක්—තමා නීත්‍යානුකූල බදුකරු බව විත්තිකරු අයැද සිටීම—විත්තිකරු-ගේ ආයාචනය ඉවත දැමීම—ඇපෑල—විත්තිකරු අයුතු ලෙස ඇතුල්වූවෙකැයි පැමිණිලිකරු කියා සිටි හෙයින් පැමිණිල්ල සාක්ෂික විය හැකි එකම මාර්ගය ඔහුගේ අයිතිය ඔප්පු කිරීමෙන් ය යන කරුණ ඇපෑලේදී මතු කිරීම—ගොඩනැගිල්ලේ වටිනාකම අනුව බලන විට රික්වැස්ට් උසාවියේ අධිකරණ බලය ද ප්‍රශ්න කිරීම—එවැනි ආයාචන-යක් සාක්ෂික විය හැකි ද?—උසාවි ආඥා පණතේ 75 වැනි ඡේදය—ආරවුලට භාජන වූ කරුණ කුමක් ද?

ප්‍රශ්නයට භාජනයවූ ස්ථානය විත්තිකරුගේ පියාට බදු දුන් බව ද, 1961 මාර්තු 7 වන දා පියා මියගිය බව ද, පැමිණිලිකරුගේ බදුකරු යයි පවසමින් විත්තිකරු නොකඩවාම පදිංචිව සිටිය බව ද චෝදනා කරමින් පැමිණිලිකරු විත්තිකරුට විරුඬව නඩු පැවරුවේය. විත්තිකරු තමාගේ පිළිතුරේ මෙසේ පැවසිය :—(අ) මේ ගොඩ-නැගිල්ලේ පවත්වාගෙන ගිය වෙළඳ ව්‍යාපාරයට තමා ද සිය පියාට හවුල්වූ හෙයින් බදුකරු වශයෙන් ද තමාට හවුලක් තිබීම; (ආ) සිය පියාගේ මරණින් පසුව, කුලී සීමාකිරීමේ ආඥා පණතේ 18 වැනි ඡේදය යටතේ තමා බදුකරු බවට පත්වීම.

නඩු විභාගයෙන් පසුව විත්තිකරු අයැද සිටි මේ කරුණු දෙකම ඉවත දැමූ උගත් කොමසාරිස්-වරයා පැමිණිලි පක්ෂයට නඩුව තීන්දු කළේය. පැමිණිලිකරු කියා සිටි අන්දමට විත්තිකරු බදු-කරුවෙකු නොව අයුතු ලෙස ඇතුල්වූවෙකු නම් පැමිණිල්ල සාක්ෂික වන්නේ පැමිණිලිකරුගේ අයිතිය ඔප්පු කිරීමෙන් පමණකැයි ද ගොඩනැ-ගිල්ලේ වටිනාකම සලකා බලන විට රික්වැස්ට් උසාවියේදී මෙය ඔප්පු කිරීමට බැරි බව ද, ඇපෑ-ලේදී ඇපැල්කරු වෙනුවෙන් තර්ක කරණ ලදී.

බෞද්ධාගමික නීතිය

බෞද්ධාගමික නීතිය—පැවිදි සහෝදරයෙකු විසින් පැමිණිලිකරුට වෂී 1930 දී ''සම්පූර්ණ පාලන බලය සංවිධානය කිරීමේ බලය සහ අධිකාරී පදවිය ඉසිලීමේ ද බලය'' දෙමින් විහාරාධිපතීන් වහන්සේ ලියූ ඔප්පුවක්—අවුරුදු කීපයකට පසු ඔහුගේ ජ්‍යෙෂ්ඨ ශිෂ්‍යයා වන චිත්තිකරු පැමිණිලිකරුගේ අයිතිවාසිකම් ගැන විරෝධය දැක්වීම—තමාගේ අයිතිවාසිකම් අත්හැර දමන ලදුයි ගෙන ආ තර්කය—යථෝක්ත දීමනාවේ ප්‍රතිඵලය.

විහාර සතරකට හිමිකම් දරූ ''ඇස්.'' නමැති සවාමීන් වහන්සේ නමක් වෂී 1928 දී තමන් වහන්සේගේ ජ්‍යෙෂ්ඨ ශිෂ්‍ය ''ජී'' ට ''සම්පූර්ණ පාලන බලය, සංවිධායක බලය සහ විහාර සතරෙහිම අධිකාරී වීමේ බලය'' යම් යම් කොන්දේසිවලට යටත් කොට දෙමින් ''පී'' 12 දරණ ලකුණු කරණ ලද ඔප්පුව ලිවූහ. යථාකාලයේ දී විහාරාධිපති පදවියට පත් ''ජී'' වෂී 1930 දී වෙන ඔප්පුවක් (පී 13) ලියා එහි ''පී'' 12 දරණ ඔප්පුවෙහි තිබූ සියළුම කොන්දේසි ඇතුලත් කොට පැමිණිලි කරු වන තම පැවිදි සහෝදරයාගේ වාසියට විහාර සතරින් එක් විහාරයක් පිළිබඳව පමණක් බලතල පැවරූහ. අවුරුදු කීපයක්ම යන තුරුම් පැමිණිලිකරු විහාරාධිපති මෙන් කටයුතු කළ අතර චිත්තිකරු උන්වහන්සේගේ අයිතිවාසිකම් ගැන විරෝධය දක්වූහ.

පැමිණිලිකරු විසින් චිත්තිකරුට විරුඬව තමා නීත්‍යානුකූල විහාරාධිපති ලෙස ප්‍රකාශයක් කරවා ගැනීම සඳහා පවරණු ලැබූ නඩුවකදී උගත් දිස්ත්‍රික් විනිශ්චයකාරතුමා උන්වහන්සේගේ වාසියට තීන්දුව දෙන ලදුව චිත්තිකරු එයට විරුඬව ඇපැල් ගත්හ.

තීන්දුව : (1) 'පී' 3 දරණ පැමිණිලිකරුගේ වාසියට ඇති ඔප්පුව ''ජී'' ගේ ඇවැමෙන් පසු විහාරාධිපති පත්කිරීමකැයි සලකා ගත හොත් ''ජී'' ට තම ශිෂ්‍යානුශිෂ්‍ය පරම්පරාවෙන් කෙනෙකු වන පැමිණිලිකරු තමාගේ ඇවැමෙන් පසු තමා හිටි තැනට පත් කිරීමට අයිතිවාසිකම් නොමැත.

(2) ''පී'' 13 දරණ ඔප්පුවෙන් ''ජී'' තමාගේ විහාරාධිපති පදවියට ඇති අයිතිවාසිකම් අත්හරින ලද්දේ යයි කියමින් පැමිණිලිකරුගේ වාසියට ඉදිරිපත් කරණු ලද තර්කය ''පී'' 13 දරණ ඔප්පුවේ එබඳු අත් හැරීමක් ගැන සඳහන් ව වටන යෙදී නොමැති නිසා පිළිගත නොහේ.

(3) මෙහිදී ඉදිරිපත් කරණ ලද සාක්ෂි අනුව ''ජී'' විසින් වෙන පන්සලක සැනසුම් ගණනක් එපිට සිටී තමා වෙනුවට ''ඒ විහාරයේ පමණක් වැඩ බලන'' විහාරාධිපති හැටියට පැමිණිලිකරු පත් කරණ ලදුයි යන නිගමනය සමග නොසැසඳෙන්නේ නොවේ.

(4) විහාරාධිපති වීමට භික්ෂුවකට ඇති අයිතිවාසිකම් අත්හරින ලද්දේ යයි කියන කරුණු දෙස බලා අවධාරණයෙන් සලකා ගත හැකි වුවද එම තත්ත්වය සැක සහිත කරුණු මත රඳා තිබේ නම් එසේ අවධාරණයෙන් සලකා ගැනීමක් නො කළ යුතු වේ.

සංඝානඤ්ඤ තෙරුන්නාන්සේ එ. සුමනතිස්ස තෙරුන්නාන්සේ 11

මහ නගර සභා ආඥා පණත

මහනගර සභා ආඥා පණත, වෂී 1947, නො: 29—ඡේදය 148 (දැන් 147)—මනුෂ්‍යයාට අහිතකර සහ අන්තරායකර වෘත්තීන්ට සහ ව්‍යාපාරයන්ට අවසර දීම—මේ සඳහා සාදන ලද අතුරු ව්‍යවස්ථා—නගර සභා සීමාවට අයත් භූමිභාගයක ලීබඩු රැස්කිරීම නිසා එවැනි අතුරු ව්‍යවස්ථාවක යටතේ ගෙන ආ චෝදනා—සපයන්නන්ගෙන් ඕළයට ගන්නා ලද ලී බඩු ප්‍රශ්නයට භාජන වූ ස්ථානයෙහි තබා තම ව්‍යාපාරය ගෙන ගිය ලී බඩු වෙළෙන්දෙක් චෝදනා ලැබ සිටීම—විකිණීම් ගිය බඩු වෙනුවෙන් අළෙවි කිරීමට බඩු තොග තබා ගැනීම.

147 වන ඡේදයෙහි ඇති ''වෘත්තිය හෝ ව්‍යාපාරය'' යන යෙදීමෙහි තේරුම සහ එයට ඇතුළත් කරුණු—මෙම ඡේදයෙන් තහනම් කරන ලද්දේ කුමක් ද යන්න—වෂී 1954, ජූලි 30 වන දින, ප්‍රසිඬ කරන ලද නො: 10697 දරණ ගැසට් පත්‍රයෙහි සඳහන් අතුරු ව්‍යවස්ථාවෙහි ඇති ''පහත සඳහන් වෘත්තීන් සහ ව්‍යාපාරයන්'' යන වචනවල තේරුම—අතුරු ව්‍යවස්ථාවෙන් තහනම් කරන ලද්දේ ලී බඩු නියම වශයෙන් රැස්කිරීම් නොව අනිත් අයගේ ලී බඩු ලාභ ලැබීම් සඳහා රැස් කිරීම් බව—මේ නිසා වරදට පත් කිරීම් නීත්‍යානුකූල ද?

කොළඹ එක්තරා සථානයක—(ඒ) ලී බඩු රැස් කිරීම ; (බී) ලී බඩු නිෂ්පාදනය කිරීම ; (සී) ලී බඩු රැස් කිරීම සහ නිෂ්පාදනය කිරීම; යන දේ කොළඹ මහ නගර සභාවේ අවසර පත්‍රයක් කොමසාරිස්-වරයාගෙන් නොලබා කිරීමේ හේතුවෙන් වසී 1947, අංක 29 දරණ මහ නගර සභා ආඥා පණතේ 148 (1), (දැන් 147 (1), දරණ ඡේදය, අංක 10697 දරණ ගැසට් පත්‍රයෙහි පල කරන ලද අතුරු ව්‍ය-වස්ථාව සමග එකට කියවූ කල උල්ලංඝනය කෙරෙණ අයුරින් කටයුතු කිරීම ගැන ඇපැල්-කරුට විරුද්ධව නඩු පවරණ ලදී.

මේ කරුණට අදළ අතුරු ව්‍යවස්ථාව කියැවෙන්-නේ පහත සඳහන් පරිදිය :—

"පහත සඳහන් වෘත්තීන් හෝ ව්‍යාපාරයන් වසී 1947, අංක 29, දරණ මහ නගර සභා ආඥා පණතේ 148 වන ඡේදයේ (දැන් 147) පරමාර්ථ-යන්ට අනුව සලකන කළ මනුෂ්‍යයාට අහිතකර වෘත්තීන් හෝ ව්‍යාපාරයන් යයි මෙයින් ප්‍රකාශ වේ."

ඉහත සඳහන් අතුරු ව්‍යවස්ථාවට අමුණා ඇති වෘත්තීන් සහ ව්‍යාපාරයන්ගේ ලේඛනයෙහි අංක 39 න් ඇඳින්වෙන කරුණ එහි විස්තර වන්නේ මෙසේ ය :—

"ලී බඩු නිෂ්පාදනය කිරීම හෝ රැස් කිරීම එසේ නැතහොත් ලී බඩු නිෂ්පාදනය කිරීම සහ රැස්කිරීම."

ඇපැල්කරු අවුරුදු 14 ක කාලයක ඇතුලත ප්‍රශ්නයට භාජනය වී ඇති මෙම සථානයෙහි ලී බඩු වෙළන්දෙකු ලෙස තම ව්‍යාපාරය ගෙන ගිය බව සාක්ෂිවලින් කියැවී තිබුණි. ලීබඩු නොසෑදූ ඔහු ඒවා නොයෙක් සම්පාදකයන්ගෙන් මිලදී ගත්තේ ය. ඔහුගේ ව්‍යාපාරික සථානය ලී බඩු ප්‍රදර්ශනයට නබා විකුණන ශාලාවකින් ද යුක්ත වූ අතර එහි විකිණෙන බඩු වල අඩුපාඩු පිටුපසින් වූ කාමරයක රැස්කොට තබා ඇති බඩුවලින් පුරවන ලදී.

ඉහත සඳහන් (බී) සහ (සී) දරණ චෝදනා-වන්ගෙන් ඇපැල්කරු උගත් මහේස්ත්‍රාත්තුමා විසින් නිදහස් කරන ලද නමුත් ඉහත සඳහන් (ඒ) දරණ චෝදනාවට ඔහු වැරදිකරු බවට පත්කරන ලද්දේ 59 න.නී.වා. 81 පිටෙහි සඳහන් ඩෙව්ඩ් එ. නාගරික සෞඛ්‍ය පරීක්ෂකයා යන නඩුවෙහි තීරණය අනුව යමිනි. කෙසේ වුවද ගුණසේකර එ. නාගරික ආදයම් පරීක්-ෂකයා, 53 න.නී.වා. 229 සහ ද සිල්වා එ. සිමාසහිත කුරුණෑගල සමූපකාර බඩු ගබඩාව, 59 න.නී.වා. 430 යන නඩු වල තීන්දු ද අනුගමනය කිරීමට මහේස්ත්‍රාත්තුමා කැමත්තක් දක්විය.

එකකට එකක් පරස්පර විරෝධී වූ එම නඩු තීන්දු නිසා මෙම ඇපැල තිදෙනෙකුගෙන් යුත් විනිශ්චයකාර මණ්ඩලයක් ඉදිරියට පත් කරනා ලදී.

තීන්දුව : (1) යම්කිසි විශේෂ පාඨයක යෙදී ඇති වචනයක තේරුම එම පාඨයටම විශේෂ සැලකිල්ලක් දක්වමින් තීරණය කළ යුතු ය. එනම් මේ සඳහා විශේෂයෙන් ඒ වචනය සමග සම්බන්ධකම් ඇති වචන ගැන ද සැළකිල්ලක් දක්වා වචනයක් එයට කුළුපග අනික් වචන වලින් තෝරාගනු ලැබේ යන සුප්‍රසිද්ධ අර්ථකථන ප්‍රඥප්-තිය (noscuntur a sociis) මෙයට අදළ කොට එය තේරුම් කළ යුතු ය. 147 වන ඡේද-යෙහි ඇති "වෘත්තිය හෝ ව්‍යාපාරය" යන වචන ඒ වචන වල සහජ සම්බන්ධතාවයෙන් මකු වන අර්ථය තේරුම් ගැනීම අවශ්‍යය. මේ නිසා මෙහි "ව්‍යාපාරය" යන වචනය "වෘත්තිය" යන වචනයෙන් වෙන්වන් වී තිබේ. එම නිසා මෙම පාඨය තේරුම් ගත යුත්තේ ව්‍යාපාරය යන වචනය එයට සම්බන්ධකම් ඇති වෘත්තිය යන වචනය හා ගැළපෙන තේරුම් හැර අන් සියළු තේරුම් ඉවත් කරන බව සළකමිනි.

(2) 147 වන ඡේදයෙහි තේරුමට අනුව වෘත්-තියක් හෝ ව්‍යාපාරයක් හැටියට නො සැළකෙන කටයුත්තක් අහිතකර අන්තරායකාරී කටයුත්තක් ලෙස ගැනෙන ප්‍රකාශයක් කිරීමට නගර සභාවට බලයක් නො මැත.

(3) අතුරු ව්‍යවස්ථාවෙහි ඇති "රැස්කිරීම්" යන වචනයෙන් තේරුම් යන්නේ ටික කාලයකට ගබඩා කිරීම විනා සිල්ලර වශයෙන් විකුණන වෙළඳාමක එදිනෙදා ඇති වන අවශ්‍යතාවන් සපුරාලීමට රැස්කිරීම නොවේ.

(4) අතුරු ව්‍යවස්ථාවෙහි ගැබ්වී ඇති තහනම ලී බඩු රැස්කිරීම එයම ගත්කල එයට අදළ නොවේ. එය අදළ වන්නේ ලාභයක් ලැබීම සඳහා අන් අයගේ ලී බඩු රැස්කිරීමකදී මෙනි. මේ නිසා විත්තිකරු වරදට පත් කිරීම ප්‍රතිෂ්ඨා රහිතය.

කේ. ඒ. දෙන් ඇල්බට් එ. නාගරික අදයම් පරීක්ෂක

සික්වැස්සි උසාවිය

එම උසාවියේ මුදල් පිළිබඳ අධිකරණ බලය. (''ඉඩම්හිමි සහ බදු කරු'')—යට බලන්න.

සිල්වා එ. සේනානායක 3

සේවක අත්‍යවශ්‍යතා අරමුදල් පනත

සේවක අත්‍යවශ්‍යතා අරමුදල් පනත, වෂී 1958, අංක 15—චිත්තිකරු දුම්කොළ හෝ දුම්කොළ වලින් තැනෙන ද්‍රව්‍ය නිෂ්පාදනය කිරීමේ ව්‍යාපාරයක් ගෙනයාම—පණතේ 8 (1) වන ඡේදය එම ඡේදය එම පණතට අනුව පැණවුනු අංක 2 (1) දරණ රෙගුලාසිය සමග එකට කියවන කල එය පණතෙහි තේරුමට අසුවන රක්ෂාවක් වීම—සේවායෝජකයා වශයෙන් සේවකයන්ගේ ඉපැයීම් වලින් සේවක අත්‍යවශ්‍යතා අරමුදල් පණත අනුව ගෙවිය යුතු ප්‍රදානය ගෙවීම චිත්තිකරු පැහැර හැරීම—මෙයින් පණතේ 15 වන ඡේදය උල්ලංඝනය වීම—පණතේ 34 (ඒ) සහ 37 වන ඡේදයටතේ චෝදනා—පැමිණිලි පක්ෂය දුම්කොළ වලින් නොඑතු ''සුරුට්ටු'' යන බව ඔප්පු නොකිරීමේ හේතුවෙන් චිත්තිකරු නිදහස් වීම—මෙම නිදහස් වීමට විරුඬව ඉදිරිපත් කළ අභියාචනය.

සේවක අත්‍යවශ්‍යතා අරමුදල් පණතේ (වෂී 1958, අංක 15), 34 සහ 37 වන ඡේද යටතේ එම පණතේ 15 වන ඡේදයෙහි ඇති පැණවීම් උල්ලංඝනය කරණ ලදැයි චෝදනා තුනකට චිත්තිකරුට විරුඬව, ඔහු තමා විසින් රක්ෂාවෙහි යොදවා ඇති සේවකයන් තිදෙනෙකු වෙනුවෙන් සේවක අත්‍යවශ්‍යතා අරමුදලට දිය යුතු ප්‍රදානය නොදීමේ හේතුවෙන් නඩු පවරණ ලදී.

මෙම පණතට අසුවන රක්ෂා අතර දුම්කොළ නිපදවීම හෝ දුම්කොළ වලින් තැනෙන ද්‍රව්‍ය නිපදවීම ද ඇතුළත්ව ඇති බව ඒ සඳහා නිකුත්වූ විශේෂ ගැසට් පත්‍රයෙහි උපලේඛනයෙහි, අංක 10 දරණ ඡේදයෙන් කියැවේ.

පැමිණිල්ලේ සාක්ෂි නිමාවට ගිය පසු උගත් මහේස්ත්‍රාත්තුමා එම චිත්තිකරු විසින් ගෙන යන ලද ව්‍යාපාරය දුම්කොළ හෝ දුම්කොළ වලින් තැනෙන ද්‍රව්‍ය නිපදවීම බව පැමිණිලි පක්ෂයට ඔප්පු කිරීමට නොහැකිවී යයි කියමින් චිත්තිකරු නිදහස් කළේ පහත සඳහන් කරුණු සලකමිනි.

(ඒ) පැමිණිලි පක්ෂයට ඉදිරිපත් කළ වාචෝද්ගත (oral) සාක්ෂිවල දුම්කොළ ගැන සඳහන් නොවීය.

(බී) චිත්තිකරුගේ දුම්කොළ පැක්ටෙරියෙහි නියුක්ත කම්කරුවන් පිළිබඳ විස්තර ඇතුළත් කර ඔහු විසින් 19–10–1958 දනමින් නිකුත්වූ රෙගුලාසි වල 8 වන රෙගුලාසිය අනුව එවනු ලැබූ පැමිණිලි පක්ෂය ඉදිරිපත් කළ ප්‍රකාශ පත්‍රයෙහි දුම්කොළ ගැන සඳහන් වී නැත.

(සී) දුම්කොළ වලින් නොතැනුනු සුරුට්ටු ද වෙළඳ පොලෙහි තිබේ.

ඇටෝර්නි–ජනරාල්තුමාගේ අනුමතිය ලැබූ පැමිණිලිකරු මෙම නියෝගයට විරුඬව ඇපැල් පෙත්සමක් ඉදිරිපත් කෙළේය.

තීන්දුව : ''සුරුට්ටුව'' යන වචනයට ඔක්ස්ෆර්ඩ් ශබ්දකෝශයේ දී තිබෙන ''ධූම්පානය සඳහා දුම්කොළ වලින් වටකුරුව ඔතන ලද්දක්'' යන තේරුම සහ චිත්තිකරු තමාගේ සුරුට්ටු කර්මාන්තය පිළිබඳව මෙම චෝදනාවේ දිනයට කලින් 19–10–1958 දින දරණ රෙගුලාසි මාලාවේ 8 වන රෙගුලාසියට අනුකූල ව එවන ලද ප්‍රකාශය ද මෙහි පැමිණිල්ලේ නඩුව මනාසේ තහවුරු වන ලෙස ඔප්පු කර තිබේ.

ඇම්. ඩී. ඇස්. රත්නවීර, කම්කරු නිලධාරිතැන එ. කේ. අරුලම්පලම් 25

ගරු ටී. ඇස්. ප්‍රනාඳු විනිශ්චයකාරතුමා ඉදිරිපිට.

පෙරේරා එ. සිමාසහිත ටකර් සහ සමාගම්*

ඉ. උ. නො: 424/1961—කොළඹ එකාබඩ ම. උ. නො: 18950.
(පරියෝධන ඉල්ලීම—නො: 184/1961 ත් සමග)

වාද කළේ : 1961–10– 4
තීන්දු කළේ : 1961–10–24

අපරාධ නඩු සංවිධාන සංග්‍රහය, 413 වෙනි ඡේදය—අපරාධ චෝදනාවක් සම්බන්ධයෙන් උසාවියට ඉදිරිපත් කළ දේපලක් ගැන සූදුසු නියෝගයක් කිරීමට මහෙස්ත්‍රාත්තුමාට ඇති බලය—චිත්තිකරු වරදකරුවෙකු නොවුවිට එමබලය කෙසේ යෙදිය යුතුද?—සොරකමක් නොවන අන්වැරදි මාර්ගයකින් එය ලබාගත්තාට වැරදිකරුවුවත් පළමු අයිතිකාරයාට එය හිමි වේද?—බඩු විකිණීමේ ආඥා පණත, 21 (2) වෙනි ඡේදය—මහෙස්ත්‍රාත්වරයකුගේ අභිමතය අනුව **(discretion)** කළ නියෝගයක් වෙනස් කිරීමට ශ්‍රේෂ්ඨාධිකරණයට ඇති බලය.

තීන්දුව:— (1) යාපරාධි චෝදනාවක් සම්බන්ධව උසාවියට ඉදිරිපත් කළ දේපලක් එය අයිතිකාරයා වෙත පත්–කිරීම පිණිස තමාගේ අභිමතය ලෙස නියෝගයක් කිරීමට අපරාධ නඩු සංවිධානයේ 413 වෙනි ඡේදය අනුව මහෙස්ත්‍රාත්වරයෙකුට බලය ඇති වුවත්, එය යුදුසු අන්දමින් කර තිබෙදැයි පරීක්ෂා කර අවලංගු කිරීමට වුවත් ශ්‍රේෂ්ඨාධිකරණයට අයිති පරියෝධන බලයෙන් හැකිවේ.

(2) එම දේපල සම්බන්ධ චෝදනා ලැබූ අය වරදකරුවෙකු බවට තීරණය නොවී නිදහස් වුවොත්, අපරාධ නඩු සංවිධාන සංග්‍රහයේ 413 වෙනි ඡේදය යටතේ මහෙස්ත්‍රාත්වරයාට අභිමත නියෝගයක් ඒ දේපල ගැන කළ නොහැක. එසේ වූ විට ඒ දේපල හුක්තියේ තිබුන අයටම පත්කළ යුතුයි.

(3) තවද, බඩු විකිණීමේ ආඥා පණතේ 24 (2) වෙනි ඡේදය අනුව එම දේපල වංචාවෙන් හෝ සොරකමක් නොවන අන්කිසි වැරදි විදියකින් යම් කෙනෙකුගෙන් ලබාගත්තේ ද එම අයට චෝදනා ලැබූ අය වරදකරුවෙක් වූ පමණින්ම ඒ දේපල අයිති නොවේ. මේ ඡේදය ද මේ නඩුවට අදල වන්නේ වගඋත්තරකරු මේ දේපල සිය කැමැත්තෙන්ම දී තිබෙන නිසාය. එබැවින් වගඋත්තරකරුගේ වාසියට දේපල භාරදීමේ නියෝගයක් කළ නොහැකිය.

සඳහන් නඩු තීන්දු:— සුප්පයියා සම්බන්ධ නඩුව, (1946) 48 න. නී. වා. 214 පිට.
සිල්වා එ. හමීඩ, (1918) ස. න. නී. වා., 414 පිට.
පොලිස් ඉන්ස්පෙක්ටර් එ. ඇල්බට්, (1916) 3 ල. සු. වා., 313 පිට.
ෂැන්ඩ්. එ. අකුකෝරාල, (1934) 37 න. නී. වා., 55 පිට.

නීතිඥවරු: පී. නාගේන්ද්‍ර, ඇපැල්කරු සහ පෙත්සම්කරු වෙනුවෙන්.
සී. පී. ප්‍රනාඳු, ඇල්. සී. සෙනෙවිරත්නත් සමග, වගඋත්තරකරු වෙනුවෙන්.
ඩී. ඩබ්ලිව්. අබේකෝන්, ආණ්ඩුවේ අධිනීතිඥතැන, අධිකරණ සහායක වශයෙන්.

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 64 වෙනි කා., 11 වෙනි පිට බලනු.

ගරු ටී. ඇස්. ප්‍රනාන්දු විනිශ්චයකාරතුමා:

ලංකා දණ්ඩ නීති සංග්‍රහයේ 396 වෙනි ඡේදය යටතේ දඩුවම් දියයුතු වරදක් වූ සොර බඩු—එනම් රුපියල් 1,760/- ක් වටිනා ''ලිජ්ස්ටන්'' ටයර් හතරක්—සිය කැමැත්තෙන්ම ඉවත් කර ඉන් නිදහස් වෙන්න සහාය දුන්නේයයි අප්පා නොහොත් මූනස් නමැත්තෙකුට විරුඬව පොලිසිය විසින් නොවේ 18950 දරණ නඩුව ඒකාබඬ මහෙස්ත්‍රාත් උසාවියට ඉදිරිපත් කරණ ලදී.

යටකී ටයර් සොරකම් කළ ඒවා බව මූනස් දැන සිටි බැව් හෝ ඔහුට ඒවා සොරකම් කල ටයර් යයි විශ්වාස කිරීමට ප්‍රමාණවත් කරුණු පැමිණිල්ලෙන් ඔප්පු වී ඇද්ද නැද්ද යන බව ගැන සැකය නිසා මහෙස්ත්‍රාත් තුමා නඩු විභාගය අවසානයේ දී 1960–10–29 වෙනි දින ඔහු නිදහස් කරණ ලදී.

නඩුව අවසානයෙන් පසු 1960–10–31 වෙනි දින උසාවියට එම චෝදනාව සම්බන්ධයෙන් ඉදිරිපත් කර තිබුන ටයර් හතර ඇපැල්කරුවූ ඇන්තනි පෙරේරාගේ බුත්තියෙන් පොලිසිය ගෙන තිබුන නිසා ඔහුට ආපසු ඒවා බාරදීමටද නියෝගයක් කරණ ලෙස උගත් මහෙස්ත්‍රාත්තුමා ගෙන් ඉල්ලා සිටියේය. මේ ඉල්ලීමට මෙම ඇපැලට වගඋත්තරකරුවූ සීමා සහිත ටකර් සහ සමාගම විසින් විරුඬවූයේ එම ටයර් හතර ඔවුන්ට අයිතිවූ දේපල නිසා ඔවුන්ට ඒවායේ අයිතිය පැවරීමේ නියෝගයක් කරණ ලෙස ඉල්ලමිනි. මේ ඉල්ලීම් ගැන විභාගකර උගත් මහෙස්ත්‍රාත්වරයා සීමා සහිත ටකර් සහ සමාගමට එම ටයර් බාර දෙන ලෙස නියෝග කළේය. මේ නියෝගය වැරදි සහිතයයි පැමිණිලි කරමින් ඇපැල්කරු අයැද සිටිමුත් ඔහුගේ නීතිවේදියා එසේ ඇපැලක් ඉදිරිපත් කිරීමට අයිතිවාසි කමක් නැති බව පිළිගන්නා නිසා ඇපැල මම ප්‍රතික්ෂේප කරමි.

එහෙත් මෙම උසාවියේ ක්‍රිමිනල් නඩු සම්බන්ධ ඇති පරිසෝධන බලය ක්‍රියා වෙහි යෙදවීම සඳහා ආයාචනයක් කරමින් ටයර් ගැන කරණ ලද යටකී නියෝගය නීත්‍යානුකූල නොවන නිසා එය අවලංගු කිරීම පතමින් තර්ක කරණ ලදී—මහෙස්ත්‍රාත්තුමෙකු විසින් තම අභිමතානුකූල කරණ ලද නියෝගයක් ඊට නිසි නඩුවකදී අවලංගු කිරීමට මේ පරිසෝධන බලය මේ උසාවියට තිබෙන බවට පෙර විනිශ්චයක් (precedent) නිබෙ. **සුප්පයියා සම්බන්ධ නඩුව** බලනු (1946) 48 න. නී. වා. 214 පිට. පෙත්සම් කරුවූ ඇන්තනි පෙරේරා වනාහි ටයර් වෙළෙන්දෙකි. 1960–3–24 දින ඔහු මේ ටයර් හතර තීරුබදු දෙපාර්තමේන්තුව විසින් පවත්වන ලද විකිණීමකදී මිලයට ගත්තේයයි කිම පිට තවත් පෙරේරා නම් ම දරණ ටයර් වෙළෙන්දෙකු ගෙන් මිලයට ගත් බව කියා තිබේ. එය අවිශ්වාස කිරීමටවත් ටයර් එකකට රුපියල් 300/- බැගින් රුපියල් 1,200/- පැමිණිලිකරු විසින් පෙරේරාට ගෙවා රිසිටි එකක් ලබාගත් බව සැක කිරීමටවත් කරුණු නැත.

මූනස්ට විරුඬව තිබූ ක්‍රිමිනල් චෝදනා විභාගයේදී මේ ටයර් හතර 1960–3–23 දින සීමා සහිත ටකර් සහ සමාගම් විසින් නාඳුනන කෙනෙකුට විකුණනු ලැබූ බවත්, ඒවායේ සාමාන්‍ය මිළය වන රුපියල් 1,780.20 කට වෙක් පතක් ඒ අය විසින් සමාගමේ අලෙවිකාරයාට (Salesman) දුන් පසු ටයර් ඔහුට භාරදී ඇති බවත්, එම වෙක්පත පසුද බැංකුවට යැවූ විට ''ගණුදෙනුවක් නැත'' යන්න සටහන්කර ආපසු එවන ලද බවත් ඔප්පු විය.

පෙත්සම්කරුගේ නීතිවේදියා බඩු විකිණීමේ ආඥා පණතේ 70 වෙනි පරිච්ඡේදය, 24 වෙනි ඡේදයේ පිළිසරණ ද පතයි. එම ඡේදයෙහි මෙසේ සඳහන් වෙයි :—

> 24 (1) බඩු සොරාගත්තේයයි කෙනෙකුට චෝදනාවක් නගා ඒ අය වරදකරුවෙකු ලෙස තීන්දු කරණු ලැබුවහොත් එසේ සොරකම් කළ බඩු ඒවා ඉහතින් අයිති ව තිබූ අයට හෝ ඔහුගේ නීත්‍යානුකූල බුදල් බලකාරයාට අතරතුරේ ඇතිවූ ගණුදෙනුවක් නොතකා හිමිවිය යුතුය.
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> (2) වංචා සහගතව හෝ සොරකමකට සමාන නොවන අන්කිසි අයුතු මාර්ගයකින් ලබාගත් බඩු සම්බන්ධයෙන් චෝදනා ලැබූ අය වැරදිකරුවකු වීමෙන් පමණක්ම ඒවායේ අයිතිය ඉහතින් අයිතිව තිබූ අයගේ හෝ ඔහුගේ බුදල් බලකාරයාගේ හෝ හිමිකමට පත් වෙන්නේ නැත. මීට පටහැනි ව ඇති අනිත් නීති වෙතත් එය අභිභවා මෙය ක්‍රියාවේ යෙදෙයි.

(1918) 20 වෙනි න. නී. වා. 414 පිටෙහි චාර්තාවී ඇති **සිල්වා එ. හමීඩ** නඩුවේදී බර්ට්ලම් අග්‍ර විනිශ්චයකාරතුමා තීන්දුකර තිබෙන අන්දමට නඩුවක විභාගයට ගේතුවූ දේපලක් ගැන වෝදනා ලැබූ අය විභාගයෙන් පසුව වරද-කරුවෙකු ලෙස තීන්දු නුවොත්, මහෙස්ත්‍රාත්තුමාට අපරාධ නඩු සංවිධාන සංග්‍රහයේ 413 වෙනි ඡේදය යටතේ ඒ දේපල ගැන තමාට අභිමත ප්‍රකාර නියෝගයක් කිරීමට බලය නැත. එවැනි අවස්ථාවකදී ඒ දේපල වල බුත්කිය එය තිබුන අය වෙතම ආපසු දියයුතු බව ද තීන්දු කර තිබේ. මට පෙනෙන අන්දමට එම නඩු තීන්දුවේ ප්‍රකාර මේ පෙත්සම්කරුගේ ද ඉල්ලීමට ඉඩදිය යුතුව තිබින. මගේ අදහස නම් බඩු විකිණීමේ ආඥා පණතේ 24 (2) වෙනි ඡේදයේ පිළිසරණ ඔහුට ලැබිය හැකිය. මේ ටයර් සීමා සහිත ටකර් සහ සමාගමෙන් වංවාවෙන් හෝ සොරකමක් නොවන අන් අයුතු ක්‍රමයකින් ලබා-ගෙන තිබෙන බව නැතෙයි කියා තර්ක කිරීම අමාරුය. ඒ සමාගම සිය කැමැත්තෙන් ඒවා දී තිබේ. කාරණය මෙසේ නම් නීතිය ප්‍රකාශ කරන්නේ ටයර් වල අයිතිය සමාගමට හිමිවිය යුතු නොවේ කියායි—පෙත්සම් කරු ඉදිරිපත් කළ නඩු තීන්දුවලින් එනම්, **පොලිස් ඉන්ස්-පැක්ටර් එ. ඇල්බට් සිල්වා**, (1916) 3 ල. ස. වා. 313 පිට; **ෂාන්ඩ එ. අතුකෝරාල**, (1934) 37 න. නී. වා. 55 පිට, සහ **සුප්පයියා සමබන්ධව නඩුව** (ඉහතින් බලනු), සීමා සහිත ටකර් සමාගමට ටයර් දීමට කළ නියෝගය වැරදිය කියා කළ තර්කය ස්ථිර වෙයි.

යටකී නියෝගය කිරීමට උගත් මහෙස්ත්‍රාත්වරයාගේ සිත තදින් නැමීගිය කරුණ නම් පෙත්සම්කරු ලංකාවේ "බ්‍රිජ්ස්ටන්" ටයර් වලට ඒජන්තවරු වන සීමා සහිත ටකර් සමාගමේ උප ඒජන්ත කෙනෙක්ව සිටීමයි—එම ටයර් වලට ඒජන්ත කෙනෙක් නොවූ අයෙකු විසින් උප ඒජන්ත කෙනෙකු වන පෙත්සම්කරුට ටයර් මිළයට ගන්ට කීවිට ඒ ගැන සැකයක් ඔහු තුල ඇතිවිය යුතු බවත්, යටත් පිරිසෙයින් ඒ ටයර් කොහෙන් ලැබුනා ද යන බවත් සෝදිසි කිරීම ඔහුට යුතු කමක් ව තිබුන බව මහෙස්ත්‍රාත්වරයා කල්පනා කළ බව පෙනේ. නමුත් මෙහිදී අමතකවී ඇති කරුණු නම් (ඒ) පෙත්සම්කරු ඒ ටයර් මිළයට ගෙන තිබෙන්නේ ඉහතිනුත් ටයර් මිළයට ගත් වෙළෙන්දෙකුගෙන් බවත් (බී) ඒ ටයර් වලට සෑහෙන ප්‍රමාණවත් මුදලක් ගෙවා තිබෙන බවත් ය.

මේ ටයර් හතර සම්බන්ධව හිමිකම පත්කිරීමේ නියෝගය පරිසෝධනය කිරීමට ප්‍රමාණවත් කරුණු පෙත්සම්කරු විසින් පෙන්වාදී තිබෙයයි මගේ අදහස නිසා එය අවලංගු කරමින් එම ටයර් පෙත්සම්කරුට භාර දීමට මම අණ කරමි.

ඇපෑල ප්‍රතික්ෂෙප කොට
පරිසෝධන ඉල්ලීමට ඉඩ දෙන ලදී.

ගරු එච්. ඇන්. ජී. ප්‍රනාන්දු විනිශ්චයකාරතුමා ඉදිරිපිටදී.

යසරත්න සිල්වා එ. සේනානායක*

ශ්‍රේෂ්ඨාධිකරණයේ අංකය, නෝ: 235/1961—කොළඹ රික්වැස්ට් උසාවිය. නෝ: 79879.

වාද කළේ: 1963 මාර්තු 21 වනද.
තීන්දු කළේ: 1963 අප්‍රෙල් 5 වනද.

ඉඩම්හිමි සහ බදුකරු—බදුකරුගේ මරණින් පසුව ගොඩනැගිල්ලේ පදිංචිව සිටින ඔහුගේ පුතා නෙරපීමට පැවරූ නඩුවක්—තමා නීත්‍යානුකූල බදුකරු බව විත්තිකරු අයැද සිටීම—විත්තිකරුගේ ආයාචනය ඉවත දැමීම—ඇපෑල—විත්තිකරු අයුතු ලෙස ඇතුල්වූවෙකැයි පැමිණිලිකරු කියා සිටි හෙයින් පැමිණිල්ල සාක්ෂික විය හැකි එකම මාර්ගය ඔහුගේ අයිතිය ඔප්පුකිරීමෙන්ය යන කරුණ ඇපෑලේදී මතුකිරීම—ගොඩනැගිල්ලේ වටිනාකම අනුව බලන විට රික්වැස්ට් උසාවියේ අධිකරණ බලය ද ප්‍රශ්න කිරීම—එවැනි ආයාචනයක් සාක්ෂික විය හැකි ද? උසාවි ආඥා පණතේ 75 වැනි ඡේදය—ආරවුලට භාජන වූ කරුණ කුමක් ද?

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 64 වෙනි කා., 15 වෙනි පිට බලනු.

ප්‍රශ්නයට භාජනවූ ස්ථානය විත්තිකරුගේ පියාට බදු දුන් බව ද, 1961 මාර්තු 7 වෙනිදා පියා මියගිය බව ද, පැමිණිලිකරුගේ බදුකරු යයි පවසමින් විත්තිකරු නොකඩවාම පදිංචිව සිටිය බව ද චෝදනා කරමින් පැමිණිලිකරු විත්තිකරුට විරුද්ධ නඩු පැවරුවේය. විත්තිකරු තමාගේ පිළිතුරේ මෙසේ පැවසිය :—(අ) මේ ගොඩනැගිල්ලේ පවත්වාගෙන ගිය වෙළඳ ව්‍යාපාරයට තමා ද සිය පියාට හවුල්වූ හෙයින් බදුකරු විශයෙන් ද තමාට හවුලක් තිබීම; (ආ) සිය පියාගේ මරණින් පසුව, කුලී සීමාකිරීමේ ආඥා පණතේ 18 වැනි ඡේදය යටතේ තමා බදුකරු බවට පත්වීම.

නඩු විභාගයෙන් පසුව විත්තිකරු අයැද සිටි මේ කරුණු දෙකම ඉවත දැමූ උගත් කොමසාරිස්වරයා පැමිණිලි පක්ෂයට නඩුව තීන්දු කළේය. පැමිණිලිකරු කියා සිටි අන්දමට විත්තිකරු බදුකරුවෙකු නොව අයුතු ලෙස ඇතුල්වූවෙකු නම් පැමිණිල්ල සාර්ථක වන්නේ පැමිණිලිකරුගේ අයිතිය ඔප්පු කිරීමෙන් පමණකැයි ද ගොඩනැගිල්ලේ වටිනාකම සලකා බලනවිට රික්වැස්ට උසාවියේදී මෙය ඔප්පුකිරීමට බැරි බව ද ඇපෑලේදී ඇපැල්කරු වෙනුවෙන් තර්ක කරණ ලදි.

තීන්දුව:— පැමිණිලිකරුට ගොඩනැගිල්ලට අයිතියක් තිබෙන බව විත්තිකරු සිය පිළිතුරෙන් පිළිගෙන තිබෙන හෙයින් ආරවුලට භාජනවූ එකම ප්‍රශ්නය බද්ද පිළිබඳ චෝදනාවයි. රික්වැස්ට උසාවියේ මුදල් පිළිබඳ අධිකරණ බලය ද රදා පවතින්නේ අයිතිය ගැන ආරවුලක් තිබේ ද යන්න උඩ බව උසාවි ආඥා පණතේ 75 වැනි ඡේදයේ සඳහන් වෙයි.

නීතිඥවරු: ඩී. ආර්. පී. ගුණතිලක, විත්තිකාර-ඇපැල්කරු වෙනුවෙන්.
බී. ජේ. ප්‍රනාන්දු, පැමිණිලිකාර-වගඋත්තරකරු වෙනුවෙන්.

ගරු එච්. ඇන්. ජී. ප්‍රනාන්දු විනිශ්චයකාරතුමා :

ප්‍රශ්නයට භාජනවූ ස්ථානය විත්තිකරුගේ පියාට බදු දී තිබුන බව ද, 1961 මාර්තු 7 වෙනිදා පියා මියගිය බවද, පැමිණිලිකරුගේ බදුකරුයයි පවසමින් විත්තිකරු නොකඩවාම එහි පදිංචිව සිටි බව ද මේ නඩුවේ පැමිණිල්ලේ සඳහන් විය. විත්තිකරු සිය පිළිතුරෙන් කරුණු දෙකක් අයැද සිටියේය. එම ගොඩනැගිල්ලේ පවත්වාගෙන ගිය තම පියාගේ වෙළඳ ව්‍යාපාරයට තමා ද හවුල්වූ නිසා බදුකරු වශයෙන් තමාට ද හවුලක් තිබුන හෙයින් නොකඩවාම පදිංචිව සිටීමට තමාට අයිතියක් තිබුන බව ඔහු පළමුව අයැද සිටියේය. පියාගේ මරණින් පසුව, කුලී සීමාකිරීමේ ආඥා පණතේ 18 වැනි ඡේදය යටතේ තමා බදුකරු බවට පත්වී යැයි දෙවනුව අයැද සිටියේය. උගත් කොමසාරිස්වරයා විසින් මේ කරුණු දෙකම ඉවත දමා ඇති අතර සාක්ෂි සලකා බලන විට මේ තීන්දුවට විරුද්ධවීමට ඉඩක් නැත.

නඩු විභාගයේදී හෝ ඇපැල් පෙත්සමේ හෝ සඳහන් නොකළ කරුණක් විත්තියේ නීතිඥතැන දැපැලේදී මතුකළ නමුත් පැමිණිලිකරුගේ නීතිඥතැන දකෂ ලෙස ඊට පිළිතුරු දී ඇත. පැමිණිලිකරු කියා සිටින අන්දමට විත්තිකරු බදුකරුවෙකු නොව අයුතු ලෙස ඇතුල්වූවෙකු නම් පැමිණිල්ල සාර්ථක වන්නේ පැමිණිලිකරුගේ අයිතිය ඔප්පු කිරීමෙන් පමණ කැයි ද ගොඩනැගිල්ලේ වටිනාකම සලකා බලනවිට රික්වැස්ට උසාවියේ දී අයිතිය ඔප්පු කිරීමට බැරි යැයි ද යනු ඇපැලේ දී මතුකළ කරුණු වේ.

මේ පිළිබඳ විවාදයේදී නඩු තීන්දු ගණනාක් ම ඉදිරිපත් කළ නමුත් ඒවා මෙහි සඳහන් කිරීම අවශ්‍ය නැත. රුපියල් 300/- ට අධික නොවූ ණයක්, අලාභයක් හෝ ඉල්ලීමක් පිළිබඳව නඩුවක් විභාග කිරීමට රික්වැස්ට උසාවියකට අධිකරණ බලය ඇති බව උසාවි ආඥා පණතේ 75 වැනි ඡේදයේ සඳහන් වන අතර මේ නඩුවෙන් ඉල්ලා ඇති අලාභයේ ප්‍රමාණය රුපියල් 283/-ක් වේ. අයිතිය පිළිබඳව ආරවුලක් තිබෙන ඉඩමක වටිනාකම රුපියල් 300/- ට අධික නම් එම උසාවියට නඩු විභාග කිරීමට බලයක් නැති බව එම ඡේදයේම සඳහන් වේ. තමා පැමිණිලිකරුගේ බදුකරුවෙකු බව ද ආරවුලට හේතුවූ එකම ප්‍රශ්නය බද්ද පිළිබඳ චෝදනාව බව ද විත්තිකරු අයැද තිබීම නිසා ගොඩනැගිල්ලේ අයිතිය ගැන ආරවුලක් නැති බව පෙනේ. වෙන විදියකට කියනවා නම්, පැමිණිලිකරුට ගොඩනැගිල්ලට අයිතියක් තිබෙන බව විත්තිකරු සිය පිළිතුරෙන් පිළිගෙන ඇති හෙයින් අයිතිය පිළිබඳ ආරවුලක් නිරාකරණය කිරීම උගත් කොමසාරිස්වරයා වෙත පැවරී නැත. එම නිසා, විත්තිකරු කියා සිටි අන්දමට ඔහු පැමිණිලිකරුගේ බදුකරුවකු ද නැද්ද යනු තීරණය කිරීමට කොමසාරිස් වරයාට අධිකරණ බලය තිබුන බව මම තීන්දු කරමි.

ඇපැල නිෂ්ප්‍රභා විය.

ගරු ටී. ඇස්. ප්‍රනාන්දු මහේශ්වයකාරතුමා ඉදිරිපිට.

සයිමන් සිල්වා එ. නය සහන ලබා දීමේ මණ්ඩලය සහ තවත් අය*

ශ්‍රේෂ්ඨාධිකරණයේ ඉල්ලුම් පත්‍ර නොමැත: 212—1962.

අධිකරණ ආඥා පනතේ 42 වන ඡේදයේ ප්‍රඥප්තීන්ට අනුව සර්ටියෝරේරයි (Writ of Certiorari) ආඥාවක් සහ තහනම් ආඥාවක් (Writ of Prohibition) නිකුත් කිරීමට යයි ඉල්ලීමේ සිඩියක් පිළිබඳවයි.

විවාද කළ දිනය: ජූනි 10 සහ 11, 1963.
තීන්දු කළ දිනය: ජූනි 11, 1963.

හේතු ප්‍රකාශයට පත් කළ දිනය: 25.6.63.

සර්ටියෝරේරයි සහ තහනම් ආඥා (Writs of Certiorari and Prohibition)—ණය සහන ලබාදීමේ ආඥා පනත (8 වෙනි පරිච්ඡේදය) වගී 1959, අංක 5 පනතින් සංශෝධිතවූ—පොරොන්දු සිත්තක්කරය—ආපසු පැවරීමේ පොරොන්දු කාලය ඉක්මෙන්ට පෙර 19 ඒ සහ 19 බී ඡේද යටතේ සහණය ඉල්ලා සිටීම—ඉල්ලීමේ නිවේදනය මුදල් හිමියාට ප්‍රමාදකර මණ්ඩලයේ නියෝගයක් නොමැතිව ලේකම්වරයා යැවීම—මුදල් හිමියා එම පොරොන්දු කාලය ඉක්ම ගිය පසු අන්කෙනෙකුට විකිණීම—ඒ විකිණීම අවලංගු යයි මණ්ඩලය තීරණය කිරීම—එම තීරණයට විරුද්ධව ඉඩම මිලයට ගත් අය සර්ටියෝරේරයි සහ තහනම් ආඥා සුප්‍රීම් උසාවියෙන් ඉල්ලීම.

වගී 1957 මාර්තු 18 වන දින මෙම පෙත්සමෙහි 7 වෙනි වගඋත්තරකරු විසින් 8 වන වගඋත්තරකරුට රු. 6,000/- ක ඉඩම් කොටසක් විකුණන ලදී. මෙම මුදල් විකුණූ දින සිට වගී තුනක් (3) ඇතුලත 15% පොලියකුත් සමග ආපසු දුනහොත් එය නැවත ආපසු පවරා දිය යුතු බවට කොන්දේසියක් ද එහි විය.

7 වෙනි වගඋත්තරකරු 15-2-60 දරණ දින වගී 1959 නොමැත: 5 දරණ පනතින් සංශෝධනය කරණ ලද ණය සහණය දීමේ ආඥා පනතේ 19 'ඒ' සහ 19 'බී' යන ඡේදයන්ට අනුව ණය සහණය දීමේ මණ්ඩලයෙන් ගනු දෙනුවට බෙරා දීමට ඉල්ලීමක් කළේය.

මෙම ඉල්ලීම එදිනම, එනම් 19 (ඒ) (1) දරණ ඡේදයෙන් කියවෙන පරිදි වගී 3 ගතවීමට 30 දිනකට කලින් මණ්ඩලය විසින් ලබන ලදී.

7-4-60 දරණ දින මණ්ඩලයෙහි ලේකම් තැන විසින් 7 වන වගඋත්තරකරු මෙසේ ඉල්ලීමක් කර ඇතැයි 8 වන වගඋත්තරකරුට නිවේදනයක් යවන ලද නමුත් එයට ඉල්ලීමේ පිටපතක් ඇමිණී නොතිබින. මෙම නිවේදනය 10-4-60 දරණ දින ලැබූ බව නොයලකා 8 වන වගඋත්තරකරු එම ඉඩම 16-4-60 දරණ දින මෙම නඩුවෙහි පෙත්සම්කරුට විකුණේ ය.

20-2-62 දරණ දින මෙම ඉල්ලීම විභාග කළ මණ්ඩලය 16-4-60 දරණ යටොක්ත දින කරණ ලද විකිණීම් ආඥා පනතේ 19 බී (2) දරණ ඡේදයට අනුකූලව බලන කල නීති විරෝධී බව ප්‍රකාශ කරණ නියෝගයක් නිකුත් කළේය. මෙම නඩුවෙහිදී තහනම් නියෝගයක් සහ සර්ටියෝරේරයි (Certiorari) ආඥාවක් ඉල්ලමින් එම නියෝගය අභියෝගයට භාජන කරයි.

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 64 වෙනි කා., 36 වෙනි පිට බලනු.

මෙකී නිවේදනය යැවීමෙදි මණ්ඩලය රැස්වී එය කල්පනාවට භාජන කොට ඒ සඳහා ලේකම් තැන නොයොදවන ලෙ බව තමන් පිළිගෙන ඇති බව නිවේදනයෙහිම සඳහන්ව තිබේ.

නීතිඥවරු:— (1) 7 වන වගඋත්තරකරුගේ ඉල්ලීම මණ්ඩලය විසින් කල්පනාවට භාජන කොට භාර නොගන්නා ලදුව එහි ලේකම් තැන තමා විසින් ම පමණක් පියවර ගැනීම නිසා 8 වන වග–උත්තරකරු ලත් නිවේදනය ආඥාපණතේ හැටියට නීත්‍යානුකූල නිවේදනයක් නොවේ.

(2) එබැවින් 19 'බී' (1) ඡේදයට අනුව පනවන ලද අත්සතු කිරීම හෝ වෙන අයුරකින් පවරාදීම හෝ තහනම් කිරීම මෙම ඉඩම පිළිබඳ සලකන කල වලංගු නැත. මේ නිසා පෙත්සම්කරුට එය විකිණීම නීති යුක්තය.

(3) 19 (ඒ) (1) ඡේදය අනුව ඉල්ලීමක් පිළිගැනීම කායර්‍ය විධියක් පමණක් නොවේ. 49 වන ඡේදයෙන් ආරක්ෂා වන්නේ මණ්ඩලය විසින් කරණ ලද කටයුතු විනා යම් යම් අනිකුත් පුද්ගලයන් විසින් කරණ ලද කටයුතු නොවේ.

(ඒ) ගරු ටී. ඇස්. ප්‍රනාන්දු විනිශ්චයකාරතුමා විසින්:—"මෙබඳු නිවේදනයක් එම නිවේදනයෙහි සඳහන් ඉඩම මුදාගැනීමේ කාලපරිච්ඡේදය අවසානවීමට පෙර ණය හිමියාට ලභාකරවීමට හැකිවෙන පරිදි කල්වේලා ඇතිව රැස්වීමේ යුතුකම මණ්ඩලය පිට පැවරී ඇති බව මට පෙනී යයි. ඉල්ලීම ලැබූ පසු නිවේදනය නොයවා ලේකම්වරයා මාස දෙකකට ආසන්න කාලයක් එය පමාකර ඇති බව මේ නඩුවේ කරුණුවලින් හුදෙක් ම ආවරණය වේ".

(බී) " . . . මෙම නිවේදනයට ඉල්ලීමෙහි පිටපත් යා නොකර යැවීමෙන් ලේකම්වරයා නොසැලකිල්ලෙන් කටයුතු කර තිබේ".

නීතිඥවරු:— රාජනීතිඥ එච්. ඩබ්ලිව්. ජයවර්ධන මහතා, ඇල්. සී. සෙනෙවිරත්න මහතා සමග, පෙත්සම්කරු වෙනුවෙන්.

ඇම්. ටී. ඇම්. සිවාර්දීන් මහතා, 8 වන වගඋත්තරකරු වෙනුවෙන්.

ඇම්. ඇම්. කුමාරකුලසිංහම් මහතා, යූ. ඒ. ඇස්. පෙරේරා මහතා සමග, 7 වන වගඋත්තරකරු වෙනුවෙන්.

ගරු ටී. ඇස්. ප්‍රනාන්දු විනිශ්චයකාරතුමා :

මෙම නඩුවේ විවාදය අවසානයේදී නය සහන ලබාදීමේ මණ්ඩලය විසින් වර්ෂ 1962 පෙබරවාරි 20 වෙනි දින කෙරුණු නියෝගය අවලංගු කරමින් මා විසින් දෙන ලද තීරණය පිටුබඳ හේතු සාධක පහත දැක්වේ.

වර්ෂ 1957 මාර්තු මස 18 වන දින ලියන ලද නොවැ: 353 දරණ ලද ඔප්පුවෙන් මෙහි 7 වැනි වගඋත්තරකරු රුපියල් 6,000/- කට එක් ඉඩමකින් කොටසක් 8 වන විත්තිකරුට විකුණා තිබේ. එහි වූ කොන්දේසිය අනුව වර්ෂ 3 ක කාල පරිච්ඡේදයක් ඇතුළතදී එම මුදල 15% පොළියකුත් සමග විකුණුම්කරු ආපසු ගෙවනු ලැබුව හොත් ඉඩම ගැනුම්කරු විසින් ඔහුට ආපිට පවරා දිය යුතු ය. වර්ෂ 1941 නය සහන ලබාදීමේ ආඥා පණත අනුව (81 වන පරිච්ඡේදය) පිහිටුවා වන ලද නය සහන ලබාදීමේ මණ්ඩලය මගින් නයකරුවෙකු විසින් ආරක්ෂිත නය හිමියෙකුට ගෙවිය යුතුව තිබුණු නය බෙරා දීමට බලතල වර්ෂ 1959 අංක 5 දරණ (සංශෝධන) පණතින් තවදුරටත් වැඩිවී තිබේ. ඉන්පසු මෙම මණ්ඩලයට "මෙම ආඥා පණතෙහි අඩංගු සීමාවට ඇතුළත් වන ලෙස පොරොන්දු සින්නක්කරයකින් ලබන ලද උකස්කරයක් සේ සැලකෙන ඔප්පුවකින් සුරක්ෂිත වූ නය ගනුදෙනුවක් වුව ද බෙරා දීමට හැකිවේ. මේ නයින් වැඩි කරන ලද බලතල මණ්ඩලයට පිරිනැමීම සඳහා අඑත් ඡේද කිපයක් ඇතුළත් කොට තිබේ. එයින් අංක 19 ඒ දරණ 19 බී යන ඡේද දෙක මෙම ඉල්ලීම් පත්‍රය සලකා බලන විට පරීක්ෂණයට භාජනය කළ යුතු ය. මෙම ඡේද දෙක පණතින් උපුටා නැවත මෙහි බහාලමු.

19 ඒ. (1) මෙම ආඥාපණතෙහි අර්ථානුසාරයෙන් උකස් තැබීමකැයි කිය හැකි යම්කිසි පොරොන්දු සින්නක්කරයකින් සුරක්ෂිත වී ඇතැයි සැලකෙන නයක් පිළිබඳ ව යම්කිසි නයකරුවෙකු හෝ නය හිමියෙකු විසින් ඉල්ලීමක් කළ කල්හි එම ඉල්ලීම කරණ ලද්දේ එයේ පවරා දුන් ඉඩම පිළිබඳව නයකරුවා සහ නයහිමියා අතර කෙරී ඇති කිසියම් නීත්‍යානුකූල ලෙස බලපැවැත්විය හැකි ඔප්පු තිරප්පුවක් හෝ සම්මුතියක් අනුව නයකරුවා විසින් එසේ පවරා දුන් ඉඩම බෙරා ගත හැකි කාල-සීමාව ඉක්මයාමට අඩුවශයෙන් තිස්-දවසකට කලින් නම් මිස එම ඉල්ලීම මණ්ඩලය විසින් කල්පනාවට නො ගත යුතු ය.

(2) ඉහත සඳහන් (1) දරණ උපඡේදයෙන් කියැවෙන පරිදි එබඳු නයක් පිළිබඳ ව මණ්ඩලය යම්හෙයකින් ඉල්ලුම් පත්‍රයක් කල්පනාවට ගතහොත් එම මණ්ඩලය විසින් ලේකම් තැනගේ අත්සන සහිත නිවේදනයක් ඉල්ලුම් පත්‍රයේ පිටපතක් සමග ලියා පදිංචි කළ තැපැලෙන් එම ඉල්ලුම් පත්‍රයෙහි සඳහන් නය හිමියා වෙත යැවෙන සේ කටයුතු සැලැස්විය යුතු ය.

19 බී. (1) 19 ඒ. දරණ ඡේදයෙහි සඳහන් පරිදි යම්කිසි ඉල්ලුම් පත්‍රයක් පිළිබඳ ව නිවේදනයක් නයහිමියෙකු විසින් ඉහත සඳහන් (2) දරණ උපඡේදයට අනුව ලද කල්හි ඔහු විසින් එහි සඳහන් ඉඩම විකිණීම, අන්-සතු කිරීම, පවරාදීම, බදුදීම හෝ උකස් තැබීම කළ යුත්තේ මණ්ඩලය විසින් එකී ඉල්ලීම අවලංගු කළොත් හෝ එම නය බේරීම කිරීමට බලයක් ලැබුණොත් පමණකි.

(2) මෙහි (1) දරණ උපඡේදය උල්ලංඝනය කරමින් කෙරෙන යම්කිසි විකිණීමක්, අන්සතු කිරීමක්, පවරාදීමක්, බදුදීමක් හෝ උකස් තැබීමක් වෙතොත් එය බලරහිත ශූන්‍ය දෙයක් හැටියට සැලකිය යුතු ය.

නො: 353 දරණ ඔප්පුවේ ගැබ්වී ඇති ගනුදෙනුව පිළිබඳව යම්කිසි අයුරකින් බෙරුමක් කරණ ලෙස ඉල්ලමින් 7 වන වගඋත්තරකරු වෂී 1960 පෙබරවාරි 15 දින මණ්ඩලයට ඉල්ලීමක් ඉදිරිපත් කෙළේ ය. මෙම ඉල්ලීම මණ්ඩලයෙහි කාර්‍යාලයට එදින, එනම්, 19 ඒ (1) ඡේදයෙහි සඳහන් කාලසීමාව ඉක්ම යාමට තිස්දවසකට කලින් ලැබිණි. එපමණක් නොව මෑ ඉදිරියෙහි ඇති මෙම නඩුවෙහි පරමාර්‍ථය ගැන සලකා බැලීමේදී එම ඉල්ලීම මණ්ඩලය වෙනුවෙන් බාරගත් බව ගැන ද මම සැහීමකට පත්වෙමි. වෂී 1960 අප්‍රෙල් මස 7 වන දින මණ්ඩලයේ ලේකම්තුමා 8 වන වගඋත්තරකරුට 7 වන වගඋත්තරකරු විසින් එබඳු ඉල්ලීමක් ඉදිරිපත් කරණ ලද බව දන්වමින් ලියමනක් යවන ලද නමුත් එම නිවේදනයට ඉල්ලුම් පත්‍රයෙහි ම පිටපතක් අමුණා නොතිබිණි. මෙම නිවේදනය 8 වන වගඋත්තරකරු විසින් වෂී 1960 අප්‍රෙල් මස 10 වන දින ලබන ලදී. එහෙත් ඔහු එම ඉඩම වෂී 1960 අප්‍රෙල් මස 16 වන දින නො: 4357 දරණ ඔප්පුවෙන් මෙම නඩුවෙහි පෙත්සම්කරුට විකුණා දී ඇත්තේය.

7 වැනි වගඋත්තරකරුගේ මෙම ඉල්ලීම ගැන සලකා බැලූ මණ්ඩලය 1962 පෙබරවාරි 20 වෙනි දින කරණ ලද තම නියෝගයෙන් වෂී 1960 අප්‍රෙල් මස 13 වෙනි දින ලියන ලද නො: 4357 දරණ ඔප්පුවෙන් කරණ ලද විකිණීම බලරහිත ශූන්‍ය දෙයක් බව 19 බී (2) දරණ ඡේදයට අනුව තීරණය කෙළේය. මෙම නඩුවෙහිදී අභියෝගයට පාත්‍රවූයේ එම නියෝගයයි. එසේ අභියෝග කිරීමට හේතුව එම නඩු කොපියේ පෙනී යන පරිදි ඒ නියෝගය නීතියේ දෝෂයකින් දූෂිත වී ඇති නියාත් එය මණ්ඩලයේ ආඥා බලයට අතිරේක ව කරණ ලද නියෝගයක් නිසා ත් ය.

නො: 353 දරණ ඔප්පුවෙන් කෙරී ඇති ගනු දෙනුව පොරොන්දු සින්නක්කරයකින් සුරක්ෂිත වූ මෙම ආඥා පණතේ අර්ථානුසාරයෙන් උකස් තැබීමකැයි කිය හැකි නයක් පිළිබඳවය යන්න ගැන දෙපක්ෂය අතර කිසිම තර්කයක් නොමැත. මෙහි ඇති විවාදය පැන නැඟී ඇත්තේ 8 වන වගඋත්තරකරු ලැබූ නිවේදනය 19 ඒ

ඡේදයේ (2) වන උපඡේදය යටතේ නිකුත් වූ නීත්‍යානුකූල නිවේදනයක් ද නැද්ද යන්න ගැන ය.

මෙහිදී පෙත්සම් කරුගේ තර්කය වූයේ මණ්ඩලය විසින් යම්කිසි ඉල්ලීමක් මෙම ආඥාපණතේ අර්ථානුසාරයෙන් උකස් තැබීමකැයි කියහැකි පොරොන්දු සින්නක්කරයකින් සුරක්ෂිත වී ඇත්නයි සලකා බැලීම පිණිස එයට මණ්ඩලයේ අවධානය අනිවාර්‍යයෙන් ම යොමුවිය යුතු ය යන්න ය. ''උකස් තැබීම'' යන යෙදීම වෂී 1959 නො: 5 දරණ (සංශෝධිත) ආඥාපණතේ 4 වන ඡේදය පැනවෙන තෙක් ම පණතට අනුව විග්‍රහ වී නොමැති බව සැලකිය යුතු ය. එම ඡේදයෙහි එය විස්තර වී ඇත්තේ පහත සඳහන් පරිදිය.

'' යම්කිසි නිශ්චල දේපලක් පිළිබඳව සැලකෙන විට එම දේපළ පොරොන්දු සින්නක්කරයකින් පවරාදීමක් එම ගනුදෙනුවෙහි සෑම අංශයක් ම සලකා බැලූ කල ඉඩම පවරා දෙනු ලබන්නාට ඒ අය විසින් පවරා දෙන්නාට නයට දුන් මුදල් ගෙවීම් සඳහා ගන්නා සුරක්ෂිත පියවරක් නම්, එය ද ' උකස් තැබීමකට ' ඇතුලත් වේ.''

ඉහත සඳහන් නිවේදනය ලේකම්තැන විසින් යැවීමට පෙර මණ්ඩලය 19 ඒ (1) ඡේදයේ සඳහන් ඇති ආකාරයට සැලකිය හැකි නයක් පිළිබඳව එවන ලද්දක් ද යන්න කිසිදු රැස්වීමකදී හෝ වෙන අන්කිසි නීත්‍යානුකූල ක්‍රමයකින් හෝ තම කල්පනාවට භාජනය නො කළ බව පිළිගෙන තිබේ. වෂී 1962 පෙබරවාරි මස 20 වන දින ලියන ලද නියෝගය ලියාගෙන යද්දී මෙබඳු ඉල්ලීමක් පිළිගැනීම සාමාන්‍ය විධිමත් කටයුත්තක් පමණක් බවත් එබඳු දෘයක් සඵකීය කාර්‍ය සම්ප්‍රදය සිතැඟි පරිදි හසුරුවා ගැනීමට බලය ඇති මණ්ඩලය වෙනුවෙන් එහි ලේකම්තුමාට කළහැකි බවත් සලකා තිබේ. ආඥාපණතේ 62 වන ඡේදයෙන් ඇමතිතුමාට මෙබඳු ඉල්ලීම් ගැන විනිශ්චය කිරීමේදී ගතයුතු කාර්‍ය සම්ප්‍රදය ගැන සහ අනිකුත් යම් යම් දේ පිළිබඳව ද රෙගුලාසි සෑදීමට බලය දී තිබේ. නමුත් ඉල්ලීම් පත්‍ර පිළිගැනීම් බඳු තම කාර්‍යයන් කිරීමට ලේකම්වරයාට පැවරීමට මණ්ඩලයට බලය ලැබී ඇති බවත් කියැවෙන රෙගුලාසියක් මා ඉදිරියේ නොපෙන්වීය. යම්හෙයකින් එබඳු රෙගුලාසියක් සාදා තිබුණි නම් එය ද මා මෙහි පහත පෙන්වා දෙන මතය අනුව, එනම්, යම්කිසි ඉල්ලීමක් ''පිළිගැනීමට'' සිදුවූ කල එහි ඇති කාර්‍ය පිළිබඳ මා කල්පනා කරණ හැටියට ඇමතිතුමාගේ බලතලවලින් ද බාහිර වූ නීති–විරෝධී කරුණක් ලෙස යැලකේ.

7 වන වගඋත්තරකරු වෙනුවෙන් පෙනී සිටි උගත් නීතිවේදියා තර්ක කෙළේ 19 ඒ (1) දරණ ඡේදයෙහි ඇති ''පිළිගැනීම'' යන යෙදීමෙන් හැඟී යන්නේ යම්කිසි ඉල්ලීමක් ලැබීම හෝ එය කල්පනාවට භාජන කිරීමට තබා ගැනීම හෝ නිසාත් එබඳු පිළිගැනීමක් මණ්ඩලය විසින් ම කරණු ලැබීම අනවශ්‍ය බවත් එම මණ්ඩලය විසින් බලපවරණු ලැබූ ඕනෑම කෙනෙකුට එබඳු පිළිගැනීමක් කළ හැකි බවත් කියමිනි. 19 වන ඡේදයේ ඇති එම වචනය ම එම තේරුම නො උසුලන බව ඔහුට නො පිළිගෙන නොසිටිය හැකි තත්වයකට ඔහු වැටුණි. එබැවින් 19 ඒ දරණ අළුත් ඡේදයෙහි මෙම වචනය වෙන තේරුමක් උසුලන බැවි පිළිගැනීමට සැහෙන හේතුවක් මට නොපෙනේ. මණ්ඩලය රැස්වී තම අවධානය මීට යොමු නොකළ බවත් එම නිවේදනය ලේකම් තැන ලවා නිකුත් නොකළ බවත් මණ්ඩලය විසින් දෙන ලද නියෝගයෙහි බැලූ බැල්මටම පෙනී යයි. 19 ඒ (1) දරණ ඡේදය ක්‍රියාත්මක කළ යුතු අවස්ථාවේ මණ්ඩලය විසින් එළඹිය යුතු තීරණයට එළඹිය යුත්තේ ඒකපාක්ෂික ව බවත් එය ඇත්ත වශයෙන් අත්හද බැලීමේ තීරණයක් බවත් සත්‍යයකි. නමුත් එය ද සිවිල් නඩුවක පැමිණිල්ලක් පිළිගැනීමේ දී හෝ ප්‍රතික්ෂේප කිරීමේ දී අධිකරණයක් විසින් කරණ අන්දමේ අධිකරණාත්මක සඵභාවයක් උසුලන තීරණයකි. එබඳු තීරණයක් ගැනීමට ඇති බලය වෙන කෙනෙකුට පවරා දීම එසේ පවරාදීමට බලතල නැතිව කළහැක්කක් නොවේ.

19 බී (1) දරණ ඡේදයෙන් පැනවී ඇති පරිදි ඉඩමක් අන්‍යතු කිරීම හෝ වෙන අයුරකින් අන්කෙනෙකුට පැවරීම වැළැක්වීම රදා ඇත්තේ 19 ඒ ඡේදයේ (2) දරණ උපඡේදයට අනුව යැවෙන නිවේදනය ලැබීම උඩය. එම උපඡේදයේ විධිවිධාන අනුව නිවේදනයක් නිකුත් කිරීම සහ නයහිමියා විසින් එම නිවේදනය ලැබීම එබඳු වැළැක්වීමක් ක්‍රියාත්මක කිරීමට පෙරාතුව සිදුවිය යුතු ඡොන්දේසියකි. ඉඩම මුදගැනීමේ කාලසීමාව ගෙවීමට අඩු වශයෙන් තිස් දවසකට කලින් මෙබඳු ඉල්ලීමක් මණ්ඩලයට ඉදිරිපත් කළ යුතු බව සහ ඉහත සඳහන්

නිවේදනය වැනි නිවේදනයක් නයහිමි ලද කලක ඉඩම් අත්සතු කිරීම වැළැක්වීමට තෙරුණු ආඥාපණතින් යොදු ඇති බව ද, පැහැදිළිව පෙන්වා දෙන්නේ මෙහි පරමාර්ථය ඵම ඉඩම් නයකරු විසින් මුදවා ගැනීමේ දිනයට කලින් ඵම නිවේදනය නයහිමි වෙත ලභා කළ යුතු බව ය. මා ඉදිරියේ ඇති මෙම නඩුවෙහි දී කරණ ලද ඉල්ලීම මණ්ඩලය විසින් නො පිළිගන්නා ලදුව එහෙත් ලේකම්-වරයා පමණක් ඒ පිළිබඳව ක්‍රියා කරණ ලදුව 8 වන වගඋත්තරකරු ලද එම නිවේදනය ආඥාපණතේ පැනවීම් වලට අනුව නීත්‍යානුකූලව කරණ ලද්දක් නොවේ. එය එසේ නිසා මෙම ඉඩම් අත්සතුකිරීම වැළැක්වීමක් එය තෙරෙහි බලපාන්නේ නැත.

මෙම නිවේදනයෙහි නීත්‍යානුකූලභාවය පිළිබඳව තවත් විරෝධයක් මතු කරන ලදී. 19 ඒ (2) දරණ ඡේදයට අනුව නිවේදනය ලේකම්වරයාගේ අත්සන සහිතව නය-හිමියාට යැවිය යුත්තේ ඉල්ලීමේ පිටපතකුත් යමගය. නමුත් මෙහි දී ඵබඳු පිටපතක් නිවේදනයට යාවි නිකුත් වූ බවක් නොපෙනේ. මණ්ඩලය විසින් ඉල්ලීම ගැන සලකා නොබලා නිවේදනය නිකුත් වී ඇති නිසා එය නීත්‍යානුකූල නොවූ නිවේදනයක් යයි මා විසින් ගත් තීරණයට අනුව නිවේදනය සමග ඉල්ලීම් පත්‍රයක් යැවිය යුතු යයි ඇති පැහැදීම් විධානාත්මක ද එසේ නැතහොත් උපදේශාත්මක ද යන්න තීරණය කිරීම මෙහිලා අන-වශ්‍යයයි හැගේ.

ආඥා පණතේ 49 වන ඡේදයෙන් සැලි කර්තව්‍යයන්හිම විධිය හෝ ආකාරය ගැන එතරම් නො සලකා සාරානුකූල ලෙස යුක්තිය ඉටුකිරීමට මණ්ඩලයට බලය ඇති බව අභියෝගයට භාජන කරණ ලද මෙම නියෝගයෙහි සඳහන් වී නිබේ. 19 ඒ (1) ඡේදයට අනුව පළමු වන අවස්ථාවෙහිදී කරන එසේ නැතහොත් ඒකපාක්ෂික ව කරන යම් කිසි ඉල්ලීමක් පිළිගැනීම සාමාන්‍ය විධිමත් කටයුත්තක් ය යන මතයට මෙහිදී මණ්ඩලය බැසගෙන නිබේ. මා විසින් ඉහතින් පෙන්වා දෙන ලද පරිදි යම්කිසි ඉල්ලීමක් මෙසේ පිළිගැනීම සාමාන්‍ය විධිමත් කටයුත්-තක් පමණක් නොවේ. එනිසා අතින් එය එසේයයි සළකා ගත්තත් 49 වන ඡේදයෙන් ආරක්ෂා ලබන්නේ විධිය හෝ ආකාරය ගැන නො සළකා මණ්ඩලය විසින් කරන ලද කටයුතු වීනා අනික් උදව්ය විසින් කරණ ලද කටයුතු නොවේ. නිදර්ශනයක් ලෙස ගතහොත් එහි ලේකම් වරයා විසින් කරන ලද කටයුතු නොවේ.

මෙම මණ්ඩලය සංයුක්ත වී ඇති ආකාරය නියා ම එයට නිතර නිතර රැස්විය නොහැකි බව මාහට පෙන්වා දෙන ලදී. නමුත් මෙම නඩුවෙහි එල්ල කර ඇති අභියෝගයට හේතුව ගැන සලකා බැලීමේ දී මෙම අපහසුව එයට උචිත පිළිතුරක් නොවන බව පෙන්වා දිය යුතුය. ඉල්ලීමක් කළ යුත්තේ එම ඉල්ලීමෙහි සඳහන් ඇති ඉඩම මුදගැනීමේ කාලසීමාව ගෙවීමට දවස් 30 කට කලින් යයි යොදු නිබීමෙන් පෙනී යන්නේ අයථා අපහසුකමක් නොමැතිව මණ්ඩලයට රැස්වීමට මෙම කාලසීමාව ප්‍රමාණවත් යයි ව්‍යවස්ථාදායක මණ්-ඩලය කල්පනා කළ වගකි. මෙබඳු නිවේදනයක් එම නිවේදනයෙහි සඳහන් ඉඩම මුදගැනීමේ කාලපරිච්ඡේදය අවසාන වීමට පෙර නයහිමියාට ලභාකරවීමට හැකි වෙන පරිදි කල්වේලාව ඇතිව රැස්වීමේ යුතුකම මණ්ඩලය පිට පැවරී ඇති බව මට පෙනී යයි. ඉල්ලීම ලැබූ පසු නිවේදනය නො යවා ලේකම්වරයා මාස දෙක-කට ආසන්න කාලයක් එය පමාකර ඇති බව මෙ නඩුවේ කරුණු වලින් හුදෙක් ම අනාවරණය වෙ. මෙම ඉල්ලීම පිළිගත යුතු ද නැද්ද යන්න ගැන කල්පනා කිරීමට මණ්ඩලය නො කැඳවා ඇතිවාක් මෙන්ම නයහිමියෙකුට නිවේදනයක් යැවිය යුතු යථාකාලයේ ලැබුණු සෑම නිවේදනයක් ම යැවීම ලේකම්වරයා වෙත පැවරීමට බලතල නැතිව වුව ද මණ්ඩලය විසින් පවරණ ලද නම් එසේ වුව ද මෙම නිවේදනයට ඉල්ලීමෙහි පිටපතක් යා නොකර සිටීමෙන් ලේකම්වරයා නො සැලකිල්ලෙන් කටයුතු කර නිබේ.

වර්ෂ 1960 අප්‍රෙල් 16 වන දින තමා කරණ ලද විකිණීම පිළිබඳව නයහිමිගේ නීත්‍යානුජ භැහීමක් හදවතෙහි නැතැයි තර්ක කළ 7 වන වගඋත්තරකරුගේ නීතිවේදියා මේ සඳහා නිකුත් විය යුතු ආඥාව නිකුත් නො කළ යුතු යයි කරුණු දැක්වීමට පරිශ්‍රමයක් දැරිය. නමුත් මා ඉදිරියෙහි ගෙනහැර දැක් වූ කරුණු අනුව මෙබඳු චෝදනාවක් නඟාසිටුවීමට නො හැකි බව කිම පමණක් ඉතාම නිවැරදි යයි මම විශ්වාස කරමි. තවද මේ සඳහා මෙම උසාවියේ අභිමතය අයැද සිටියේ නයහිමියා නොව ඔහු ගෙන් ඉඩම් මිලයට ගත් පෙත්සම්කරුවා ය.

එහෙත් 7 වන වගඋත්තරකරු තමාගේ කිසිම වරදක් නොමැතිව මෙම නඩුවෙහි පාඳු පණිතව අනුව තමාට ලැබිය යුතු සහනය නො ලැබීමේ විශේෂ පරිසරය සහ අවසථාව ගැන සලකා නඩුගාස්තුව පිළිබඳ කිසිම නියෝගයක් කිරීමෙන් මම වැළකුණෙමි.

නය සහන මණ්ඩලයේ නියොග අවලංගු කරමින් ඉල්ලීම්වලට ඉඩදී ඇත.

ගරු ගේරත් විනිශ්චයකාරතුමා ඉදිරිපිට.

ජෝසප් එ. මාරියම්පිල්ලේ පොලිස් සාජන්ට් මඩකලපුව*

ඌ. උ. නො: 979/62—ම. උ. මඩකලපුව, නො: 5579.

වාද කළේ සහ තීන්දු කළේ: 1963 පෙබරවාරි 11 වැනිදය.

දණ්ඩන නීති සංග්‍රහය, 488 වන ඡේදය—මත් ව සිටියදී අනිසි ලෙස හැසිරීම—මත්වීම වෛද්‍යසාක්ෂියෙන් හෙලි නොකිරීම—එම සාක්ෂියෙහි අවශ්‍යතාවය.

තීන්දුව:— මත් ව සිටීම, වරදක අවශ්‍යාංගයක්වන විට, චූදිත අය මත්වී සිටිය බව වෛද්‍ය සාක්ෂියෙන් පෙන්විය යුතුයි. එසේ නොකිරීම වරද ඔප්පුකිරීමට බාධාවකි.

නීතිඥවරු: ඇපැල්කරු වෙනුවෙන් කිසිවෙකු පෙනී සිටියේ නැත.
ජී. ඊ. ඇස්. ද සිල්වා, ඇටෝර්නි ජනරාල්තුමා වෙනුවෙන්.

ගරු ගේරත් විනිශ්චයකාරතුමා:

මෙම නඩුවේ චූදිත ඇපැල්කරු වෙනුවෙන් කිසිවෙක පෙනී නොසිටින හෙතර, ඔහු ද උසාවියට පැමිණි නැත. එහෙත් උගත් ආණ්ඩුවේ අයිනිකිඳ තුමා, ඇටෝර්නි-ජෙනරාල් තුමාගේ දෙපාර්තමේන්තුවේ උසස් චාරිත්‍ර අනුව චූදිත අයගේ නිදහසට වැදගත් කරුණක් මා වෙත ඉදිරිපත්කර තිබේ.

ඇපැල්කරුට විරුඬව දණ්ඩන නීති සංග්‍රහයේ 488 වන ඡේදය යටතේ චෝදනා නහා තිබේ ; එනම් :—

"කිසිවෙක්, මත් ව සිටියදී, ප්‍රසිඬ තැනක හෝ තමාට ඇතුල්වන්ට අයකු තැනක හෝ අනුන්ට හිරිහැරයක් වන ලෙස හැසිරුන හොත්, දඩුවම් වශයෙන් ඔහුට මාසයක් නොහොත් ඊට අඩුකාලයක් බන්ධනාගාර ගතකිරීමට හෝ රුපියල් සියයක නැතහොත් ඊට අඩු ගණනක දඩයක් ගෙවීමට හෝ මේ දඩුවම් දෙකටම හෝ මුහුන පාන්ට සිදුවිය හැක."

පොලිස් නිලධාරියෙක්, චූදිත ඇපැල්කරු අතියයින් මත්පැන් ගඳගහන අවස්ථාවක අයුතුලෙස හැසිරෙනු දුටු බව, පැමිණිලි පක්ෂයේ සාක්ෂියයි. චූදිත ඇපැල්-කරුට එවේලේ කට-උත්තරයක් දීමට නුපුලුවන්ව සිටි බව ද මේ නිලධාරියා කියා පෑවේය.

වරදකරු, වැරැද්ද කරණ විට මත් ව සිටීම, වරදෙහි එක අංගයක් බව මතක තබාගෙන යුතුයි. චූදිත ඇපැල්-කරුගේ සිත, මත්පැනින් මත්වූවා ද කිවහැකි වෛද්‍ය-වරයකු විසින් ඔහු පරීක්ෂාකර නැත. තම මුඛයෙන් මත්පැන් ගඳ හමන මිනිසෙක් අයුතු අන්දමට හැසිරේ නම්, එයින් පමණක්, ඔහු මත්ව සිටියේයයි නීත්‍ය ලෙස කිව නොහැකිය. එමනිසා වරදෙහි අවසානම අංගයක් සාක්ෂියෙන් හෙලිනොවූ බව මාගේ තීරණයයි. මෙම අදහස පහල උසාවිඥ ද ඉදිරිපත් කර තිබුන නමුත්, උන්ත් මහේස්ත්‍රාත් තුමා වැරැද්දේ මේ අංගය සහතික කිරීමට ඉහත සඳහන් පොලිස් නිලධාරියාගේ සාක්ෂිය ඇතැයි කල්පනා කළේය. ඔහු හා එකහවීමට මට නුපුලුවන. එනිසා දණ්ඩන නියෝගය ඉවත් කොට ඇපැලට ඉඩදෙමි.

ඇපැලට ඉඩ දෙන ලදී.

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 64 වෙනි කා., 40 වෙනි පිට බලනු.

ගරු සන්සෝනි සහ ගේරත් විනිශ්චයකාරතුමන් ඉදිරිපිට.

සංඝානන්ද තෙරුන්නාන්සේ එ. සුමනතිස්ස තෙරුන්නාන්සේ*

ශ්‍රේ: අ: නොං: 639/1960 ඇ.පි.—මාතර දිස්ත්‍රික් උසාවියේ නඩු නොං: 289/එල්.

තර්ක කළ දිනය: 1963 මැයි 6.
තීන්දු කළ දිනය: 1963 මැයි 15.

බෞද්ධාගමික නීතිය—පැවිදි සහෝදරයෙකු විසින් පැමිණිලිකරුට වසී 1930 දී "යම්සුණි පාලන බලය සංවිධානය කිරීමේ බලය සහ අධිකාරී පදවිය ඉසිලීමේ ද බලය දෙමින් විහාරාධිපතීන් වහන්සේ ලියූ ඔප්පුවක්—අවුරුදු කීපයකට පසු ඔහුගේ ජ්‍යෙෂ්ඨ ශිෂ්‍යයා වන විත්තිකරු පැමිණිලිකරුගේ අයිතිවාසිකම් ගැන විරෝධය දැක්වීම—තමාගේ අයිතිවාසිකම් අත්හැර දමන ලදැයි ගෙන ආ තර්කය—යථෝක්ත දිමනාවේ ප්‍රතිඵලය.

විහාර සතරකට හිමිකම් දුරු "ඇස්." නමැති සඟමින් වහන්සේ නමක් වසී 1928 දී තමන් වහන්සේගේ ජ්‍යෙෂ්ඨ ශිෂ්‍ය "ජී" ට "යම්සුණි පාලන බලය, සංවිධායක බලය සහ විහාර යතරෙහිම අධිකාරී වීමේ බලය" යම් යම් කොන්දේසිවලට යටත් කොට දෙමින් 'ඊ' 12 දමා ලකුණු කරණ ලද ඔප්පුව ලිවූහ. යථාකාලයේ දී විහාරාධිපති පදවියට පත් 'ජී' වසී 1930 දී වෙන ඔප්පුවක් (ඊ 13) ලියා එහි 'ඊ' 12 දරණ ඔප්පුවෙහි තිබූ සියළුම කොන්දේසි ඇතුලත් කොට පැමිණිලිකරු වන තම පැවිදි සහෝදරයාගේ වාසියට විහාර සතරින් එක් විහාරයක් පිළිබඳව පමණක් බලතල පැවරූහ. අවුරුදු කීපයක්ම යන තුරුම පැමිණිලිකරු විහාරාධිපති මෙන් කටයුතු කළ අතර විත්තිකරු උන්වහන්සේගේ අයිතිවාසිකම් ගැන විරෝධය දැක්වූහ.

පැමිණිලිකරු විසින් විත්තිකරුට විරුඩව තමා නීත්‍යානුකූල විහාරාධිපති ලෙස ප්‍රකාශයක් කරවා ගැනීම සඳහා පවරණු ලැබූ නඩුවකදී උගත් දිස්ත්‍රික් විනිශ්චයකාරතුමා උන්වහන්සේගේ වාසියට තීන්දුව දෙන ලදුව විත්තිකරු එයට විරුඩව ඇපැල් ගත්හ.

තීන්දුව:— (1) 'ඊ' 13 දරණ පැමිණිලිකරුගේ වාසියට ඇති ඔප්පුව "ජී" ගේ ඇවැමෙන් පසු විහාරාධිපති පත්කිරීමකැයි සලකාගත හොත් 'ජී' ට තම ශිෂ්‍යානුශිෂ්‍ය පරම්පරාවෙන් පිට කෙනෙකු වන පැමිණිලිකරු තමාගේ ඇවැමෙන් පසු තමා හිටි තැනට පත් කිරීමට අයිතිවාසිකමක් නොමැත.

(2) 'ඊ' 13 දරණ ඔප්පුවෙන් " ජී " තමාගේ විහාරාධිපති පදවියට ඇති අයිතිවාසිකම් අත්හරින ලද්දේ යයි කියමින් පැමිණිලිකරුගේ වාසියට ඉදිරිපත් කරණ ලද තර්කය 'ඊ' 13 දරණ ඔප්පුවේ එබඳු අත්හැරීමක් ගැන සඳහන් වන වචන යෙදී නොමැති නිසා පිළිගත නොහේ.

(3) මෙහිදී ඉදිරිපත් කරණ ලද සාක්ෂි අනුව " ජී " විසින් වෙන පන්සලක සැතපුම් ගණනක් එපිට සිටී තමා වෙනුවට "ඒ විහාරයේ පමණක් වැඩ බලන" විහාරාධිපති හැටියට පැමිණිලිකරු පත්කරණ ලදැයි යන නිගමනය සමග නොසැසඳෙන්නේ නොවේ.

(4) විහාරාධිපති වීමට භික්ෂුවකට ඇති අයිතිවාසිකම් අත්හරින ලද්දේ යයි කියන කරුණු දෙය බලා අවධාරණයෙන් සලකා ගත හැකි වුවද එම තත්ත්වය සැක සහිත කරුණු මත රඳා තිබේ නම් එසේ අවධාරණයෙන් සලකා ගැනීමක් නො කළ යුතු වේ.

නීතිඥවරු:— ඒ. ඇ.පි. විජේමාන්න මහතා, විත්තිකාර-ඇපැල්කරු වෙනුවෙන්.
එච්. වනිගතුංග මහතා, කරවිට මහතා සමග, පැමිණිලිකාර-වගඋත්තරකරු වෙනුවෙන්.

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 64 වෙනි කා., 52 වෙනි පිට බලනු.

ගරු යන්ත්‍රෝනි විනිශ්චයකාරතුමා.

තමා වැලිගිඳ සුදර්ශනාරාමයේ නිත්‍යානුකූල විහාරාධිපති බැව් කියා සිටින පැමිණිලිකරුවිසින් බොහෝ භික්ෂූවක් වන විත්තිකරුට විරුද්ධව එක්තරා ඉඩමක අයිතිය ප්‍රකාශ කරවා ගන්න අටියෙන්ද විත්තිකරු ඉන් බැහැර කරගන්නා අටියෙන් ද මේ සඳහා ඇලාභයක් අයකරගන්නා අටියෙන්ද නඩු පවරණ ලදී. මෙහි දී විත්තිකරු එම සුදර්ශනාරාම විහාරයේ අධිපති පැමිණිලිකරු නොවන බවද කියා සිටියේ ය. විත්තිකරු කියා සිටියේ මේ තත්වයට තමාට ද හිමිකම් තිබෙන බවකි. එහෙත් උන්වහන්සේ මේ සම්බන්ධයෙන් පෙරළා ඉල්ලීමක් නොකළහ. උගත් විනිශ්චයකාරතුමා පැමිණිලි කරුට පක්ෂව කරුණු සලකා ඔහුගේ වාසියට නඩුවේ පැමිණිල්ලෙන් අයැද සිටි පරිදි තීන්දුව දුන්හ. විත්තිකරු මීට පටහැනිව ඇපැල් පෙත්සමක් ඉදිරිපත් කළේය.

එක් කාලපරිච්ඡේදයක මෙම විහාරයෙහි අධිපති පදවිය ද ලාල්පේ සුධම්මාරාමය, අකුරුගොඩ නාගරුක්ඛාරාමය, සහ වරකපිටියේ ත්‍රිභූම්කාරාමය, නැමැති විහාරස්ථාන තුනක අධිපති පදවිය ද උසුලන ලද්දේ අකුරුගොඩ සුදස්සි හිමියන් විසින් බව දෙපක්ෂය ම පිළිගෙන ඇත. උන්වහන්සේගේ ජ්‍යෙෂ්ඨ ශිෂ්‍යයා වූයේ මීරුප්පේ ගුණානන්ද සඛාමීන් වහන්සේ ය. මෙහි පැමිණිලිකරු ද උන්වහන්සේගේ ශිෂ්‍ය නමක් වූ අතර උන්වහන්සේට තවත් ශිෂ්‍යයන් වහන්සේ සිටි නමුදු ඒ හැම කෙනෙකුන් වහන්සේ ම ගුණානන්ද හිමියන්ට වඩා කණිෂ්ඨ අය වූහ. වෂී 1928 දී ඉහත සඳහන් පන්සල් හතරෙහි ම ''පාලනය පිළිබඳ සම්පූර්ණ බලය ද එම විහාරස්ථානවල අධිකාරී පදවිය ඉසිලීමේ බලය ද'' ගුණානන්ද හිමියන්ට පැවරෙන ඔප්පුවක් සුදස්සි හිමියන් විසින් ලියන ලද්දේ ය. එහෙත් මෙය යම් යම් කොන්දේසි වලට යටත් ව ලියන ලද්දක් බව මෙහිලා සඳහන් කළ යුතු ය.

යථා කාලයේ දී මීරුප්පේ ගුණානන්ද හිමියෝ යථෝක්ත විහාර සතරෙහි ම අධිපති පදවියට පත් වූහ. උන්වහන්සේ ද වෂී 1930 දී පැමිණිලිකරුගේ වාසියට 'පී' 12 දමා ලකුණු කරණ ලද එම ඔප්පුවේ සඳහන් කොන්දේසි නොවෙනස් ව ඇතුල් කොට ඔප්පුවක් ලියූහ. එය 'පී' 13 දමා ලකුණු කර තිබේ. නමුත් මේ ඔප්පුව ලියන ලද්දේ වැලිගිඳ පන්සල පිළිබඳව පමණකි. එහි 'පී' 12 දමා ලකුණු කර ඇති ඔප්පුවේ සඳහන් සියලු කොන්දේසි ඇතුලත් ව තිබේ.

මෙම ඇපැලේදී පැනනැඟී ඇති ප්‍රශ්නය නම් එකී 'පී' 13 දරණ ඔප්පුව විත්තිකරුගේ සහ පැමිණිලිකරුගේ අයිතිවාසිකම් වලට බලපවත්වන්නේ කෙසේ ද යන්නයි. මෙහිලා විශේෂයෙන් සලකා ගතයුතු කරුණ නම් පැමිණිලිකරු ගුණානන්ද හිමියන්ගේ පැවිදි සහෝදරයකු වූ අතර විත්තිකරු උන්වහන්සේගේ ජ්‍යෙෂ්ඨ ශිෂ්‍යයා වශයෙන් දෙපක්ෂය ම පිළිගෙන ඇති බවයි. ඉදින් 'පී' 13 දරණ එම ඔප්පුව තමාගේ ඇවැමෙන් තමා මෙන් විහාරාධිපති පදවියට පත් වන්නා පත් කිරීමක් හැටියට සැලකේ නම් ගුණානන්ද හිමියන්ට තමන්ගේ ශිෂ්‍ය පරම්පරාවෙන් බාහිරව මෙම පත්වීම් ප්‍රවේණිය යොමු කිරීමට කිසිදු අයිතියක් නොමැති බව කලින් විනිශ්චිත නඩු සාධක වශයෙන් ගත්කල පැහැදිලි ව පෙනී යේ.

පැමිණිලිකරුගේ අයිනීතිඥවරයා සහ උගත් දිස්ත්‍රික් විනිශ්චයකාර තුමා ද සලකා ගෙන ඇත්තේ පී 13 දරණ ඔප්පුවෙන් ගුණානන්ද හිමියන් වැලිගිඳ පන්සලේ විහාරාධිපති තම අත්හැර නිබෙන බව තමන්ට අවබෝධ වූ බවකි. නමුත් මෙම මතයට මට එකඟ විය නොහැක. පී 13 දරණ එම ලියවිල්ලෙහි එබදු අත්හැරීමක් ගැන අදහස් දක්වෙන වචන පද්ධතියක් ඇතුලත් ව නැත. එපමණක් ද නොව අනික් අතින් බැලූ විට එම ලියවිල්ලෙහි ම තමාගේ ශිෂ්‍යයන් වහන්සේ විසින් එම පන්සලෙහි උන්වහන්සේලාට ඇති අයිතිවාසිකම් ක්‍රියාවෙහි යෙදවිය යුතු බව උන්වහන්සේට සඳහන් කර තිබේ. තමාගේ අයිතිවාසිකම් අත්හළ කෙනෙකු මේ ලෙස සඳහන් කිරීම පරස්පර විරෝධී කරුණකි. වැඩිදුරටත් සලකා බලන කල 'පී' 13 දරණ ඔප්පුවෙහි සඳහන් සියළුම කොන්දේසි සඳහන් ව ඇති 'පී' 12 දරණ ඔප්පුව සුදස්සි හිමියන් විසින් උන්වහන්සේගේ අයිතිවාසිකම් අත්හැර දැමීමට ලියන ලද්දකැයි පැමිණිලිකරු තමාගේ නඩුවේදී කොයිලෙසකින් වත් දක්වා නැති බව පෙනී යයි. යම්හෙයකින් උන්වහන්සේගේ තත්වය එසේ වී නම් ගුණානන්ද හිමියන්ට සුදස්සි හිමියන්ගේ ඇවැමෙන් විහාරාධිපති පදවියට පත්වීමට ඇති අයිතිවාසිකම් මුලුමනින් ම වැලකේ. මා හිතන හැටියට 'පී' 13 දරණ ඔප්පුවෙන් ගතහැකි යුක්තිසහගත අවබෝධය ඒ ඔප්පුවෙන් ගුණානන්ද හිමියන් තමන් වෙතුවෙන් වැලිගිඳ පන්සලෙහි පමණක් ඇති කටයුතු පිළිබඳව විහාරාධිපති හැටියට පත්කිරීමක් කර ඇති බව පමණකි. මෙය මෙසේ කර ඇත්තේ ඒවකට ගුණානන්ද හිමියන් අත්කියුත්සලක වැඩ වාසය කරණ ලද බැවිනි. 'පී' 13 දරණ මෙම ඔප්පුව ලියන ලද අවධියේදී විත්තිකරු දහනව වියට පමණක් පා තැබූ කෙනෙකු නිසා වැඩිමහළු සඛාමීන් වහන්සේ නමකට තමන්වහන්සේ වෙනුවෙන් එම විහාරය පාලනය කිරීමට යැයි ගුණානන්ද හිමියන් විසින් අයැද සිටීම සාමාන්‍යයෙන් සඛාහාවික සිද්ධියකි. පැමිණිලිකරුගේ අයිනීතිඥවරයා ගුණානන්ද හිමියන් මෙම පැමිණිලිකරු විසින් ම කලින් පවරණ ලද නඩු-

එකදී කියා ඇති සාක්ෂිය පිළිබඳ ව අපගේ අවධානය යොමු කරණ ලෙස අයැද සිටියේ ය. මෙම සාක්ෂිය දී ඇත්තේ වෂී 1935 දීය. තමන් වහන්සේ සැතපුම් 30 ක් ඈත වැඩ වාසය කරණ නිසා මෙම ඔප්පුව දුන් බව ගුණානන්ද සවාමීන් වහන්සේ කීහ. වැඩිදුරටත් සාක්ෂි දුන් උන්වහන්සේ ''මා එම ඔප්පුව දෙන්නට යෙදුනේ නාවකාලිකව නොවේ. දෙවයකට පසු වැලිහිඳ පාලනය ගෙනයාමට අමාරු බව මට අවබෝධ වීය.'' යනුවෙන් ද කියා තිබේ. මේ සාක්ෂියෙන් හොඳ හැටි තේරුම් ගත හැක්කේ මෙම පන්සලෙහි පරිපාලනය සඳහා සහකාර පාලකයෙකු පත් කිරීම තමන් වහන්සේට සැතපුම් 30 ක් ඈත සිට විහාරය පාලනය කළ නොහැකි නිසා ඉතාම සුදුසු දෙයක් බව උන්වහන්සේට අවබෝධ වී තිබුණු බව ය.

යම්කිසි භික්ෂුවක් විසින් විහාරාධිපති කමට තමාට ඇති අයිතිය අත්හැර දමා ඇති බව ඒ පිළිබඳව සිදුවී ඇති කරුණු වලින් සහ එම සිද්ධීන් පසුබිම් කොට ඇති පරිසරයෙන් ද තේරුම් ගතහැකි වෙතත් කිසියම් සැක සහිත තත්වයක මේ කරුණු තිබේ නම් එබඳු දෙයක් අවධානයෙන් යලකා ගැනීම සුදුසු නොවන බව පැහැදිලි-ව ම අපේ නීතියෙන් පෙනේ. පන්සල් බොහෝ ගණනක විහාරාධිපතිකම උසුලන යම්කිසි භික්ෂූන් වහන්සේ නමක් විසින් ඉන් එකක හෝ වැඩිගණනක පාලනය එම පන්සල්වල වැඩ වාසය කරමින් එම සිඛස්ථාන බලා-හදගන්නා අනික් යම් යම් සවාමීන් වහන්සේලාගේ බාරයට ඒවා සහ ඒවාට අයත් ධනසම්භාරයන් පත් කිරීම සිරිත් පරිදි සිදුවන දෙයකි. යම්කිසි විහාරාධිපතීන් වහන්සේ නමකට තමන්වහන්සේ වැඩවසන පන්සලෙන් දුර බැහැර ඇති අනිකුත් විහාරස්ථානයන් රැක බලා ගැනීම් නිතරම පහසු ක්‍රියාවක් නොවන නිසා එම විහාරස්ථානයන්හි පාලකවරු හෝ කළමනාකාරවරු මේ හේතුවෙන් පත්කිරීමට සිදුවෙනු ඇත. මෙසේ පත් කරණ ලද අය ඒ නියෝගයෙන් ලබන භුක්තිය හෝ පාලනය එම පත් කිරීමට ම තුඩු දී ඇති නිසාත් ඒ කෙරෙහිදේ නිසාත් එබදු පත්කිරීමක් ලත් අයෙකුට එම පත්වීම ලැබූ හේතුවෙන් විහාරාධිපතිකමට අයිති-වාසිකම් කිව නොහැක.

පැමිණිලිකරු වැලිහිඳ පන්සලේ කටයුතු අවුරුදු බොහෝ ගණනක් තුළ පාලනය කරණ ලද බව මෙම නඩුවේදී සලකා ගැනීමට ඉඩ තිබේ. එමතුද නොව විත්තිකරු මේ කරුණට පමණක් උන්වහන්සේ විහාරාධි-පති හැටියට පිළිගෙන තිබේ. නමුත් මේ නිසාම පැමිණිලිකරුට තමන්වහන්සේ විහාරාධිපති යයි කියා සිටීමට හෝ පරිපාලක විහාරාධිපති යයි ප්‍රකාශකරවා ගැනීමට හෝ නොහැක්කේ උන්වහන්සේ ගුණානන්ද හිමියන්ගේ ශිෂ්‍යයෙක් නොවන බැවිනි. උන්වහන්සේ මෙම නඩුව දැමීම සඳහා ඉදිරිපත් කළ හිමිකම උන්වහන්-සේට ප්‍රතිෂ්ඨාපිත කිරීමට නොහැකි නිසා මෙම නඩුව නිෂ්ප්‍රභා විය යුතුය.

එබැවින් විරුද්ධව ඇපල් පෙත්සමක් ඉදිරිපත් කර ඇති එම නඩු තීන්දුව මම අවලංගු කර පැමිණිලිකරු උසාවි දෙකෙහි ම නඩු ගාස්තුවට ද යටත් කරණු කැමැත්තෙමි.

ගෞරව විනිශ්චයකාරතුමා:

මම එකඟ වෙමි.

ඇපැලට ඉඩදී පැමිණිල්ල නිෂ්ප්‍රභාකරන ලදී.

ගරු තම්බයියා විනිශ්චයකාරතුමන් ඉදිරිපිට.

චාර්ලිස් අප්පුහාමි එ. සෙනෙවිරත්න, පොලිස් සථානාධිපති, මාදම්පෙ*

ශ්‍රේෂ්ඨාධිකරණයේ නොා: 954/62—මහලාවත මහේස්ත්‍රාත් උසාවිය නොා: 43449.

විවාද කළ දිනය : 8 පෙබරවාරි, 1963.
තීන්දුව දුන් දිනය : 12 පෙබරවාරි, 1963.

අයාල ආඥාපණත—එම පණතේ 4 (ඩී) වෙනි ඡේදය යටතේ චෝදනාවක්—තම ශරීරයේ රහසඟ අශ්ලීල විලාසයෙන් ඕනෑකමින් ම පෙන්වා සිටීම—එම ඡේදයේ ඇති ''වෙන යම් තැනක'' යන වචනවල තේරුම.

තීන්දුව:—අයාල ආඥා පණතේ 4 (ඩී) ඡේදයේ ගැබ්වී ඇති පාඨය අනුව ''වීදිය, පාර, මහා මාර්ගය මහජනයා ගැවසෙන සථානය හෝ වෙනයම් තැනක'' යන වචන සමාන ගණයකට ඇතුලත් නොවේ. එමනිසා එහි අර්ථ කථනයෙහි සමාන ගණය (ejudem generis) පිළිබඳ ප්‍රඥප්තිය එයට අදල කළ නොහැකිය. මහාජනයා ගැවසෙන තැනකට අතිරේක වශයෙන් ගැනෙන තැනක් ලෙස එය තේරුම් ගත යුතුයි.

නීතිඥවරු:— ජේ. ඩී. ආශීර්වාදම්, ඇපැල්කාර-චිත්තිකරු වෙනුවෙන්.
ආර්. අයි. ඔබේසේකර, රජයේ අධිනීතිඥ, ඇටෝර්නි ජනරාල්තුමා වෙනුවෙන්.

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* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 64 වෙනි කා., 51 වෙනි පිට බලනු.

ගරු තම්බයියා විනිශ්චයකාරතුමා

අයාල ආඥාපණතේ (Vagrants Ordinance) 4 සී දරණ ඡේදයේ පැණවීමට අනුව දඬුවම් ලැබිය යුතු වරදක් හැසිරීමට සැලකෙන ක්‍රියාවන් වශයෙන් ගිණිය හැකි තම ශරීරයේ රහසඟ එමලින් වීජේසිංහ නමැත්තියකගේ අප්‍රසාදයට හේතු වන ලෙස සාවද්‍ය අයුරින් පෙන්වා සිටීම නිසා චිත්තිකාර ඇපැල්කරු වරදකරුවකු වී ඔහුට රු. 20/- දඩයක් ගෙවන ලෙසත් එය නෝ ගෙවීමෙන් බරපතල වැඩ දැනිව මාසයක හිර දඬුවමක් විඳින ලෙසත් නියම වී තිබේ. මෙම ඇපැලෙහි විසඳිය යුතු එකම ප්‍රශ්නය ඇපැල්කරු අයාල ආඥාපණතේ 4 සී ඡේදයට අනුව වරදක් කර ඇද්ද යන්නයි.

අයාල ආඥා පණතේ (32 වන පරිච්ඡේදය) 4 සී දරණ ඡේදයෙහි ඇතුලත් පැනවීම පහත සඳහන් පරිදි වේ:

> "4 (සී) තමාගේ ශරීරයේ රහසඟ අශ්ලීල විලාශයෙන් ඕනෑකමින් ම කිසියම් වීදියක, පාරක, මහාමාවතක හෝ මහජනයා ගැවසෙන ස්ථානයක හෝ වෙන යම් තැනක හෝ පෙන්වා සිටින තැනැත්තෙක් හෝ එසේම යම් කිසි අශ්ලීල මුද්‍රණයක්, සිතියමක් හෝ වෙන යම් අශෝභන දර්ශනයක් අනිත් අයගේ අප්‍රසාදයට සහ පිළිකුලට භාජන වන ලෙසින් ප්‍රදර්ශනය කරන යම් කිසි පුද්ගලයෙක් . . ."

ඇපැල්කරුගේ අධිනිතිඥවරයා තර්ක කෙළේ ඉහත සඳහන් ඡේදයෙහි ඇති (වෙන යම් තැනක) යන වචනය මහජනයා ගැවසෙන තැනක් යන තේරුම් ඇති බව කියා පාමිනි. වැඩිදුරටත් තර්ක කළ ඔහු මෙම පාඨයෙහි ඇති "වෙනයම් තැනක" යන වචනයෙහි තේරුම් පිළිබඳ අසී කථනය කිරීමෙහිදී **සමාන ගණය** (ejusdem generis) පිළිබඳව අසී කථන විෂයෙහි ඇති ප්‍රඥප්තියට අනුරූපව ක්‍රියා කළ යුතුයයි ද ප්‍රකාශ කෙළේය.

ඔහුගේ මෙම තර්කයට එකඟවීමට මට නුපුළුවන. අයාල ආඥාපණතේ 4 සී ඡේදයේ ගැබ්වී ඇති පාඨය අනුව "වීදිය, පාර, මහාමාර්ග, මහජනයා ගැවසෙන ස්ථානය හෝ වෙනයම් තැනක" යන වචන සමාන ගණයට ඇතුළත් යයි මම අදහස් නොකරමි. යම්කිසි වාක්‍යයක සමාන ගණයක වචන සඳහන් නොවේ නම් එහි අසී කථනයෙහි **සමාන ගණය** (ejusdem generis) පිළිබඳ ප්‍රඥප්තිය එයට අදාළ කිරීමට ඉඩ නොලැබේ. **(සීමාසහිත එක්සත් නාගරික විදුලි බල කොම්පැනිය එ. නිවුපවුන්ඩ්ලන්තයේ ඇටෝර්නි ජනරාල්තුමා,** (1939) 1 ඒ. ඉ. ආර්. 423 වන පිටේ සඳහන් නඩුවේ 428 වන පිටේ සඳහන් තැන්කර්ටන් යාමිගේ ප්‍රකාශය කියවා බලන්න). මෙම පාඨයෙහි ම ඇති "වෙනයම් තැනක" පමණක් නොව එහි අවසාන කොටස අසී විරහිත ව්‍යාකරණානුකූල නොවෙන තත්ත්වයකට ද පත් කෙරේ.

ඉංග්‍රීසි අයාල පණතේ (1824) 4 වන ඡේදයෙන් "වෙනයම් තැනක" යන වචන ඉවත්වී තිබීම මෙහිදී සලකා ගත යුත්තකි. ලස්ටෝන් මහතා විසින් ලියන ලද විනිශ්චයකරුවන්ගේ අත්පොත, (2621 පිට බලන්න). අපේ අයාල ආඥාපණතේ 4 (1) දරණ ඡේදයෙහි සඳහන්ව ඇති "වෙනයම් තැනක" යන වචන "මහජනයා ගැවසෙන තැන" යන වචන ලඝින්ම සඳහන් වී තිබීමෙන් නේරුම් යන්නේ එය මහජනයා ගැවසෙන තැනකට අතිරේක වශයෙන් ගැනෙන තැනක් බවයි. යම්කිසි ලිඛිත නීතියක ඇති වචන ඒ වචන ගැනම සලකන විට පැහැදිලිව දූරවබෝධයෙන් නොරව ඇත්නම් එම වචන ඒ වචන වලට අයත් සාමාන්‍යවික තේරුමට අනුව අසී කථනය කරනු විනා වැඩිමනාත් කිසිවක් අවශ්‍ය නොවේ. එවැනි අවස්ථාවක ව්‍යවස්ථාදායකයාගේ අදහස ඉතා හොඳින් ඒ වචන මාලාවම අනාවරණය කෙරේ. **(සසෙක්ස් ප්‍රදේශයේ ශ්‍රුහුන්ඩය පිළිබඳ නඩුව, (1844) 11 සී 1 සහ එජ්, 143 වන පිට සහ අබේවර්ධන එ. අමරදස,** 30 යි. එල්. ඩබ්: 55 වන පිට බලන්න). මෙබඳු අවස්ථාවක එම පාඨයට යම්කිසි වෙනස් කරන ලද අසී නිරූපනයක් අවශ්‍යයයි නොපෙනේ නම් එහි ඇති සෑම වචනයකට ම තේරුමක් ලැබෙනසේ එය නිරූකරණය කළ යුතු වේ.

4 සී ඡේදය පැනවීමෙහි දී ව්‍යවස්ථා සම්පාදකයන් අදහස් කෙළේ තම ශරීරයේ රහසඟ අශ්ලීල අයුරින් පෙන්වා ගෙන සිටින කෙනෙකුට හෝ යම්කිසි අශ්ලීල මුද්‍රණයක්, චිත්‍රයක් හෝ වෙනත් අශෝභන දර්ශනයක් **කිනම් තැනක හෝ** අනිත් අයවළුන්ගේ අප්‍රසාදයට හා පිළිකුලට භාජන වන ලෙස පෙන්වා ගෙන සිටින කෙනෙකුට දඬුවම් දීමය.

අයාල ආඥාපණතේ සම්පූර්ණ ක්ෂේත්‍රය විහිදී ඇත්තේ (Scope) මහජනයා ගැවසෙන තැන්වල නිදුල්ලේ හැසිරීම සහ එබඳු තැන්වල අහිතකර දේ කිරීම වැළක්වීමටයයි ද ඇපැල්කරුගේ නීතිවේදියා තර්ක කෙළේය. මෙම ආඥා පණතෙන් පුද්ගලික ස්ථානවල කෙරෙන යම් යම් ක්‍රියාවන්ට ද දඬුවම් දියහැකි අයුරු යම් යම් දේ පැනවී තිබෙන නිසා මෙම තර්කය ද පිළිගත නොහේ. (3 (1) (ඡේදය සහ එයට පසුව පළවන ඡේදයන් ද බලන්න).

මේ හේතූන් නිසා මම මේ ඇපැල නිෂ්ප්‍රභා කරමි.

බස්නායක අග්‍රවිනිශ්චයකාරතුමා, හේරත් විනිශ්චයකාරතුමා සහ අබේසුන්දර විනිශ්චයකාරතුමා ඉදිරිපිට

කේ. ඒ. දෙන් ඇල්බට් එ. නාගරික ආදායම් පරීක්ෂක*

ශ්‍රේෂ්ඨාධිකරණයේ නො. 646/59—කොළඹ නාගරික මහේස්ත්‍රාත් උසාවියේ නො. 13.

විවාද කළ දිනය : ඔක්තෝබර් 26 , 1962.
තීන්දු කළ දිනය : නොවැම්බර් 5, 1962.
කරුණු ප්‍රකාශ කළ දිනය : ජනවාරි 24, 1963.

මහනගර සහා ආඥ පණත, වෂ 1947, නො. 29—ඡේදය 148 (දැන් 147)—මනුෂ්‍යයාට අහිතකර සහ අන්තරායකර වෘත්තීන්ට සහ ව්‍යාපාරයන්ට අවසර දීම—මේ සඳහා සාදන ලද අතුරු ව්‍යවස්ථා—නගර සහා සීමාවට අයත් භූමිභාගයක ලීබඩු රැස්කිරීම නිසා එවැනි අතුරු ව්‍යවස්ථාවකයටතේ ගෙන ආ චෝදනා—සපයන්නන්ගෙන් මිළයට ගන්නා ලද ලී බඩු ප්‍රශ්නයට භාජන වූ ස්ථානයෙහි තබා තම ව්‍යාපාරය ගෙන ගිය ලී බඩු වෙළෙන්දෙක් චෝදනා ලැබ සිටීම—විකිණීගිය බඩු වෙනුවෙන් අළෙවි කිරීමට බඩු නොග තබා ගැනීම.

147 වන ඡේදයෙහි ඇති "වෘත්තිය හෝ ව්‍යාපාරය" යන යෙදීමෙහි තේරුම සහ එයට ඇතුළත් කරුණු—මෙම ඡේදයෙන් තහනම් කරන ලද්දේ කුමක් ද යන්න—වෂ 1954, ජූලි 30 වන දින, ප්‍රසිද්ධ කරන ලද නො 10697 දරණ ගැසට් පත්‍රයෙහි සඳහන් අතුරු ව්‍යවස්ථාවෙහි ඇති "පහත සඳහන් වෘත්තීන් සහ ව්‍යාපාරයන්" යන වචනවල තේරුම—අතුරු ව්‍යවස්ථාවෙන් තහනම් කරන ලද්දේ ලී බඩු නියම වශයෙන් රැස්කිරීම නොව අනිත් අයගේ ලී බඩු ලාභ ලැබීම සඳහා රැස් කිරීම බව—මේ නිසා වරදට පත් කිරීම නීත්‍යානුකූල ද ?

කොළඹ එක්තරා ස්ථානයක—(ඒ) ලී බඩු රැස් කිරීම ; (බී) ලී බඩු නිෂ්පාදනය කිරීම ;

(සී) ලී බඩු රැස් කිරීම සහ නිෂ්පාදනය කිරීම; යන දේ කොළඹ මහනගර සභාවේ අවසර පත්‍රයක් කොමසාරිස්වරයාගෙන් නොලබා කිරීමේ හේතුවෙන් වෂ 1947, අංක 29 දරණ මහනගර සහා ආඥ පණතේ 148 (1), (දැන් 147 (1), දරණ ඡේදය ,අංක 10697 දරණ ගැසට් පත්‍රයෙහි පලකරන ලද අතුරු ව්‍යවස්ථාව සමග එකට කියවූ කල උල්ලංඝනය කෙරෙණ අයුරින් කටයුතු කිරීම ගැන ඇපැල් කරුට විරුඬව නඩු පවරණ ලදී.

මේ කරුණට අදළ අතුරු ව්‍යවස්ථාව කියැවෙන්නේ පහත සඳහන් පරිදිය :—

"පහත සඳහන් වෘත්තීන් හෝ ව්‍යාපාරයන් වෂ 1947, අංක 29, දරණ මහනගර සහා ආඥ පණතේ 148 වන ඡේදයේ (දැන් 147) පරමාර්ථයන්ට අනුව සලකන කළ මනුෂ්‍යයාට අහිතකර වෘත්තීන් හෝ ව්‍යාපාරයන්යයි මෙයින් ප්‍රකාශ වේ."

ඉහත සඳහන් අතුරු ව්‍යවස්ථාවට අමුණා ඇති වෘත්තීන් සහ ව්‍යාපාරයන්ගේ ලේඛනයෙහි අංක 39 න් හැඳින්වෙන කරුණ එහි විස්තර වන්නේ මෙසේ ය :—

" ලී බඩු නිෂ්පාදනය කිරීම හෝ රැස් කිරීම එසේ නැතහොත් ලී බඩු නිෂ්පාදනය කිරීම සහ රැස්කිරීම "

ඇපැල්කරු අවුරුදු 14 ක කාලයක ඇතුලත ප්‍රශ්නයට භාජනය වී ඇති මෙම ස්ථානයෙහි ලී බඩු වෙළෙන්දෙකු ලෙස තම ව්‍යාපාරය ගෙන ගිය බව සාක්ෂිවලින් කියැවී තිබුණි. ලී බඩු නොයෑදූ ඔහු ඒවා නොයෙක් සම්පාදකයන්ගෙන් මිළදී ගත්තේ ය. ඔහුගේ ව්‍යාපාරික ස්ථානය ලී බඩු ප්‍රදර්ශනයට තබා විකුණන ශාලාවකින් ද යුක්ත වූ අතර එහි විකිණෙන බඩු වල අඩුපාඩුව පිටුපසින් වූ කාමරයක රැස්කොට තබා ඇති බඩුවලින් පුරවන ලදී.

ඉහත සඳහන් (බී) සහ (සී) දරණ චෝදනාවන්ගෙන් ඇපැල්කරු උගත් මහේස්ත්‍රාත්තුමා විසින් නිදහස් කරන ලද නමුත් ඉහත සඳහන් (ඒ) දරණ චෝදනාවට ඔහු වැරදිකරු බවට පත්කරන ලද්දේ 59 න.නී.වා., 81 පිටෙහි

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 64 වෙනි කා., 75 වෙනි පිට බලනු.

සඳහන් ඩෙව්ඩ එ. නාගරික සෞඛ්‍ය පරීක්ෂකයා යන නඩුවෙහි තීරණය අනුව යමිනි. කෙසේ වුවද මහේස්ත්‍රාත් වරයාට ගුණසේකර එ. නාගරික ආදයම් පරීක්ෂකයා 53 න. නී. වා., 229 සහ ද සිල්වා එ. සීමාසහිත කුරුණෑගල සමූපකාර බඩු ගබඩාව, 59 න. නී. වා. 430, යන නඩු වල තීන්දු ද අනුගමනය කිරීමට මහේස්ත්‍රාත්තුමා කැමත්තක් දක්වීය.

එකකට එකක් පරස්පර විරෝධී වූ එම නඩු තීන්දු නිසා මෙම ඇපැල තීදෙනෙකුගෙන් යුත් විනිශ්චයකාර මණ්ඩලයක් ඉදිරියට පත් කරන ලදී.

තීන්දුව :—(1) යම්කිසි විශේෂ පාඨයක යෙදී ඇති වචනයක තේරුම එම පාඨයටම විශේෂ සැලකිල්ලක් දක්වමින් තීරණය කළ යුතුය. එනම් මේ සඳහා විශේෂයෙන් ඒ වචනය සමග සම්බන්ධකම් ඇති වචන ගැන ද සැලකිල්ලක් දක්වා වචනයක් එයට කුළුපග අනික් වචන වලින් තෝරාගනු ලැබේ යන සුප්‍රසිද්ධ අර්ථ කථන ප්‍රඥප්තිය **(noscuntur a sociis)** මෙයට අදළ කොට එය තේරුම් කළ යුතුය. 147 වන ඡේදයෙහි ඇති "වෘත්තිය හෝ ව්‍යාපාරය" යන වචන ඒ වචනවල සහජ සම්බන්ධතාවයෙන් මතුවන අර්ථය අනුව තේරුම් ගැනීම අවශ්‍යය. මේ නිසා මෙහි "ව්‍යාපාරය" යන වචනය "වෘත්තිය" යන වචනයෙන් වෙන්වත් වී තිබේ. එම නිසා මෙම පාඨය තේරුම් ගත යුත්තේ ව්‍යාපාරය යන වචනය එයට සම්බන්ධකම් ඇති වෘත්තිය යන වචනය හා ගැළපෙන තේරුම් ගැර අන් සියළු තේරුම් ඉවත් කරන බව සළකමිනි.

(2) 147 වන ඡේදයෙහි තේරුමට අනුව වෘත්තියක් හෝ ව්‍යාපාරයක් හැටියට නොසැළකෙන කටයුත්තක් අහිතකර අන්තරායකාරී කටයුත්තක් ලෙස ගැනෙන ප්‍රකාශයක් කිරීමට නගර සභාවට බලයක් නොමැත.

(3) අතුරු ව්‍යවස්ථාවෙහි ඇති "රැස්කිරීම" යන වචනයෙන් තේරුම් යන්නේ ටික කාලයකට ගබඩා කිරීම විනා සිල්ලර වශයෙන් විකුණන වෙළඳාමක එදිනෙදා ඇති වන අවශ්‍යතාවය සපුරාලීමට රැස්කිරීම නොවේ.

(4) අතුරු ව්‍යවස්ථාවෙහි ගැබ්වී ඇති තහනම ලී බඩු රැස්කිරීම එයම ගත්කල එයට අදළ නොවේ. එය අදළ වන්නේ ලාභයක් ලැබීම සඳහා අන් අයගේ ලී බඩු රැස්කිරීමක දී පමණි. මේ නිසා වික්තිකරු වරදට පත්කිරීම ප්‍රතිෂ්ඨා රහිතය.

බස්නායක අග්‍රවිනිශ්චයකාරතුමා :—" . . . නමුත් ඇපැල් උසාවියෙහි නඩු තීන්දුවලට අනුව සිතා බලන විට යම්කිසි නියමිත කර්තව්‍යයක් ව්‍යාපාරයක් ද නැද්ද යන්න තීරණය කිරීමෙහි දී කෙනෙකු විසින් එහි පරමාර්ථය හා එහි කාර්‍යවිෂය පරීක්ෂා කොට එම ජාවාරමේ සාරය කුමක් දැයි සිතා ගතයුතු යයි තරයේ කියා තිබෙන බව පෙනී යයි. එමෙන්ම යම්කිසි වැඩපිළිවෙලකින් හෝ කටයුත්තකින් ලාභයක් ලැබීම පමණකින් එම වැඩ පිළිවෙල හෝ කටයුත්ත ව්‍යාපාරයක් යයි ගිණිය නොහැකි බව එහි වැඩිදුරටත් විද්‍යමාන වේ. එමතු ද නොව යම්කිසි පාඨයක ඇති වචනවල අර්ථකථනය කිරීමෙහි දී එම වචන යෙදී ඇති පාඨය ගැන ද සැලකිල්ලක් දක්වීමේ වැදගත් කම ද එම නඩු තීන්දු වලින් තරයේම අනාවරණය වේ".

"බොහෝ අංගෝපාංග කටයුතු වලින් සමන්විත කිසියම් ව්‍යාපාරයක් ද නැතහොත් එකම පරිපාලනයක් පිට වෙන් වෙන් වශයෙන් කෙරෙන ව්‍යාපාරයක් ද යන්න නිශ්චය කළ යුත්තේ ඒ විවිධ කටයුතු පරීක්ෂාකර බැලීමෙනි. මෙම නඩුවෙහි සිදුවී ඇති ලී බඩු රැස්කිරීම, ඔපදැමීම, අඩුපාඩු යකස් කිරීම, පිරිද්දීම, අවශ්‍යවූ විටෙක ප්‍රවාහණයෙහි දී සිදුවී ඇති අලාභහානි පිළියම් කිරීම ආදී සියළුදේම එකම ව්‍යාපාරයක කොටස් වශයෙන් සැලකේ—එය නම්—ලී බඩු වෙළඳාම ය."

අනුගමනය කළ නඩු :—ගුණසේකර එ. නාගරික ආදයම් පරීක්ෂකයා, 53 න.නී.වා. 229.
ද සිල්වා එ. සීමාසහිත කුරුණෑගල සමූපකාර බඩු ගබඩාව, 57 න.නී.වා. 430.

අනුගමනය නොකළ නඩුව :— ඩෙව්ඩ එ. නාගරික සෞඛ්‍ය පරීක්ෂකයා, 59 න.නී.වා. 81.

නීතිඥවරු :—රාජනීතිඥ එච්. ඩබ්ලිව්. ජයවර්ධන මහතා, ඇල්. ඩබ්ලිව්. ද සිල්වා, ඇස් ඇස්. බස්නායක සහ ඩී. ඊ. ඩබ්ලිව්. වික්‍රමසේකර යන මහතුන් සමග, විත්තිකාර-ඇපැල්කරු වෙනුවෙන්.

රාජනීතිඥ එච්. වී. පෙරේරා මහතා, එච්. වනිගතුංග සහ එච්. මොහිදීන් යන මහතුන් සමග, පැමිණිලිකාර-වගඋත්තරකරු වෙනුවෙන්.

ගරු බස්නායක අග්‍රවිනිශ්චයකාරතුමා :

අධිකරණ ආඥා පණතේ 48 වන ඡේදය අනුව කරන ලද සඳහනක් නිසා එම ආඥා පණතේ 48 'ඒ' දරණ ඡේදය යටතේ දෙන ලද නියෝගයක ප්‍රතිඵලයක් වශයෙන් මෙම ඇපෑල විනිශ්චයකාරවරු තිදෙනෙකු ගෙන් යුක්ත මණ්ඩලයක් ඉදිරියේ විනිශ්චය කිරීම සඳහා ඉදිරිපත්වී තිබේ. මෙහි උද්ගතවී ඇති ප්‍රශ්නය පිළිබඳව පරස්පර විරෝධී විනිශ්චය කිපයක් ම දී තිබීම නිසා මෙය මෙසේ සිදුවී ඇත. විනිශ්චයෙන් පසු ඇපෑලට ඉඩදුන් අපි එම විනිශ්චයට බැසීමට හේතු මතු දිනක නිකුත් කරන බව ප්‍රකාශ කොළෙමු. එපරිදි දැන් අපි එසේ හේතු දක්වමු.

මෙම ඇපෑලෙහි විසඳීමට ඇති එකම ප්‍රශ්නය නම් නියම ලෙස බල පත්‍රයක් නොලබා ලී බඩු එක්රැස් කිරීමේ ව්‍යාපාරය හෝ ව්‍යක්තිය කිරීමෙන් එසේ තහනම් කොට ඇති අතුරු ව්‍යවස්ථාව උල්ලංඝනය කිරීම පිළිබඳව ඇපැල්කරු වරදට පත් කිරීම නිවැරදි ද යන්නයි.

චෝදනා තුනකට විනිශ්චයට භාජන වූ ඇපැල්කරුට නඟා තිබුණ චෝදනා එකක් එකක් පාසා ඔහු විසින් කරන ලදැයි කියන ක්‍රියාවෙහි විස්තර හැරුණු විට එක සමාන වචන මාලාවකින් සුසැදී තිබුණි. එය මෙසේය:—

"වෂී 1958 දෙසැම්බර් මස 30 වන දින කොළඹ මරදන පාරේ නො. 615 දරණ කොළඹ නාගරික සභා සීමාවට අයත් මෙම උසාවියේ ආඥා බලය පවතින ස්ථානයෙහි වෂී 1947, නො. 29 දරණ නාගරික සභා ආඥා පණතේ 148 (1) දරණ ඡේදය ඒ සඳහා වෂී 1954 ජූලි මස 30 වන දින නො. 10697 දරණ ලංකාණ්ඩුවේ ගැසට් පත්‍රයේ ප්‍රසිද්ධ කරන ලද උපව්‍යවස්ථා සමඟ සම්බන්ධ කොට කියවන කල එය උල්ලංඝනය කෙරෙන අන්දමට කොළඹ නගර සභාවේ විශේෂ කොමසාරිස්වරයාගෙන් බල පත්‍රයක් නොලබා ඉහත සඳහන් කොළඹ මරදන පාරේ නො. 615 දරණ තැන (මෙනැන ඇපැල්කරු විසින් එම ස්ථානය භාවිතා කළ අන්දම ගැන විස්තරයක් සඳහන් වේ). එබඳු ව්‍යාපාරයකට යෙදවීමෙන් යථොක්ත ආඥා පණතේ 148 (3) දරණ ඡේදයෙන් දඬුවම් ලැබිය හැකි වරදක් කරන ලදැයි ඔබට විරුද්ධව මෙයින් චෝදනා ඉදිරිපත් කරනු ලැබේ."

එම චෝදනා වල කියන අන්දමට ඔහු විසින් කරන ලද විවිධ භාවිතා කිරීම් මෙසේය :—

(ඒ) පළමු වන චෝදනාව—"ලී බඩු රැස්කිරීමේ ව්‍යාපාරය සඳහා";

(බී) දෙවන චෝදනාව—"ලී බඩු නිපදවීමේ ව්‍යාපාරය සඳහා";

(සී) තුන්වන චෝදනාව—"ලී බඩු රැස්කිරීමේ සහ නිපදවීමේ ව්‍යාපාරය සඳහා".

එම ස්ථානය: (1) ලී බඩු නිපදවීම සඳහා භාවිතා කිරීම පිළිබඳ චෝදනාවෙන් ද; (2) ලී බඩු රැස්කිරීම සහ නිපදවීම සඳහා භාවිතා කිරීම පිළිබඳ චෝදනාවෙන් ද ඔහු නිදහස් විය. නමුත් මරදන පාරේ නො. 615 දරණ ස්ථානය "ලී බඩු රැස්කිරීමේ ව්‍යාපාරයට" භාවිතා කිරීමේ චෝදනාවට ඔහු වැරදිකරු විය.

මෙහිදී උගත් මහේස්ත්‍රාත්වරයා ගුණසේකර එ. නාගරික ආදයම් නිලධාරිතුමා (53 න.නී.වා 229) සහ ද සිල්වා එ. සීමාසහිත කුරුණෑගල සමූපකාර බඩු ගබඩාව (57 න.නී.වා. 430) යන නඩු දෙකෙහි තීන්දු අනුගමනය කිරීමට රුචිකත්වයක් දක්වා ඇති නමුත් ඩෙවිඩ් එ. නාගරික සෞඛ්‍ය පරීක්ෂක (59 න.නී.වා. 81) යන නඩුවේ නිගමනයට අනුව ක්‍රියා කිරීමට තමා බැඳී ඇති බව සැලකූ ඔහු ඇපැල්කරුට විරුද්ධව තීන්දුව දුන්නේය.

මෙම නඩුවෙහි අවශ්‍ය කරුණු සැකෙවින් මෙසේය : මරදනේ ඇවොන්ඩේල් පාරේ නො. 65 දරණ ගෙයි පදිංචිව සිටි ඇපැල්කරු තම ව්‍යාපාරය ඇල්බට් සභ සමාගම යන නමින් මරදන පාරේ නො. 615 දරණ ස්ථානයෙහි කරගෙන ගිය ලී බඩු වෙළෙන්දෙකි. ඉස්සරහ බිත්තියෙහි සවිකර තිබුණු ඔහුගේ ව්‍යාපාරික නාමපුවරුවෙහි "ලී බඩු වෙළෙන්දෝ" යන වචන ද අතිරේක වශයෙන් යොදා තිබුණි. ප්‍රශ්නයට භාජන වී ඇති මෙම ස්ථානයෙහි ඔහු තමාගේ ව්‍යාපාරය ඉකුත් වෂී 14 තුළම කරගෙන ගියේය. ලී බඩු තමන් විසින් ම නිෂ්පාදනය නොකරන ලද නමුත් ඔහු ලී බඩු සාද තම සාප්පුවට ගෙනත් විකුණන්නන්ගෙන් ඒවා මිළදී ගත්තේ ය. ඔහුට ලී බඩු සපයන්නෝ වැල්ලම්පිටිය, නුගේගොඩ සහ මොරටුව යන ප්‍රදේශවල විසූහ. ඔහුගේ කාර්‍ය්‍ය මණ්ඩලය පස් දෙනෙකුගෙන් සමන්විත විය. මින් තිදෙනෙකු වාහනවලට බඩු පැටවීමට හා වාහනවලින් බඩු බැමට ද ඔහුට ලැබෙන සවිනොකරන ලද ලී බඩු සවිකිරීමට ද යෙදූ අතර අනිත් දෙදෙනා ලී බඩු ගෙන ඒමේදී යම්කිසි කැලලක් වුවහොත් එය මකාදැමීමට ද යෙදවිය. මොහුගේ ව්‍යාපාරික ස්ථානය පාරට මුහුණ ලා පිහිටි බඩු ප්‍රදර්ශනය කොට තැබීමේ කාමරයකින් ද ඉන් පිටුපස අඩක් වට වූ ආලින්දයකින් ද ඉන් ඔබ්බෙහි තවත් කාමරයකින් ද යුක්ත විය. බඩු ප්‍රදර්ශන කාමරය සහ සියල්ලටම පිටිපසින් ඇති කාමරය යන දෙකින් ම කලින් කියන ලද වටවූ ආලින්දයට පිවිසීමට දොරවල් තිබේ. ප්‍රදර්ශන කාමරයෙහි මහජනයාට පෙනෙන පරිදි තබන ලී බඩු අනුක්‍රමයෙන් විකිණී යන්ම ඒ වෙනුවට පිටිපස කාමරයෙහි තැන්පත් කොට ඇති තොගයෙන් බඩු ගෙනවිත් තැබීම සිරිත විය. වෂී 1958 දෙසැම්බර් මස 30 වෙනි දින තමා මෙතැනට ගිය විට වේවැල් නොවියන ලද පුටු සහ පොලිස් ගා ඔපනොදමන ලද ලී බඩු ද එහිවූ බව ආදයම් පරීක්ෂක වාස් නමැත්තා කිය. එහෙත් මෙම කරුණු පිළිබඳව කිසිවක් තීරණාත්මකව විනිශ්චය වී නැත. සංශෝධිත නීතිග්‍රන්ථ මාලාවෙහි මහ නගර සභා ආඥා පණතේ 147 වන ඡේදය නමින් දැන් හැඳින්වෙන, වෂී 1947, නො. 29 දරණ මහ නගර සභා ආඥා පණතේ 148 වන ඡේදයට (මින්පසු මෙය 147 වන ඡේදය නමින් හැඳින්වේ). විවිධ තත්වයේ කරුණු ඇතුළත්ය. නගර සභාවෙන් අවසර පත්‍රයක් නොගෙන නගර සභාවට අයත් දේශ සීමාවෙහි කිනම් තැනක් හෝ මෙහි පහත සඳහන්

කටයුතු වලට භාවිතා කිරීම එයින් තහනම් වී තිබේ. එනම් : —

(ඒ) කිනම් වර්ගයක හෝ සත් ඔකුණප හෝ ලේ තැම්බීම හෝ ;

(බී) සබන් සාදන තැනක්, තෙල් කකාරවන තැනක්, රෙදි සායම් කරන තැනක්, හම් කර්මාන්තය කරන තැනක්, ගඩොල් වලං හෝ හුණු පෝරණුවක්, කැඳ ජාති නිපදවන තැනක්, වෙඩි බෙහෙත් කාමරයක් හෝ ගිනිකෙළි කර්මාන්ත ශාලාවක් පැවත්වීම හෝ

(සී) පිළිකුල උපදවන හෝ ශරීරයට අහිතකර දුර්ගන්ධ විහිදෙන යම්කිසි ව්‍යාපාරික ස්ථානයක් පැවත්වීම හෝ

(ඩී) මනුෂ්‍ය ජීවිතයට හානිකර යැයි ගිණිය හැකි කිනම් විධියේ කටයුත්තක් කිරීම හෝ

(ඊ) පන් පැදුරු, ලී, රට අතුරු, පුළුන්, ඇටකටු වර්ග හෝ දුවෙන සුළු තෙල් වර්ග තැන්පත් කරන හෝ රැස්කරන ගබඩාවක් හෝ කොටාරයක් පැවත්වීම හෝ

(ඇප්) නගර සභාව අතුරු ව්‍යවස්ථාවකින් අභිමත පරිදි මෙම ඡේදයෙහි පරමාර්ථයට අනුකූලව මනුෂ්‍යයාට හානිකර හෝ අන්තරායකර යැයි ප්‍රකාශ කිරීමට යෙදෙන වෙන යම් ව්‍යාපාරයක් හෝ වෘත්තියක් කරගෙන යාම ද වේ.

නමුත් මෙහිදී අප විසින් සලකා බැලිය යුත්තේ මෙම ලිඛිත ආඥා පණතින් පැනවී ඇති තහනම් කිරීම් නොව අතුරු ව්‍යවස්ථාවලින් ප්‍රකාශිත මනුෂ්‍යයාට අහිතකර හෝ අන්තරායකර යම් යම් වෘත්තීන් සහ ව්‍යාපාරයන් පිළිබඳව ය. ඇතැම් වෘත්තීන් හෝ ව්‍යාපාරයන් පමණක් අහිතකර හෝ අන්තරායකර වෘත්තීන් හෝ ව්‍යාපාරයන් යයි නගර සභාවට ප්‍රකාශ කළ හැකැයි පැනවී තිබීමෙන් එක් අතකින් නගර සභාවට ඇති අතුරු ව්‍යවස්ථා සම්පාදක බලය සීමාවී තිබේ යයි කිව හැක. මේ නියමයෙන් බලන කල වෘත්තියක් හෝ ව්‍යාපාරයක් නොවන කිසියම් කටයුත්තක් මනුෂ්‍ය ජීවිතයට අහිතකර හෝ අන්තරායකර යැයි කීමට එම සභාවට බලයක් නැත. එසේ කිවහොත් එම අතුරු ව්‍යවස්ථාව බලයෙන් පිටස්තරව පනවන ලද්දක් සේ ගැනේ. මහනගර සභාව විසින් පනවන ලද අතුරු ව්‍යවස්ථා තුනක් වර්ෂ 1954 ජූලි 30 වන දින, නොට්. 10697 දරණ ආණ්ඩුවේ ගැසට් පත්‍රයෙහි පළ කරන ලදී. ඉන් පළමු වැන්න එහි සඳහන් ව්‍යාපාර හෝ වෘත්තීන් පණස් එකක් අහිතකර වෘත්තීන් හෝ ව්‍යාපාරයයි කියන අතර දෙවැන්න එහි සඳහන් වෘත්තීන් හෝ ව්‍යාපාරයන් තිස්හතරක් අන්තරායකර වෘත්තීන් හෝ ව්‍යාපාරයන් බව කියයි. තුන්වැන්නෙන් ප්‍රකාශ වන්නේ එහි සඳහන් වෘත්තීන් හෝ ව්‍යාපාර තුනක් අන්තරායකර මෙන්ම අහිතකර ද වෘත්තීන් හෝ ව්‍යාපාරයන් බව කියන ප්‍රකාශයකි. අප ඉදිරිපිට ඇති මෙම නඩුවෙහි අපේ අවධානය යොමු කෙරෙන අතුරු ව්‍යවස්ථාව පහත සඳහන් පරිදි කියැවෙන එයින් පළමු වැන්න ය.

"වර්ෂ 1947, නොට්. 29 දරණ මහනගර සභා ආඥා පණතේ 148 වන ඡේදයෙහි (මෙය දැන් 147 වන ඡේදය යයි) පැනවීම් වලට අනුව පහත සඳහන් වෘත්තීන් හෝ ව්‍යාපාරයන් මනුෂ්‍ය ජීවිතයට හානිකර වෘත්තීන් හෝ ව්‍යාපාරයන් බව මෙයින් ප්‍රකාශ කෙරේ. (මෙම ආඥා පණත දැන් හැඳින් වෙන්නේ මහනගර සභා ආඥා පණත යනුවෙනි)."

ඉහත සඳහන් අතුරු ව්‍යවස්ථාවට යා කොට ඇති වෘත්තීන් හෝ ව්‍යාපාරයන් පිළිබඳ ලේඛනයෙහි 39 වන කරුණ මෙසේ සඳහන් වේ : "ලී බඩු නිපදවීම හෝ රැස්කිරීම නැතහොත් එම ලී බඩු නිපදවීම සහ රැස්කිරීම . . ."

විනිශ්චය කළ යුතු පළමු වන ප්‍රශ්නය නම් 147 වන ඡේදයෙහි "වෘත්තියක් හෝ ව්‍යාපාරයක් යන යෙදීමෙහි තේරුම සහ එයට ඇතුළත් විෂය කුමක් ද යන්නයි. මෙහි එක් එක් වචනයක් ම ශබ්දකෝෂයට අනුව විවිධාර්ථයක තේරුම් ඇති වචනයකි. නමුත් යම්කිසි විශේෂ පාඨයක යොදන ලද වචනයක තේරුම නිශ්චය කළ යුත්තේ එම පාඨය ගැන ද සළකා බැලීමෙනි. විශේෂයෙන් ම එහි සම්බන්ධ වී ඇති අනික් වචන ගැන ද සළකා බැලිය යුතුය. යාබද වචන වල අනුසාරයෙන් දැනගනු ලැබේ යන්න අර්ථකථනය පිළිබඳ ඉතා ප්‍රසිද්ධ නීතියකි. මැක්ස්වෙල් මහතාගේ "ලිඛිත නීති අර්ථ කථනය" නමැති ග්‍රන්ථයෙහි (දශ වන මුද්‍රණය) 332 වන පිටේ මෙම නීතිය මෙසේ සඳහන් කර තිබේ: "අර්ථයෙහි සමතාවය දරණ බවට සාධක ඇති වචන දෙකක් හෝ ඊට වැඩි ගණනක් එකට ඇම්ණූ කල ආශ්‍රය ඇති අනික් වචන වලින් අර්ථය දැනගනු ලැබේ. ඒ වචන එහි ගැබ්වී ඇති නියම අර්ථයෙහි භාවිතා කර ඇති බව මෙහිදී වටහා ගනු ලැබේ. ඇත්ත වශයෙන් ම ඒ එක් වචනයක් තමාගේ අර්ථයෙහි ඇති ප්‍රභාසම්පන්නතාවය අන්‍යොන්‍ය ලෙස අනිත් වචනයෙන් ලබාගනී. මෙහිදී වැඩි වශයෙන් සාමාන්‍ය තේරුම ගෙන දෙන වචනය අඩු වශයෙන් සාමාන්‍ය තේරුම දෙන වචනයෙහි තේරුමට ම සීමිත ව පවතින බව සැලකිය යුතුය."

මෙහි "වෘත්තිය සහ ව්‍යාපාරය" යන වචන එකට ගළපා ඇත. එමෙන් ම ව්‍යාපාරය යන වචනයෙහි තේරුම වෘත්තිය යන වචනයෙන් ඔප වැටී තිබේ. ඒ නිසා මෙම පාඨයෙහි අර්ථ නිරූපණය කළ යුත්තේ එම වචනයට යාබද වචනය වන වෘත්තිය යන වචනයෙහි තේරුමට සැසඳෙන අදහසක් ඇතිවන සේ ගතහැකි දෙයක් පමණක් ගෙන අනිත් සියළුම තේරුම් ඉවත් කර දැමීමෙනි.

ඇපල්කරු වෙනුවෙන් පෙනී සිටි උගත් නීතිවේදියා මෙම ආඥා පණතින් ලී බඩු රැස්කිරීම එහි ක්‍රියාව අනුව ම සිතා බැලුවිට එම පණතින් තහනම් නොවී ඇති බවත් තහනම් වී ඇත්තේ වෘත්තියක් හෝ ව්‍යාපාරයක් වශයෙන් ලී බඩු රැස්කිරීම බවත් උදාහරණයක් වශයෙන් එය ලාභයක් ලැබීම සඳහා අන් අයගේ ලී බඩු කෙනෙකු විසින් රැස්කිරීම බවත් කියමින් තර්ක කෙළේය. අතුරු ව්‍යවස්ථාවෙහි ඇති "පහත සඳහන් වෘත්තීන් සහ

ව්‍යාපාරයන්'' යන වචන වලින් පෙනී යන්නේ වෘත්තියක් හෝ ව්‍යාපාරයක් වශයෙන් කෙරිගෙන යන විශේෂ කර්තව්‍යයන්ට පමණක් මෙම ප්‍රකාශය අදාළ වන බව යනු ඔහු සැලකර සිටියේ ය. මේ සඳහා **ගුණසේකර එ. නාගරික ආදයම් පරීක්ෂක** (ඉහත සඳහන්) සහ **ද සිල්වා එ. සිමාසහිත කුරුණෑගල සමුපකාර** ගබඩාව (ඉහත සඳහන්) යන නඩු ඔහු උපයෝගි කර ගත්තේය. මෙම නඩුවේ ඇපැල්කරු ලාභයක් ලැබීම සඳහා අනිත් උදවිය සතු ලී බඩු රැස් නොකළ බව දෙපාර්ශවය ම පිළිගෙන තිබේ.

නමුත් වගඋත්තරකරු වෙනුවෙන් පෙනී සිටි උගත් නීතිඥවරියා තර්ක කෙළේ ලාභයක් උපයා ගැනීමේ පරමාර්ථයෙන් කරන ලද කිනම් කටයුත්තක් වුවත් 147 වන ඡේදයෙහි සඳහන් ''ව්‍යාපාරය,, යන යෙදීමේ විශේෂ සීමාවට ඇතුළත් වන බව කියමිනි. ඇපැල්කරු ලාභයක් ලැබීම සඳහා අනිත් අයගේ ලී බඩු රැස් නොකළ නමුත් ඉහාම කෙටි කාලයකට වුව ද ලී බඩු රැස්කිරීම ඇපැල්කරුගේ ව්‍යාපාරයට අදාළ කොටසක් වන නිසා ක්‍රියාව අනුසාරයෙන් බලන කල එය ලාභ උපදවන දෙයක් නොවුවත් මේ නියායෙන් ලී බඩු රැස්කිරීම ඡේදයෙහි ඇති ''ව්‍යාපාරය'' යන යෙදීමේ සීමාවට අයුත්න බව ඔහු වැඩිදුරටත් තර්ක කෙළේය. **ස්මිත් එ. ඇන්ඩර්සන්** (.5 වැනසරි ඩිවිෂන්, 258 පිට) යන නඩුවේ විනිශ්චයාසනය ඉසිලූ **ජෙසල් විනිසුරු** තුමාගේ පහත සඳහන් ප්‍රකාශය කෙරෙහි ඔහු විශ්වාසය තැබුවේය. එම ප්‍රකාශය මෙසේය: ''ලාභයක් ලැබීමේ පරමාර්ථයෙන් කෙරෙන මිනිසෙකුගේ කාලය, අවධානය සහ ශ්‍රම ශක්තිය වැයවෙන කිනම් දෙයක් වුවද එය ව්‍යාපාරයක් කෙටියට ගත හැක''. මෙහිදී විනිශ්චයකාරතුමා අධිරාජ්‍ය ශබ්දකෝෂයේ මෙම වචනය ගැන ඇති විග්‍රහය අනුගමනය කොට තිබේ. එම ශබ්දකෝෂය ඉතා හොඳ ශබ්දකෝෂයක් බව ද විනිසුරුතුමා කීය. යම්කිසි නියමිත පාඨයක ඇති වචනයකට ශබ්දකෝෂයෙහි සඳහන් තේරුම පැවරීමෙහිදී එම වචනය සඳහන් වී ඇති පාඨය කෙරෙහි දැඩි සැලකිල්ල දැක්විය යුතුය. ස්මිත් එ ඇන්ඩර්සන් නැමති නඩුව දමන ලද්දේ මුහුදුපත්ලේ කේබල් බලමණ්ඩලය විසුරුවා හැරීම පිණිසය. ඊට හේතුවන වූයේ 1862 වෙළඳ සමාගම් පනත අනුව ලියා පදිංචි කරන ලද වෙළඳ සමාගමක් නොවී සමහර හාරකාරයන් සහ බලමණ්ඩලය විසින් නිකුත් කරන ලද අරමුදල් සහනික පත්‍ර දරන්නන් තවත් ව්‍යාපාරයක් කරගෙන යෑමය. එහි විනිශ්චයට භාජනය වූ ප්‍රශ්නය නම් එම ආඥා පණතෙහි පැනවීම්වලට අනුව ඒ හාරකාරයන් ව්‍යාපාරයක් කරගෙන යන්ද යන්නයි. විනිශ්චයකාරතුමා ඔවුන් එසේ කරන බව නිගමනය කළේය. නමුත් ඔහුගේ තීරණය ඇපැලේදී නිෂ්ප්‍රභා විය. ජේමිස් සර්ගාම් විනිශ්චයකාරතුමා මෙසේ කීය:—

''වර්ෂ 1862 වෙළඳ සමාගම් පණතේ 4 වන ඡේදයට පවරන ලද විනිශ්චයකාරතැනගේ එම අර්ථකථනයට මට එකඟවිය හොතැකි බව එතුමාගේ ඉහාම පැහැදිලි මතයට ගරු කරන අතර මෙහිලා සඳහන් කරමි.''

මෙසේ කියූ එතුමා තමාගේ නඩු තීන්දුවෙහි අවසානයේදී පහත සඳහන් ලෙස ද කියා තිබේ:—

''නමුත් සහතික පත්‍ර දරන්නන් සමාගමක් වශයෙන් සෑදී සිටියයි සිතුවහොත් 'ව්‍යාපාරය' යන වචනයෙහි සාමාන්‍ය තේරුම අනුව බලන කල එසේම ඕනෑම ව්‍යාපාරිකයෙකු එම වචනය භාවිතා කරන ඕනෑම තේරුමක් ගෙන ඒ අනුව බලන කල එම සඳහන ඔවුන් විසින් ම හෝ ඔවුන්ගේ යම්කිසි නියෝජිතයෙකු විසින් හෝ ව්‍යාපාරයක් කරගෙන යාමේ පරමාර්ථයෙන් ඇතිකරන ලද්දෑයි මට කිසිසේත් කිව නොහේ'' (275 පිට). මෙසේ මේ පාඨයෙහි ඇති ''ව්‍යාපාරය'' යන වචනයට දී ඇති තේරුමට විරෝධය ප්‍රකාශ කිරීම සඳහා ජේමිස් සාමි විනිශ්චයකාරතුමාට ඔරෙට් සාමි විනිශ්චයකාරතුමාගේ ද කොවන් සාමි විනිශ්චයකාරතුමාගේ ද අනුමැතිය ලැබිණ. සමිත්ගේ නඩුවෙහි ලාභ ලැබීම සඳහා කරගෙන යන විශාල ව්‍යාපාරයක කොටස් වූ වෙන් වෙන් වශයෙන් ඇති කර්තව්‍යයන් ගත් කල ඒවා වෙන වෙනම ව්‍යාපාර වශයෙන් ගත හැකි ද යන ප්‍රශ්නය කල්පනාවට භාජන කිරීම පිණිස උද්ගත වී නැත. නමුත් ඇපැල් උසාවියෙහි නඩු තීන්දු වලට අනුව සිතා බලන විට යම්කිසි නියමිත කර්තව්‍යයක් ව්‍යාපාරයන් ද නැද්ද යන්න තීරණය කිරීමෙහි දී කෙනෙකු විසින් එහි පරමාර්ථය හා එහි කාර්‍ය්‍ය විෂය පරීක්ෂා නොට එම ආචාරමේ සාරය කුමක් දැයි සිතා ගත යුතු බව කරයේ කියා තිබෙන බව පෙනී යයි. එමෙන් ම යම්කිසි වැඩ පිළිවෙලකින් හෝ කටයුත්තකින් ලාභයක් ලැබීම පමණක් එම වැඩ පිළිවෙල හෝ කටයුත්ත ව්‍යාපාරයක් යයි ගිණිය නොහැකි බව එහි වැදගත්කම ද නොව යම්කිසි පාඨයක ඇති වචන වල අර්ථකථනය කිරීමෙදී එම වචන යෙදී ඇති පාඨය ගැන සැලකිල්ලක් දක්විය යුතු බව පිළිබඳ ඇති වැදගත්කම ද එම නඩු තීන්දු වලින් තරයේ ම අනාවරණය වේ.

අප ඉදිරියෙහි ඇති මෙම නඩුවෙහි යම්කිසි ලී බඩු වර්ගයකින් එකකට වඩා ඇති තොගයක් විටින් විට විකිණෙන බඩු වෙනුවට ඉදිරිපත් කිරීමට නඩා ගැනීම හෝ ඒ වර්ගයේම ලී බඩු කිපයක් සැපයීම සඳහා නඩා ගැනීම හෝ ''රැස්කර නැබීම'' යන වචනයෙහි අර්ථ විෂයට ගැනෙණ බව සළකා තිබේ. නමුත් වෙළෙන්දෙකු විසින් තමාගේ වෙළඳ ව්‍යාපාරයෙහි දිනපතා අලෙවි වන බඩුභාණ්ඩ වෙනුවට තමා ළඟ නඩාගෙන සිටින බඩු තොගය ගැන සළකන විට ඒ බඩු ''රැස්කිරීමකැ'' යි විස්තර කිරීම නුසුදුසු යැයි හැඟෙනසේ ය. ''රැස්කිරීම'' යන වචනයෙන් දෙන තේරුම සැලකිය යුතු දීර්ඝ කාලසීමාවකට බඩු රැස්කර නැබීම විනා සිල්ලර බඩු විකිණීමෙහි දී ඒ සඳහා දිනපතා ප්‍රයෝජනය ගැනීමට බඩු රැස්කිරීම නොවේ.

යම්කිසි ව්‍යාපාරයක් සම්පූර්ණ කිරීමට අදාළ වන කටයුතු සංඛ්‍යාව රඳා පවත්නේ එහි ඇති ස්වභාවය මතය. සමහර විට සිල්ලර ලී බඩු විකුණන්නෙකුට එම බඩු මිළට ගැනීමටත්, එහාමෙහා ගෙනයාමටත්, රැස්කර නැබීමටත්, විකිණීමටත් සිදුවනු ඇත. ඒ අනුව අප ඉදිරියෙහි ඇති නඩුවේ ද ලී බඩු විකුණන්නෙකුගේ කටයුතු ගැන මෙනෙහි කරන විට ඔහුට ද බඩු මිළට ගැනීමටත් එහා මෙහා ගෙනයාමටත් රැස්කිරීමටත් විකිණීමටත් ප්‍රස්තාව සැළසෙන සේ පෙනේ. තමා

මිළට ගත් ලී බඩු එහි නිෂ්පාදකයා ඔපදමා නිමුණත් වඩා යෝගය තත්ත්වයකින් පොලිෂ් ගා ඔප දැමීම හෝ ඒ බඩුවල පොරාදූ වැඩ කොටය වඩා හොඳ අන්දමින් දියුණු කිරීම හෝ සළකන විට මෙසේ ඔපදැමීම හෝ ඉන් කොටවට මෙවට යෝග්‍ය ලෙස සැදීම හෝ ව්‍යාපාරයක් හැටියට නොගැනෙන්නේ එම ඔප දැමීම හෝ අපාරාදූ වැඩ ප්‍රධාන ව්‍යාපාරයෙහි අංගෝපාංග වශයෙන් සැළකෙන නියාය. බොහෝ අඩිගෝපාඩිග කටයුතු වලින් සමන්විත කිසියම් ව්‍යාපාරයක එකම ව්‍යාපාරයක් ද නැතහොත් එකම පරිපාලනයක් පිටවෙන් වෙන් වශයෙන් කෙරෙන ව්‍යාපාරයක් ද යන්න නිශ්චය කළ යුත්තේ ඒ විවිධ කටයුතු පරීක්ෂා කර බැලීමෙනි. මෙම නඩුවෙහි සිදුවී ඇති ලී බඩු රැස්කිරීම ඔප දැමීම අඩුපාඩු සකස් කිරීම පිරිදීම, අවශ්‍ය වූ විටක ප්‍රවාහණයෙහි දී සිදුවී ඇති අලාභහානි පිළියම් කිරීම ආදී සියළු දේම එකම ව්‍යාපාරයක කොටස් වශයෙන් සැළකේ. එහෙයි ලී බඩු වෙළඳාම ය. අතුරු ව්‍යවස්ථාවෙහි ඇති තහනම් ලී බඩු රැස්කිරීම ක්‍රියාවක් වශයෙන් ගත් කල එයට අදළ නොවේ යයි කියමින් ඇපැල්කරුගේ නීතිවේදියා කරන ලද කරුණු සැළකිරීමට යටි ද එකඟ වෙමු. එය අදළ වන්නේ අන් අයගේ ලී බඩු ලාභ ලැබීමේ පරමාර්ථයෙන් එක්රැස් කළ කලෙක පමණි.

අංගෝපාංගයක් හැටියට ගැනෙන කටයුත්තක් 147 වන ඡේදයෙහි සඳහන් පරිදි ව්‍යාපාරයක අවසි සීමාවට වැටේ ද යන ප්‍රශ්නය **කොළඹ නගර සභාපතිතුමා එ. සිල්වා (4 සී.ඩබ්.ආර්. 150)** යන නඩුවෙහිදී සලකා බලා තිබේ. මෙම නඩුවෙහි විත්තිකරු තම ව්‍යාපාරය විශාල ලෙස කරගෙන ගිය ගොඩනැගිලි කොන්ත්‍රාත්කරුවෙකි. ඔහුට විරුද්ධව:—

(1) ලී රැස්කරන කොටාරයක් තබා ගැනීම සඳහාත්,
(2) ලී ඉරන ස්ථානයක් තබා ගැනීම සඳහාත්

නඩු පවරන ලද්දේ මෙම ආඥා පනත යහ එහි අතුරු ව්‍යවස්ථා උල්ලංඝනය කළ බව කියමිනි. තමාගේ ඉඩමෙහි වහි ප්‍රමාණයෙන් අඩි 200 ක් සහ අඩි 150 ක් දිග පළල ඇති විශාල කොටාරයක ඔහු කුඩාරම් කිපයක් ඔහු විසින් සාද තිබුණි. මෙම කොටාරයෙහි සහ ඔහු වල තමා කොන්ත්‍රාත් ලැබූ ගොඩනැගිලි වලට අවශ්‍ය බඩුබාහිරාදිය පිළියෙල කරගත් ඔහුට ඒ සඳහා සැළකිය යුතු තරාතිරමක වඩු කර්මාන්තයක් ද කරවීමට සිදුවිය. මෙහි ධූම බලයෙන් ක්‍රියා කරවන කියත් දෙකක් සහ අතින් ලී ඉරීමට උවමනා කරන පලාවියන් ද පිළියෙල වී තිබුණි. ලී ඉරන වඩු බංකු ලහ ද මඩුකුඩාරම් ඇතුළත ද කොටාරයේ ඒ මේ තැන විසිරී පෙනෙන ලද ලී කොට රාශියක් එහි විය. නිමවන ලද දෙර රාමු සහ කවුළු රාමු ද එහි දක්නා ලදී. මෙම ගොඩනැගිලි කොන්ත්‍රාත්කරුගේ ව්‍යාපාරයෙහි මේවා විවිධ අංගෝපාංග යන්න ගැනෙන් කිසිදු තර්කයක් නොවිය. මෙම උසාවියෙහි තීරණය වූයේ ඒ කායර්ය කටයුතු ඡේදයෙහි ඇති තහනමට ඇතුළත් නොවෙන බව ය. එමෙන් ම ප්‍රධාන ව්‍යාපාරයක අංගයක් වූ වෙනයම් ව්‍යාපාරයක් ආඥා පණතෙහි 147 වන ඡේදයෙහි දැඩි සීමාවට වැටේ ද යන්න **ජයසේකර එ. සිල්වා (5 සී.ඩබ්.ආර්. 255)** යන නඩුවේ කල්පනාවට භාජන වූ වා සේ පෙනේ. එසේ ව්‍යාපාරයක අංගයක් වන ව්‍යාපාරයක් එම ඡේදයට අයුවන බව තීරණය වී ඇත. නමුත් මේ නඩුවෙහි දී ඉහත සඳහන් **කොළඹ නගර සභාපති එ. සිල්වා** යන නඩුවෙහි විනිශ්චිත වූ ප්‍රශ්නය එනම් යම්කිසි අංගෝපාංගයක් හැටියට සැළකෙන එසේ නැතහොත් ද්විතීයික කටයුතු කොටසක් හැටියට සැළකෙන එහෙත් ක්‍රියාවන් වශයෙන් බලන කළ වෘත්තීන් හෝ ව්‍යාපාරයන් යයි නොකිය හැකි යම් කිසි වැඩ කටයුත්තකට පමණක් සීමාවී එම ව්‍යාපාරයෙහි සම්පාදන අංගයක් ලෙස අවධාරණයෙන් සැළකෙන ක්‍රියා විශේෂයන් ''ව්‍යාපාරය'' යන වචනයෙහි අර්ථ සීමාවට වැටේ ද යන්න විසඳිනු නැත. ඉහත සඳහන් ජයසේකරගේ නඩුවෙහි උපප්‍රධාන විනිශ්චයකාර **බර්ටම්** මැතිතුමා ඊට කලින් ඇසුණු **කොළඹ නගර සභාපති එ. සිල්වා** යන නඩුව කල්පනාවට ඒත්තු ගෙන තිබෙන බවක් නොපෙනේ. එමෙන් ම වෙනත් ව්‍යාපාරයකට සම්බන්ධ කමක් ඇති ඒ ව්‍යාපාරයෙහි අංග වශයෙන් සැළකෙන කායර්ය සංවිධානයන් කෙරෙහි එතුමාගේ අවධානය යොමුවී නැතිසේ පෙනීයන්නේ එතුමා පහත යඳහන් පරිදි ප්‍රකාශ කර ඇති බැවිනි. එනම් :

> ''එම භූමිභාගයෙහි කරගෙන යන යම්කිසි නියමිත ව්‍යාපාරයක් ප්‍රධාන ව්‍යාපාරය ද නැතහොත් උපයෝගී ව්‍යාපාරයක් දැයි යන්න මෙහිලා විසඳීම අවශ්‍ය යයි මම කල්පනා නොකරමි.''

මෙසේ ම **කොළඹ නගර සභාපතිතුමා එ. සිල්වා** යන නඩුව ඉහත සඳහන් කරන ලද **ඩෙව්ඩ එ. නාගරික සෞඛ්‍ය පරීක්ෂක** යන නඩුවෙහි දී සඳහන් කොට ඇති සෞඛ්‍ය පරීක්ෂකයා පිළිබඳ නඩුව එම අතින් නඩුව සමග ගැටෙනු පමණක් නොවී ඉහත සඳහන් **ගුණසේකර එ. නාගරික ආදයම් පරීක්ෂක** යන නඩුව සමග ද **සිල්වා එ. සීමාසහිත කුරුණෑගල ශම්පූකාර බඩු ගබඩාව** (ඉහත සඳහන්) යන නඩුව යම්ග ද ගැටේ. මාගේ සොහොයුරු වීරසූරිය මහතාට හුදු ගෞරවයෙන් මා කියනු කැමැත්තේ ජෙසල් මහතා කළ ව්‍යාපාරය පිළිබඳ විග්‍රහය අනුගමනය කිරීමෙන් ඔහු යාබද වචන වලින් දැනගනු ලැබේ. (Noscuntur a sociis) යන ප්‍රඥප්තිය ගැන නොසලකා හැර ඇතුවා පමණක් නොව ජේසල් විනිශ්චයකාරතුමාගේ අර්ථ කථනය ගැන විරෝධය දක්වූ එම ඇපැල් නඩුවෙහි සිටි සාමී විනිශ්චයකාරවරුන්ගේ මතය ද කල්පනාවට ගෙන නැති බවය.

අපේ අදහසේ හැටියට **ඩෙව්ඩ එ. නාගරික සෞඛ්‍ය පරීක්ෂක** යන නඩුව විරදවා විනිශ්චය කරන ලද්දකි. එසේම **කොළඹ නගර සභාපතිතුමා එ. සිල්වා** යන නඩුවත්, **ගුණසේකර එ. නාගරික ආදයම් පරීක්ෂකයා** යන නඩුවත්, **ද සිල්වා එ. සීමාසහිත කුරුණෑගල ශම්පූකාර බඩුගබඩාව** යන නඩුවත් නිවැරදිව විනිශ්චය කරන ලද නඩුනියා ඒ නඩු අනුගමනය කළ යුතුය.

හේරත් විනිශ්චයකාරතුමා :
මම එකඟ වෙමි.

අබේසුන්දර විනිශ්චයකාරතුමා :
මම එකඟ වෙමි.

ඇපැලට ඉඩ දෙන ලදී.

ගරු වීරසූරිය ඡොෂ්ඨ විනිශ්චයකාරතුමා ඉදිරිපිට

මිහිරිහාමගේ එ. බුලත්සිංහල*

ශ්‍රේෂ්ඨාධිකරණයේ නො: 162—ගම්පහ මහේස්ත්‍රාත් උසාවියේ නො: 64757.

විවාද කළ දින : 1962 අගෝස්තු 24 සහ සැප්තැම්බර් 3.
තීන්දු කළ දින : 1962 සැප්තැම්බර් 3.

නඩත්තු ආඥා පණත, 2 වන ඡේදය—තම සවාමිපුරුෂයාට විරුඩව දික්කසාද වීමට නියෝගයක් ලත් කලින් භාර්‍යාව ලෙස විසූ කැනැත්තියකගේ ඉල්ලීමක්—එබඳු සවාමිපුරුෂයෙකුට විරුඩව කළ ඉල්ලීමක් ඇයට ඉදිරිපත් කොට ගෙන යා හැකි ද?—මෙසේ කලින් භාර්‍යාව ලෙස සිටි කැනැත්තියක් 2 වන ඡේදයේ "භාර්‍යාව" යන වචනයට ඇතුළත් වේද යන්න.

තීන්දුව:— (1) කසාද බඳින ලද ස්ත්‍රියක විසින් කලින් සවාමිපුරුෂයාව සිටි අයගෙන් දික්කසාද වූවාට පසු නඩත්තු ආඥා පණතේ දෙවන ඡේදය අනුව නඩත්තුව ලැබීම සඳහා ඉදිරිපත් කරණ ඉල්ලීමක් පිළිගෙන ඒ අනුසාරයෙන් ක්‍රියා කළ නොහැක.

(2) නඩත්තු ආඥා පණතේ 2 වන ඡේදයෙහි සඳහන් "භාර්‍යාව" යන වචනය, නියමිත බලය ඇති උසාවියක නියෝගය පරිදි වගඋත්තරකරුගේ භාර්‍යා තත්ත්වයෙන් නිදහස්වූ කලින් භාර්‍යාව ලෙස විසූ ස්ත්‍රියක ඇතුළු කිරීම සඳහා පෘථුල අර්ථයක් ගෙන හැර පාන්නක් ලෙස දීර්ඝ කොට සැලකීම නොමැනවි.

නීතිඥවරු:— ඇල්. ඩබ්ලිව්. ඔබේසේකර මහතා, ඉල්ලුම්කාර ඇපැල්කරු වෙනුවෙන්.

ජේ. සි. කුරෙයිරත්නම් මහතා, ඇම්. ටී. ඇම්. සිවර්දීන් මහතා සමග චිත්තිකාර-වගඋත්තරකරු වෙනුවෙන්.

ගරු වීරසූරිය, ඡොෂ්ඨ විනිශ්චයකාරතුමා.

තමාටත් තමාගේ දරුවාටත් නඩත්තුව ඉල්ලමින් ඉල්ලුම්කාර-ඇපැල්කාරිය විසින් ඉදිරිපත් කරණ ලද ඉල්ලීමකට විරුඩව තීන්දුව ලැබූ වගඋත්තරකරුට එරෙහිව ඉදිරිපත් කරන ලද ඇපැලකි මෙය. වර්ෂ 1961 මැයි මස 13 වෙනි දින නඩත්තු ආඥා පණතේ (91 වන පරිච්ඡේදය) 2 වන ඡේදය යටතේ කරන ලද මෙම ඉල්ලීමෙහි දී ඉල්ලුම්කාරිය තමා වගඋත්තරකරුගේ නීත්‍යානුකූල භාර්‍යාව ලෙස විස්තර කළාය. එහෙත් නඩුව නිමාවට යාමට පෙර වර්ෂ 1961 සැප්තැම්බර් මස 23 වන දින දරුවා මියගිය නිසා දරුවාගේ නඩත්තුව පිළිබඳ කරන ලද ඉල්ලීම ගැන ගතයුතු පියවර නොගන්නා ලද බව පෙනේ.

මෙහි 'ඒ' 1 දමා ලකුණු කරන ලද ලිපියෙන් පෙනී යන පරිදි ඉල්ලුම්කාරියක් වගඋත්තරකරුත් අතර සිදුවී ඇති විවාහය ද්වේෂසහගත ලෙස වගඋත්තරකරු බිරිඳ අතහැර යාමේ හේතුවෙන් අවලංගු කිරීම පිණිස ගම්පහ දිස්ත්‍රික් උසාවිය විසින් වර්ෂ 1960 අගෝස්තු 30 වන දින නියෝග ආඥාවක් නිකුත් කරන ලදී. මෙම ආඥාවෙන්ම මාසික ගාස්තුව වශයෙන් රුපියල් 50!- ක් භාර්‍යාවට ගෙවීමට ද දරුවාගේ නඩත්තුව වශයෙන් මසකට රුපියල් 20!- ගෙවීමට ද වගඋත්තරකරුට නියම විය. වර්ෂ 1960 දෙසැම්බර් මස 20 වන දින මෙම ආඥාව ස්ථිරකරන ලද නිසා ඉල්ලුම්කාරිය දැනට මෙහි ඇති නඩුවෙහි නඩත්තුව ඉල්ලන අවධියේ ඈ වගඋත්තරකරුගේ භාර්‍යාව ලෙස එවකට ගණන් ගත නොහැකිව තිබිණි. මේ නිසා තමා ඉල්ලුම්කරුගේ නීත්‍යානුකූල භාර්‍යාව යයි ඉල්ලුම්කාරිය විසින් කරන ලද විස්තරය වරද සහිතය. මේ ගැන පරීක්ෂණයක් කළ මහේස්ත්‍රාත්වරයා එම ඉල්ලුම් පත්‍රය ඉදිරිපත් කරන ලද දින ඉල්ලුම්කාරිය වගඋත්තරකරුගේ භාර්‍යාව වශයෙන් විසීමේ තත්ත්වය නතරවී තිබුණු නිසා ඇයට නඩත්තු ආඥා

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයේ 64 වෙනි කා., 90 වෙනි පිට බලනු.

පණතේ 2 වන ඡේදය යටතේ නඩත්තුව ලැබීමට නියෝගයක් ලබාගත නොහැකැයි ඉල්ලීම ප්‍රතික්ෂේප කෙළේය.

ආඥා පණතේ 2 වන ඡේදයෙන් ''යම් කිසිවෙක් සැහෙන ප්‍රමාණයක ආදායමක් ඇති කල තම භාර්‍යාවට හෝ තමාගේ නීත්‍යානුකූල හෝ නීත්‍යානුකූල නොවන තමාටම නඩත්තු වියනොහැකි දරුවෙකුට නඩත්තුව දීම නොසළකා හැරියහොත් හෝ ප්‍රතික්ෂේප කළ-හොත්'' මහේස්ත්‍රාත්වරයෙකුට නඩත්තු ගෙවීමට යයි නීන්දු කිරීමට බලය ලැබේ. නමුත් මෙම ආඥා පණතේ ''භාර්‍යාව'' යන වචනය විග්‍රහවී නැත. එබැවින් විග්‍රහයක් නොමැති කල එම වචනයට අර්ථකථනය කළ යුත්තේ එයට දුප්පත් වූ තේරුමක් දීමට යම් කිසි හේතුවක් නොපෙනේ නම් නීත්‍යානුකූලව විවාහ කරගත් භාර්‍යාව යන තේරුම අනුව ය. ඇපැල්කාරිය වෙනුවෙන් පෙනී සිටි උඛේසේකර මහතා මෙම උසා-විය‍ෙහි නඩුකීන්දු කීපයක පිළිසරණ සොයමින් කරුණු සැළකර සිටියේ මෙම 2 වන ඡේදයෙහි ඇති ''භාර්‍යාව'' යන වචනයට අර්ථකථනය කිරීමෙහි දී ඒ නඩු තීන්දුවල ශක්තිය අනුව දෙවන ඡේදයෙහි ඇති භාර්‍යාව යන යෙදීම, නඩත්තුව සඳහා ඉල්ලුම් පත්‍රය දැමීමට පෙර තමාගේ කසාදය අහෝසි කරමින් නියම ආඥා බලය ඇති උසාවියක් විසින් දෙන ලද තීන්දුවකින් පසු යම් භාර්‍යාවක් පුරුෂයාට විරුඛව එම නඩත්තු නියෝගය ලබා ගැනීමට ප්‍රයත්නයක් කෙරේ නම් කලින් භාර්‍යා භාවයෙහි සිටි එම භාර්‍යාව එම ඡේදයෙහි තේරුමට ඇතුළත් කළ හැකියයි ප්‍රකාශ කරමිනි. මෙම නඩු අතුරෙන් පළමුවැන්න **පිරිස්** එ. **පිරිස්,** (45 න.නී.වා. 18,) යන්නය. එම නඩුවෙහි කරුණු පහත සඳහන් පරිදි විය. වගඋත්තරකරුගෙන් නිති මාර්ගයෙන් වෙන්වීමට තීන්දු ප්‍රකාශයක් ඉල්ලමින් ඔහුට නඩුදමූ ඉල්ලුම්කාරි එය ද කසාදයෙන් ඉපදුණු දරුවාගේ භාරකාරත්වය ද ලබා ඉන් ජයග්‍රහණය කළාය. මෙහි දී දික්කසාද දීමනාවක් ද ඇගේ වාසියට ගෙවීමට යයි නියෝගයක් ලැබී තිබෙන පරි පෙනෙන නමුදු මෙම ලගවීමෙන් වැළකීම සඳහා වගඋත්තරකරු ඉන්පසු තමා බංකොලොත් ලැබූ කෙනෙකු හැටියට තීන්දුවක් ලබාගෙන තිබේ. ඉක්බිති භාර්‍යාව විත්ති-කරුට විරුඛව නඩත්තු ආඥා පණත යටතේ ඇයට සහ ඇගේ දරුවාට ද නඩත්තු ඉල්ලමින් ඉල්ලුම් පත්‍රයක් ඉදිරිපත් කළාය. නමුත් තමා බැඳී සිටින බව මහේස්-ත්‍රාත්තුමා විසින් ගලකන ලද **අරියනායගම් එ. තංගම්මා,** (41 න.නී.වා. 169,) නමැති නඩුවේ තීන්දුව අනුව ගිය මහේස්ත්‍රාත්වරයා භාර්‍යාවට දික්කසාද **ඉජ්ඡණ** මූදලක් ගෙවීමට යයි සිවිල් උසාවියකින් තීන්දුවූ නඩුවක් ඇති බව කියමින් භාර්‍යාවගේ එම ඉල්ලුම් පත්‍රය නිෂ්ප්‍රභා කළේය. මේ නඩුව පිළිබඳ වූ ඇපැලෙහිදී **සූට්ස් විනිශ්චයකාරතුමා** කියේ දික්කසාද දීමනාව පිණිස කෙරුණු නියෝගය ඉටුනොකර තිබෙනතාක් එය නඩත්තු ආඥා පණතෙහි දෙවන ඡේදය යටතේ කෙරෙන ඉල්ලීමකට බාධකයක් හැටියට නොගැනෙන බවත් එවැනි ඉල්ලීමක් ලත්විට සෑම්පුරුෂයා සෑහෙන පමණ වත්කම තිබියදී තම භාර්‍යාවට හෝ දරුවාට නඩත්තුව දීම නොසළකා හැරි විටෙක හෝ ප්‍රතික්ෂේප කළ විටෙක නඩත්තුව සඳහා නියෝගයක් කිරීමට මහේස්-ත්‍රාත්වරයාට අවකාශ ඇති බවත් ය. නමුත් ඒ නඩුවේදී එහි ඉල්ලුම්කාරිය ඒ වනතුරුම වගඋත්තර-කරුගේ භාර්‍යාව බව මෙහිදී සිහාගත යුතුය.

සූට්ස් විනිශ්චයකාරතුමා සහ **ක්‍රෙට්සර් විනිශ්චය-කාරතුමා** විසින් කරන ලද පරස්පර විරෝධී ප්‍රකාශයන් ගේ හේතුවෙන් ඉන්පසු උද්ගත වූ **ප්‍රනාන්දු** එ. **අමර-සේන,** (45 න.නී.වා. 25,) යන නඩුව මෙම උසාවියේ විනිශ්චයකාරවරු දෙදෙනෙකු ඉදිරියට පමුණුවන ලදී. මෙම නඩුවෙහිදී නඩත්තුව සඳහා ඉල්ලුම් පත්‍රය දැමූ අය ඊට කලින් තම සෑම්පුරුෂයා වන වගඋත්තර-කරුගෙන් දික්කසාද වී තිබේ. එම නඩුවේදීම ඔහුට දික්කසාද දීමනාවක් හැටියටත් නඩත්තුව හැටියටත් ඉල්ලුම්කාරියට සහ ඔහුගේ කසාද දරුවාට රුපියල් 50!-ක් ගෙවන ලෙස ද නියම කර තිබේ. කරුණු මෙසේ තිබියදී පවා එම නියෝගයට අනුව වගඋත්තරකරු විසින් කිසි මුදලක් ගෙවා නැති නිසා ඉල්ලුම්කාරි අනතුරුව දරුවාට පමණක් නඩත්තුව ඉල්ලමින් මහේස්-ත්‍රාත් උසාවියට නඩුවක් ඉදිරිපත් කළාය. දැ තමාට නඩත්තුව එහිදී ඉල්ලීමෙන් වැළකී හිටියේ තමා වග-උත්තරකරුගේ භාර්‍යාභාවයෙන් එවකට ඉවත්වී සිටිය නිසා යයි සළකා ගැනීමට ඉඩ තිබේ. මෙම නඩුවෙහි තීන්දුව වූයේ එහිදී පෙන්වා දී ඇති සියළු දේම ගත්කල හැඟී යන්නේ දික්කසාද පෝෂණදීමනාවක් ගෙවීමට සිවිල් උසාවියකින් දුන් තීන්දුවක් ඇති බව පමණක් පෙන්වා සිටීම නිසා මහේස්ත්‍රාත්වරයාට නඩත්තු ආඥා පණතේ පැනවීම් වලට අනුව තමාගේ ආඥා බලය ක්‍රියාකරවීමට එබඳු නියෝගයක් තිබීම බාධකයක් නොවන බව ය. නමුත් වගඋත්තරකරුගේ භාර්‍යා භාවයෙන් ඉවත්වුණු පසු යම්කිසි ''භාර්‍යාවකට'' නඩත්තු ආඥා පණතට අනුව තමාට නඩත්තුව ඉල්ලීමට සුදුසුකම තිබේ ද යන ප්‍රශ්නය නිරාකරණය කිරීමට අධිකරණයට මෙහිදී ප්‍රස්තාවක් ලැබී නැත.

ඔබේසේකර මහතා විශ්වාසය තබා සිටි තුන්වෙනි නඩුව **ප්‍රන්සිස් ප්‍රනාන්දු** එ. **වින්සෙන්තිනා ප්‍රනාන්දු** (59 න.නී.වා. 522,) යන නඩුවයි. මෙම නඩුවෙහි ඉල්ලුම්කාරි නඩත්තු ආඥා පණතේ පැනවීම් යටතේ තමාට නඩත්තුව ලැබෙන ලෙස නියෝගයක් ලබා

සිටියා ය. පසු දවසක ඈ දිස්ත්‍රික් උසාවියෙන් ද වගඋත්තරකරු සමග තමාගේ විවාහය අවලංගු කරමින් තමාට දික්කසාද පෝෂණ දීමනාවක් ලෙස තීන්දුවක් ලබා ගත්තාය. මෙහි පෙනී යන අන්දමට දික්කසාද පෝෂණ දීමනාව ගෙවීමට යයි නියුක්තවූ නියෝගය ක්‍රියාවෙහි නොයොදන ලද නිසා ඉල්ලුම්කාරී නඩත්තු ආඥා පණතේ දහවන ඡේදයට අනුව දික්කසාද නඩු විභාගයට කලින් ඇයට ලැබී තිබුණ නඩත්තුව වැඩිකිරීමට ඉල්ලුම් පත්‍රයක් ඉදිරිපත් කළා ය. දහවන ඡේදයෙහි ඇති භාෂාවිලාශය ගැන සළකා බැලූ **සින්නතම්බි විනිශ්චයකාරතුමා** තීන්දු කෙළේ වගඋත්තරකරුගේ භාර්‍යා භාවයෙන් ඉවත්වූවාට පසුව වුව ද කලින් තිබූ තමාගේ සමාජ තත්ත්වය වෙනස්වීමට පෙර තමාට නියම කරණ ලද නඩත්තුවත් වැඩිකර ගැනීම සඳහා දහවන ඡේදය යටතේ ඇයට ඉල්ලීමක් ඉදිරිපත් කිරීමට නිදහස ඇති බව පළකරමිනි. මෙම මතය ප්‍රකාශ කරන අතරම **සින්නතම්බි විනිශ්චයකාරතුමා** දහවන ඡේදයෙහි ඇති භාෂාවිලාශය සමග දෙවන ඡේදයෙහි ඇති භාෂාවිලාශය අතර ඇති අසමානකම පෙන්වා දුන්නේය. මෙසේ කළ ඔහුගේ ප්‍රකාශය වූයේ දෙවන ඡේදයෙහි ඇති පැනවීමට අනුව කටයුතු කිරීමට ඉල්ලුම්කාරිය ''භාර්‍යාවක් විය යුතු බව'' පෙනී යන අතර එම නඩුවේ කරුණු සඳහා දික්කසාද නඩු තීන්දුවක් ලත් ''භාර්‍යාවකට'' ඉන්පසු දෙවන ඡේදය යටතේ නඩත්තු ඉල්ලිය හැකි ද යන ප්‍රශ්නය විසඳීම අනවශ්‍ය යයි තමා සිතන බවය.

කලින් භාර්‍යාව වී සිටි අයෙකුට දෙවන ඡේදය යටතේ, තමාගේ තත්ත්වය වෙනස්වීමට කලින්, දෙන ලද තීන්දුවකින් ලත් නඩත්තුව වැඩිකර ගැනීමට දහවන ඡේදය යටතේ ඉල්ලීමක් කළ හැකි යයි **සින්නතම්බි විනිශ්චයකාරතුමා** ගත් මතය එයට කලින් තීන්දු වූ **මැණිකෙ** එ. **සියාතුවා,** (42 න.නි.වා. 53,) යන නඩුවේ තීරණයට පටහැනි වුවාසේ පෙනේ. නමුත් මෙම නඩුව ඔහු විසින් සලකා බලා නැත. එහිදී නඩත්තු ආඥා පණත අනුව තමාගේ ස්වාමී පුරුෂයාට විරුඬව නඩත්තු නියෝගයක් ලැබූ භාර්‍යාවකට ඊට පසු වගඋත්තරකරු සමග තිබූ තම විවාහය වඩී 1870, අංක 3 දරණ, උඩරට විවාහ ආඥා පණතේ පැනවීම් වලට අනුව අවලංගු වූ දින සිට එම නඩත්තු නියෝගය අනුසාරයෙන් නඩත්තුව ඉල්විය නොහැකි බව තීන්දු වී තිබේ.

නමුත් **ප්‍රැන්සිස් ප්‍රනාණ්ඩු** එ. **වින්සෙන්තිනා ප්‍රනාණ්ඩු** (ඉහත සඳහන්) යන නඩුවෙහි සභ ඔබේසේකර මහතා විසින් විශ්වාසය තබන ලද අනිත් නඩු දෙකෙහි ද විසඳුණු ප්‍රශ්නය අප ඉදිරියේ ඇති මෙම ඇපැලෙන් මතුවන ප්‍රශ්නයට වඩා වෙනස් බව මාගේ හැඟීමයි. වගඋත්තරකරු වෙනුවෙන් පෙනී සිටින සිවාර්දීන් මහතා මගේ අවධානය යොමු කළ **සුබ්‍රමනියම් එ. පක්කිය ලච්චුමි,** (55 න.නි.වා. 87,) යන නඩුව මේ නඩුවට ඊට වඩා ගොදින් සැසඳෙන නඩුවකි. එහිදී දෙවන ඡේදයෙහි භාෂාවිලාශය ගැන යැලකූ රෝස් අග්‍රවිනිශ්චයකාරතුමා කියේ ස්වාමිපුරුෂයෙකු විසින් නඩත්තු කිරීම පැහැර හරින ලද ''භාර්‍යාවකට'' ඔහුට විරුඬව ඉල්ලීමක් කිරීමට ඉඩ ලැබෙය කියාය. තවදුරටත් කුරුණු දැක්වූ එතුමා ''ස්වාමිපුරුෂයෙකු පිට පැවරී ඇති යුතුකම් තම භාර්‍යාව පමණක් නඩත්තු කිරීම යයි ද එබැවින් නඩත්තුව සඳහා ඉල්ලුම්කාරියක් සමග සිදුවී යයි කියන විවාහය යම්බඳු නීත්‍යානුකූල සම්බාධකයක් හේතුවෙන් නිර්බල තත්ත්වයට වැටී ඒ නයින් තමා සඳහන් කරන ස්වාමිපුරුෂයා සභ තමා අතර ඇති සම්බන්ධතාවය භාර්‍යා තත්ත්වයෙන් යමකිසි අඩුලඟුඩු තත්ත්වයකට වැටී ඇත්නම් මෙම ආඥා පණත යටතේ ඇයට නඩත්තුව ඉල්ලීමට සුදුසුකමක් නැති බව එම ඡේදයේ වචනවලින් පෙනේ යැයි ද කීවිය.

අපේ නඩත්තු ආඥා පණතේ දෙවන ඡේදය ඉන්දියානු අපරාධ නඩුවිධාන සංග්‍රහයේ (වඩී 1898, නොං. 5 දරණ පණත), 488 (1) ඡේදයට සාරානුකූලව සමාන බව පෙනේ. ''ස්ත්‍රියක සහ පුරුෂයකු අතර අඛණ්ඩ ලැහැස්ති සම්බන්ධතාවයක් පවත්නා බව ඔප්පුවූ කල පමණින් 488 වන ඡේදය යටතේ ඒ මිනිසාට එම ගැහැණියගේ ආධාරය පිණිස කටයුතු සම්පාදනය කිරීමට නියෝග කළ හැකි බව'' ඉන්දීය අධිකරණයන් ගෙන ඇති මතය ලෙස යැලකිය හැකිය. මෙම ප්‍රකාශය **මාඳබු ඉල්යාස් එ. උල්ෆාට් බීබී,** භාරතීය නඩුතීන්දු (අභිනව මුද්‍රණය), 9 අලහබාද් 33, යන නඩුවෙහිදී අයික්මන් විනිශ්චයකාරතුමා විසින් කරන ලද්දකි. **මොහමඩ රහිමුල්ලා සහ තවත් කෙනෙකු,** ,(1947) සමස්ත භාරතීය වාර්තා— මදුරාසිය 461, අතර වූ අර්බුදය සහ **ජන්නි බීබී එ. මොහොමඩ් අබ්දුල් රහමන්,** (1955) සමස්ත භාරතීය වාර්තා—අන්ධ්‍රා 1, අතර කියැවුණු නඩුව ද කියවා බලන්න.

මෙහි දැනට අප අතර ඇති නඩුවෙහි ද නඩත්තු ආඥා පණතේ දෙවන ඡේදයෙහි ඇති ''භාර්‍යාව'' යන වචනයට අර්ථ කීමෙහිදී වගඋත්තරකරුගේ භාර්‍යා තත්ත්වයෙන් නියමිත උසාවියකින් දෙන ලද තීන්දුවක බලපෑමෙන් ඉවත් වූ අයෙකුට ද එය ඇතුළත් වනසේ පෘථුල ලෙස සළකා අර්ථ කීමට අවසර දීම සුදුසු යයි මම නොසිතමි.

එබැවින් ඉල්ලුම්කාරියගේ ඉල්ලුම් පත්‍රය ප්‍රතික්ෂේප කිරීමෙන් මහේස්ත්‍රාත්වරයා දෙන ලද නියෝගය නිවැරදිය යන මතයට බැසගත් මම ඒ අනුව මෙම ඇපැල නිෂ්ප්‍රභා කරමි.

ඇපැල නිෂ්ප්‍රභා විය.

ගරු සන්සෝනි විනිශ්චයකාරතුමා සහ ඇල්. බී. ද සිල්වා විනිශ්චයකාරතුමා ඉදිරියේ

දොන් නෝරිස් අප්පුහාමි එ. නේරිස් සිංඤෝ හා තව කෙනෙක්*

සු. උ. නෝ. 619/1960—පානදුරේ දි. උ. (ඇල්ජ), නෝ. 7058.

වාද කළේ සහ තීන්දු කළේ: 1963 මැයි මස 15 වනද.

බාලවයස්කාරයින්—බාලවයස්කාරයෙකු විසින් ලියා අත්සන් කර දෙන ලද ඔප්පුවක් නීතියෙන් ඉවෙම අවලංගුවේ ද? එසේ නැත්නම් අවලංගු කළ හැකි ද?—අයිතිය පැවරීමට බාලවයස්කාරයෙකු විසින් ප්‍රකාශය ස්ථිර කළ යුතු ද?

තීන්දුව:— (1) බාලවයස්කාරයෙකු විසින් ලියා අත්සන්කර දෙන ඔප්පුවක් නීතියෙන් අවලංගු කළ හැකි නමුත් නීතියෙන් ඉවෙම අවලංගුවී නැත. එවැනි ඔප්පුවක් වෙනස් කිරීමට බාලවයස්කාරයාම පියවරක් ගන්නාතුරු ප්‍රකාශ ස්ථිර කිරීමක් නොමැතිව මිලයට ගත් නැනැත්තාට අයිතිය පැවරෙනවා ඇත.

(2) මේ සම්බන්ධයෙන් කර ඇති නඩු තීන්දු අතර කිසිම පරස්පර විරෝධිතාවයක් නැත.

(3) දෙවෙනි විත්තිකරු ඔහුගේ බාලවයස්කාර පුත්‍රයින් වෙනුවෙන් ඉඩම භුක්ති විඳ බව පිළිගෙන ඇති හෙයින් ද ඔවුන් සඟකිය ඉඩම් කොටස් දැන් පැමිණිලිකරුට සතුකර ඇති හෙයින් මේ නඩුවේදී දෙවැනි විත්තිකරුට කාලසීමාව අනුව බුත්තියපිට අයිතියක් පැවරීමට ඉඩ නැත.

නීතිඥවරු:— ඒ. සි. ගුණරත්න මහතා, ඇන්. ඇස්. ඒ. ගුණතිලක මහතා, සහ වයි. එච්. ගුණරත්න මහතා සමග පැමිණිලිකාර ඇපැල්කරු වෙනුවෙන්.

විත්තිකාර වගඋත්තරකරු වෙනුවෙන් කිසිවෙක් පෙනී සිටියේ නැත.

ගරු සන්සෝනි විනිශ්චයකාරතුමා,

පැමිණිල්ලේ මහවත්ත යනුවෙන් හඳුන්වනු ලැබූ ඉඩමේ "ජී" ඉඩම කට්ටියේ අයිතිය තමාට පවරණ ලෙස ඉල්ලමින් පැමිණිලිකරු මේ නඩුව පැවරුවේ ය. බෙදුම් නඩුවක අවසාන තීන්දුවේදී කරුණාරත්න සහ කරුණාසේන යන පුද්ගලයින් දෙදෙනා මේ ඉඩමේ අයිතිකරුවන් වූ බව ඔප්පුවී ඇත. ඔවුන් දෙදෙනාම බාලවයස්කාරයන් ව සිටියදී 1956 සහ 1958 යන වර්ෂ වලදී ඔප්පු දෙකක මාර්ගයෙන් ඔවුන්ගේ කොටස් පැමිණිලිකරුට සතු කළහ. මේ නඩුවේ විත්තිකරුවෝ දෙදෙනෙක් සිටිති. බාලවයස්කාරයින්ගේ පියා වන 2 වන විත්තිකරු වන අතර ඔහුගේ බදුකරුවෙකු 1 වන විත්තිකරු වෙයි.

බාලවයස්කාරයෙකු විසින් ලියා අත්සන්කර දෙන ඔප්පුවක් නීතියෙන් අවලංගු කළ හැකි නමුත් නීතියෙන් අවලංගු නැතැයි මේ අධිකරණයෙන් ඉහා පැහැදිළිවම තීන්දු කර තිබියදීත් බාලවස්කාරයින් විසින් පැමිණිලිකරුට පක්ෂව ලියා අත්සන් කර දුන් ඔප්පු නීතියෙන් අවලංගු යයි උගත් දිස්ත්‍රික් නඩුකාරතුමා තීන්දු කර තිබේ. එම තීන්දුව සහ උසාවියේ අවසරය නැතිව බාලවයස්කාරයෙකුගේ ඉඩකඩම් ඔහුගේ බාරකරු විසින් අන් කෙනෙකුට පැවරීමට බලයක් නැතැයි යන වෙනත් තීන්දුවක් අතර පරස්පර විරෝධිතාවයක් තිබුනේ යැයි උගත් දිස්ත්‍රික් නඩුකාරතුමා කල්පනා කළ බව පෙනේ. එවැනි පරස්පර විරෝධිතාවයක් කිසිසේත් ම නැති හෙයින්, ඔවුන් ලියා අත්සන් කර දුන් ඔප්පු වෙනස් කිරීමට බාලවයස්කාරයින්ම පියවරක් ගන්නාතුරු එම ඔප්පු වලංගු බවත් පැමිණිලිකරුට අයිතිය පැවරුන බවත් උගත් දිස්ත්‍රික් නඩුකාරතුමා තීන්දු කළ යුතුව තිබුනි. ඔප්පු ලියා අත්සන් කරදීමෙන් පසු බාලවයස්කාරයින්ගේ ප්‍රකාශ ස්ථිර කිරීමක් නොතිබුන හෙයින් පැමිණිලිකරුට අයිතිය පැවරී නැතැයි ද උගත් දිස්ත්‍රික් නඩුකාරතුමා කල්පනා කළ බව පෙනේ. එය ද වැරදි මතයකි.

කාලසීමා බුත්තිය පිළිබඳ ප්‍රශ්නයට පිළිතුරු වශයෙන් කාලසීමාව අනුව 2 වන විත්තිකරුට ඉඩමට අයිතියක් ලැබී ඇතැයි තීන්දු කිරීමෙන් උගත් දිස්ත්‍රික් නඩුකාරතුමා කුමක් අදහස් කළේ දැයි තේරුම් ගත නොහැකිය. ඔහුගේ බාලවයස්කාර පුත්‍රයින් වෙනුවෙන් තමා මේ ඉඩම භුක්ති විඳ බව 2 වන විත්තිකරු පිළිගෙන ඇත. එහෙයින්, ඔහුගේ පුත්‍රයින්ට විරුඬව කාලසීමා බුත්තිය අනුව ඔහුට අයිතියක් පැවරීමේ ප්‍රශ්නය මතු නොවේ. පැමිණිලිකරුට බාලවයස්කාරයින් විසින් ඔවුන්ගේ කොටස් සතු කර අවුරුදු දහයක් ගතවී නැති හෙයින් පැමිණිලිකරුට විරුඬව කාලසීමාව පිළිබඳ ප්‍රශ්නයක් මතුවීමට පුළුවන් කමක් ද නැත.

එම නිසා ඇපැලට භාජන වූ නඩු තීන්දුව ඉවත ලමින් පැමිණිලිකරු ඉල්ලා ඇති පරිදි විත්තිකරුවන් දෙදෙනා ගාස්තුවලට යටත් කරමින් අපි නඩුව තීන්දු කරමු. අලාභ ප්‍රමාණය එකහවූ පරිදි වීය යුතුය.

ගරු ඇල්. බී. ද සිල්වා විනිශ්චයකාරතුමා:

මම එකහවෙමි.

ඇපැලට ඉඩ දෙන ලදී.

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 64 වෙනි කා., 95 වෙනි පිට බලනු.

ගරු ජී. පී. ඒ. සිල්වා විනිශ්චයකාරතුමා ඉදිරිපිට

ඇම්. ඩී. ඇස්. රත්නවීර, කම්කරු කීලධාරිනෑන එ. කේ. අරුලම්පලම්*

ග්‍රෙප්ඨාධිකරණය අංකය 897/1962—කොළඹ මහේස්ත්‍රාත් උසාවියේ අංකය 15579/ඒ.

විවාද කළ දිනය: 11.3.1963.
නිතු කළ දිනය: 9.5.1963.

සේවක අක්‍රීයාධක අරමුදල් පණත, වසී 1958, අංක 15—චිත්තිකරු දුම්කොළ හෝ දුම්කොළ වලින් තැනෙන ද්‍රව්‍ය නිෂ්පාදනය කිරීමේ ව්‍යාපාරයක් ගෙනයාම—පණතේ 8 (1) වන ඡේදය එම පණතට අනුව පැණවුනු අංක 2 (1) දරණ රෙගුලාසිය සමග එකට කියවන කල එය පණතෙහි තේරුමට අසුවන රක්ෂාවක් වීම—සේවායෝජකයා වශයෙන් සේවකයන්ගේ ඉපැයීම් වලින් සේවක අක්‍රීයාධක අරමුදල පණත අනුව ගෙවිය යුතු ප්‍රදනය ගෙවීම චිත්තිකරු පැහැර හැරීම—මෙයින් පණතේ 15 වන ඡේදය උල්ලංඝනය වීම—පණතේ 34 (ඒ) සහ 37 වන ඡේද යටතේ චෝදනා—පැමිණිලි පක්ෂය දුම්කොළ වලින් නොඑතු "සුරුට්ටු" යන බව ඔප්පු නොකිරීමේ හේතුවෙන් චිත්තිකරු නිදහස් වීම—මෙම නිදහස්වීමට විරුඩව ඉදිරිපත් කළ අභියාචනය.

සේවක අක්‍රීයාධක අරමුදල් පණතේ (වසී 1958 අංක 15), 34 සහ 37 වන ඡේද යටතේ එම පණතේ 15 වන ඡේදයෙහි ඇති පැණවීම උල්ලංඝනය කරණ ලදයි චෝදනා තුනකට චිත්තිකරුට විරුඩව, ඔහු තමා විසින් රක්ෂාවෙහි යොදවා ඇති සේවකයන් තිදෙනෙකු වෙනුවෙන් සේවක අක්‍රීසාධක අරමුදලට දිය යුතු ප්‍රදනය නොදීමේ හේතුවෙන් නඩු පවරණ ලදි.

මෙම පණතට අසුවන රක්ෂා අතර දුම්කොළ නිපදවීම හෝ දුම්කොළ වලින් තැනෙන ද්‍රව්‍ය නිපදවීම ද ඇතුළත්ව ඇති බව ඒ සඳහා නිකුත්වූ විශේෂ ගැසට් පත්‍රයෙහි උපලේඛනයෙහි, අංක 10 දරණ ඡේදයෙන් කියැවේ.

පැමිණිල්ලේ සාක්ෂි නිමාවට ගිය පසු උගත් මහේස්ත්‍රාත්තුමා එම චිත්තිකරු විසින් ගෙන යන ලද ව්‍යාපාරය දුම්කොළ හෝ දුම්කොළ වලින් තැනෙන ද්‍රව්‍ය නිපදවීම බව පැමිණිලි පක්ෂයට ඔප්පු කිරීමට නොහැකිවී යයි කියමින් චිත්තිකරු නිදහස් කලේ පහත සඳහන් කරුණු සලකමිනි.

(ඒ) පැමිණිලි පක්ෂයට ඉදිරිපත් කළ වාචෝද්ගත (oral) සාක්ෂිවල දුම්කොළ ගැන සඳහන් නොවිය.

(බී) චිත්තිකරුගේ දුම්කොළ පැක්ටෙරියෙහි නියුක්ත කම්කරුවන් පිළිබඳ විස්තර ඇතුළත් කර ඔහු විසින් 19–10–1958 දතමින් නිකුත්වූ රෙගුලාසි වල 8 වන රෙගුලාසිය අනුව එවනු ලැබූ පැමිණිලි පක්ෂය ඉදිරිපත් කළ ප්‍රකාශ පත්‍රයෙහි දුම්කොළ ගැන සඳහන්වී නැත.

(සී) දුම්කොළ වලින් නොතැනුනු සුරුට්ටු ද වෙළඳ පොලෙහි තිබේ.

ඇටෝර්නිජනරාල්තුමාගේ අනුමතිය ලැබූ පැමිණිලිකරු මෙම නියෝගයට විරුඩව ඇපැල් පෙත්සමක් ඉදිරිපත් කෙළේය.

නීතුව:— "සුරුට්ටුව" යන වචනයට ඔක්ස්ෆර්ඩ් ශබ්දකෝශයේ දී තිබෙන "ධූමපානය සඳහා දුම්කොළ වලින් වටකුරුව ඔතන ලද්දක්" යන තේරුම සහ චිත්තිකරු තමාගේ සුරුට්ටු කර්මාන්තය පිළිබඳව මෙම

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 64 වෙනි කා., 97 වෙනි පිට බලනු.

චෝදනාවේ දිනයට කලින් 19-10-1958 දින දරණ රෙගුලාසි මාලාවේ 8 වන රෙගුලාසියට අනුකූල ව එවන ලද ප්‍රකාශය ද මෙහි පැමිණිල්ලේ නඩුව මනාසේ තහවුරු වන ලෙස ඔප්පු කර තිබේ.

නීතිඥවරු: ඇල්. බී. ටී. ප්‍රේමරත්න, ජ්‍යෙෂ්ඨ රජයේ අධිනීතිඥතැන, ඇටෝර්නිජනරාල්තුමා වෙනුවෙන්.
චෝදිත වගඋත්තරකරු වෙනුවෙන් නියෝජිතයෙක් නැත.

ගරු ජී. පී. ඒ. සිල්වා විනිශ්චයකාරතුමා:

මෙම නඩුවෙහි මින්පහත චෝදිතයා ලෙස සඳහන් කෙරෙණ චෝදිත වග-උත්තරකරුවාට විරුද්ධව වෂී 1958, අංක 15 දරණ සේවක අර්ථසාධක අරමුදල් පණතේ (Employees Provident Fund Act) 15 වන ඡේදයෙහි ඇති පැණවීම් උල්ලංඝනය කරණ ලදැයි කරුණු තුනක් යටතේ නඩු පවරණ ලදී. පළමු වන කරුණ යටතේ ඔහුට විරුද්ධව ඉදිරිපත් කළ චෝදනාව පහත පළවේ:—

වෂී 1958 අංක 15 දරණ සේවක අර්ථසාධක අරමුදල් පණත (මෙය මින්පසු යථොක්ත පණත නමින් හඳුන්වනු ලැබේ), බල පවත්වන වයස අවුරුදු 14 කට වැඩිවූ එනමේ ම අවුරුදු 55 කට අඩුවූ පිරිමියෙකු ලෙස සිටියදී, පස්දෙනෙකු හෝ ඊට වැඩිදෙනෙකු රක්ෂාවෙහි නියුක්ත, සම්පූර්ණ වශයෙන් හෝ අර්ධ වශයෙන් දුම්කොළ නිෂ්පාදනයෙහි හෝ දුම්කොළ වලින් තැනෙන ද්‍රව්‍ය නිෂ්පාදනයෙහි නිරතවූ ව්‍යාපාරයක, එනම් තෙල්ලිපලයිහි, කුරුම්බවිටි ප්‍රදේශයෙහි පිහිටි අරුලම්පලම් සුරුට්ටු පැක්ටෙරියෙහි වැඩ කරන්නන් වන පී. පොන්නදෙරේ නැමැත්තකුගේ සේවායෝජකයාව සිට ඒ රක්ෂාව යථොක්ත සේවක අර්ථසාධක අරමුදල් පණතේ 8 (1) උප-ඡේදය සමග 1958 ඔක්තෝම්බර් මස 31 වන දින පලවූ නොා: 11573 දරණ අණ්ඩුවේ ගැසට් පත්‍රයෙහි සඳහන් රෙගුලාසිවල අංක 2 (1) (ඒ) දරණ රෙගුලාසිය සමග ගත් කල එම පණතට අනුවත රක්ෂාවක් නිසා පණතේ 15 වන ඡේදය උල්ලංඝනය වන අයුරින් ඉහත නම් කළ පොන්නදෙරේ නැමැත්තා වෙනුවෙන් 1960 නොවැම්බර් මාසයේ අවසාන දිනට ප්‍රථම ඔහු නමින් වෙනත් අර්ථසාධක අරමුදලක් හෝ ප්‍රදයක විශ්‍රාම වැටුප් පිළිවෙලක් හෝ නොතිබියදී එම අර්ථසාධක මුදලට ඔහුගේ ප්‍රදනය 1960 ඔක්තෝම්බර් මාසයේ නොගෙවන ලදින් සේවා යෝජකයාගෙන් වෂී 1959 ඔක්තෝම්බර් මස 26 වෙනි දින පලවූ නොම්මර 11924 දරණ ගැසට් පත්‍රයෙහි සඳහන් 10 (3) දරණ ඡේදයෙන් නිකුත්වී ඇති නියෝගය සමග 10 (1) දරණ ඡේදය කියවූ කල දඩුවම් ලැබිය යුතු වරදක් කෙරී ඇති බැවින් මෙම චෝදිත වග-උත්තරකරු එම පණතේ 34 (ඒ) දරණ ඡේදය යටතේ දඩුවම් ලැබිය යුතු වරදක් කළ නිසා එම පණතේ ම අංක 37 දරණ ඡේදයෙන් දඩුවම් ලැබිය යුතුය යන්නයි.

පළමු වන දෙවන කරුණු වලදී ද ඇන්. කන්දවානම් සහ ඇන්. අරුලම්බලම් යන නම් ඇති වෙන මිනිසුන් දෙදෙනෙකු පිළිබඳව ද මේ වරදට ම ඔහුට විරුද්ධව චෝදනා ඉදිරිපත් කරන ලදී.

පහත සඳහන් කරුණු පිළිබඳව පැමිණිල්ලෙන් සාක්ෂි ඉදිරිපත් කෙරිනි:—

(ඒ) අරුලම්පලම් සුරුට්ටු පැක්ටෙරියේ අධිකරු මෙම චෝදිත වගඋත්තරකරුවා වේ. එම පැක්ටෙරියෙහි කෙරෙණ ව්‍යාපාරයෙහි ස්වභාවය සුරුට්ටු නිපදවීමයි.

(බී) වයස අවුරුදු 14 ත් වැඩිවූත් 55 ත් අඩුවූත් පිරිමි වන පී. පොන්නදුරේ, ඇන්. කන්දවානම් සහ ඇන්. අරුලම්බලම් යන අයගේ සේවා යෝජකයා චෝදිත වග-උත්තරකරුය.

(සී) එකී සේවකයෝ අරුලම්පලම් සුරුට්ටු පැක්ටෙරියෙහි රක්ෂාවෙහි නිරතවූහ.

(ඩී) එම සේවකයන්ගේ ප්‍රයෝජනය සඳහා අනුමතිය ලැබූ ප්‍රදයක විශ්‍රාම වැටුප් ක්‍රමයක් හෝ අර්ථසාධක අරමුදලක් නොවීය.

(ඊ) වෂී 1960 ඔක්තෝබර් මාසයේ අරුලම්පලම් සුරුට්ටු පැක්ටෙරියේ 70 දෙනෙක් රැකියාවෙහි නියුක්ත වූහ.

(ඇෆ්) පී. පොන්නදුරේ, ඇන්. කන්දවානම් සහ ඇන්. අරුලම්බලම් යන අය වෙනුවෙන් වෂී 1960 ඔක්තෝබර් මාසයට ගෙවිය යුතු ප්‍රදයක මූදල සේවක අර්ථසාධක අරමුදලට වෂී 1960 නොවැම්බර් මාසයේ අවසන් දිනට ප්‍රථම ගෙවීම් විත්තිකරුගෙන් සිදුවී නැත.

පැමිණිල්ලේ සාක්ෂි නිමවූ පසු මහේස්ත්‍රාත්වරයා චිත්තිකරුගෙන් නිදහසට කාරනා ඇසූ කල චිත්තිකරු වෙනුවෙන් පෙනී සිටි නීතිවේදියා චිත්තිය වෙනුවෙන් සාක්ෂි නොකැඳවූ නමුත් චිත්තිකරු විසින් ගෙනගිය ව්‍යාපාරය දුම්කොළ නිෂ්පාදනය හෝ දුම්කොළ වලින් තැනෙන ද්‍රව්‍ය නිෂ්පාදනය කෙරෙන්නක් බව පැමිණිලි පක්ෂය විසින් ඔප්පු කර නැති බව උයාවියට සැළකර සිටියේ ය. මේ විරෝධය පිළිගත් මහේස්ත්‍රාත්වරයා චිත්තිකරු නිදහස් කළේය. ඔහුගේ තීන්දුවෙහි තවත් කරුණු අතර පහත සඳහන් ප්‍රකාශය ද ඇතුළත් විය.

''චිත්තිකරුගේ ව්‍යාපාරය දුම්කොළ නිෂ්පාදනය හෝ දුම්කොළ වලින් තැනෙන ද්‍රව්‍ය නිෂ්පාදනය යන්න පැමිණිලි පක්ෂය විසින් ඔප්පු කිරීම අත්‍යාවශ්‍ය. නමුත් පැමිණිලි පක්ෂය විසින් ඉදිරිපත් කළ වාචෝද්ගත සාක්ෂි වල දුම්කොළ ගැන කිසිම දෙයක් සඳහන් කර නොමැත. පි 2 දමා සලකුණු කරන ලද විත්තිකරු විසින් දෙන ලද ප්‍රකාශයෙහි ද මෙම ව්‍යාපාරයෙහි ස්වභාවය සඳහන් කොට ඇත්තේ සුරුට්ටු ව්‍යාපාරයක් යනුවෙනි. මෙහි ද දුම්කොළ ගැන කිසිම සඳහනක් අවිද්‍යමානය. නොඅනුමානව ම සුරුට්ටු සාදනු ලබන්නේ සාමාන්‍යයෙන් දුම්කොළ වලින් වුවද වෙළඳ පොලේ දුම්කොළ වලින් නොසෑදූ සුරුට්ටු නැතැයි කිය නොහැක. මෙය අපරාධ නීතිය අනුව පවරන ලද නඩුවක් නිසා පි 3 දමා සලකුණු කරන ලද 10 වන ඡේදයෙහි ඇති විග්‍රහය අනුව මෙම නඩුව එයට ඇතුළත් වන්නක් යැයි පැමිණිලි පක්ෂය තීරනාත්මක ලෙස ඔප්පු කළ යුතු යැයි මම කල්පනා කරමි. එබැවින් එම සුරුට්ටු දුම්කොළ වලින් සාදන ලදැයි ඔප්පු කිරීමට නොහැකිවීම මාගේ කල්පනාවේ හැටියට මෙම නඩුවට විනාශකාරී තත්ත්වයක් ගෙනදී තිබේ.''

මෙම නඩුවෙහි පැමිණිලිකරුවූ කොළඹ කම්කරු නිලධාරියා ඇටෝර්නි-ජනරාල් තුමාගේ අනුමැතිය අනුව මෙම නියෝගයට විරුඩව ඇපැලක් ඉදිරිපත් කර තිබේ. ඒ ඉදිරිපත් කර ඇත්තේ පැමිණිලි පක්ෂය විසින් විත්තිකරුගේ මෙම ව්‍යාපාරය දුම්කොළ නිෂ්පාදනයක් හෝ දුම්කොළ වලින් තැනෙන ද්‍රව්‍ය නිෂ්පාදනයක් යැයි ඔප්පු කිරීමට පැමිණිලි පක්ෂයට බැරිවූයේයැයි මහේස්ත්‍රාත්වරයා විසින් තීරණය කරනිබීම වරද සහිතයයි කියමින් සහ ලංකාවේ දුම්කොළ වලින් හැර වෙනත් ද්‍රව්‍යවලින් සුරුට්ටු සෑදෙන බවට සාක්ෂි නඩුපොතෙහි නැති බව ද කියමින් ය.

රජයේ ජ්‍යෙෂ්ඨ අධිනීතිඥ ප්‍රේමරත්න මහතා මෙම නඩුවෙහි ඇපැල්කරු වෙනුවෙන් පෙනී සිටීමින් මා ඉදිරියේ තොයෙකුත් තර්ක ඉදිරිපත් කළේ එම නියෝගය දීමෙහිදී මහේස්ත්‍රාත්වරයා කරුණු වරදවා සලකා ඇති බව සැලකර සිටීමිනි. පළමුවෙන්ම ''ඔක්ස්පඩ්'' ශබ්දකෝෂයේ සුරුට්ටුව යන වචනයෙහි තේරුම ගැන මගේ අවධානය ඔහු විසින් යොමු කරවන ලදී. එහි කියවෙන්නේ සුරුට්ටුව ධූම්පානය පිණිස රටුමකර ඔතන ලද දුම්කොළ කැබෙල්ලක් බව ය. යම් කිසිවකුට විරුඩව ඉංග්‍රීසි භාෂාවෙන් චෝදනාවක් ඉදිරිපත්වූ කල්හි ඔහුට විරුඩව ඇති චෝදනාව සුරුට්ටු පැක්ටෙරියක අයිතිකරු වශයෙන් ඔහු දඩුවම් ලැබිය යුතු වරදක් කර ඇති බව නම් සුරුට්ටුව යන වචනයට ඔක්ස්පඩ් ශබ්දකෝෂය දී ඇති තේරුමෙන් කෙනෙකු රැකවරන ලබා ගත යුතු ය. එම තේරුම මෙම නඩුවෙහිදී විවාදයට භාජන වී ඉදිරිපත් කොට ඇති තේරුම සමග නොගැලපේ. වෂී 1958 අංක 15 දරණ සේවක අත්‍යවශ්‍ය අරමුදල් පණතේ 8 (1) දරණ ඡේදයෙන් පැනවෙන්නේ තැන්පත් අරමුදල සහමුලින් හෝ ඉන් අඩක් හෝ රජයෙන් සැපයෙන සංයුක්ත මණ්ඩලයක සේවාවෙහි රක්ෂාවක් හෝ වෙනත් රක්ෂාවක් එම පණතෙහි කරුණු වලට අසුවන රක්ෂාවක් බව රෙගුලාසියකින් ප්‍රකාශ කළ හැකි බවකි. තවදුරටත් එම පණතේ 8 (3) දරණ ඡේදයෙන් පැනවෙන පරිදි නියමිත වයස සීමාවකින් වැඩි සෑම තැනැත්තෙක් ම එම පණතට අසුවන යම්කිසි රැකියාවක වෙන කෙනකු විසින් යොදා නිබේ නම් එම සේවකයා මෙම පණතට ඇතුළත් වන සේවකයෙකි. වෂී 1958 අංක 15 දරණ සේවක අත්‍යවශ්‍යක අරමුදල් පණතේ 46 වන ඡේදයෙන් තමා පිට පැවරී ඇති බලතල අනුව කම්කරු නිවාස හා සමාජසේවා ඇමතිතුමා විසින් 1-1-1958 දකමින් ආණ්ඩුවේ ගැසට් පත්‍රයේ පළකරන ලද රෙගුලාසි මාලාවේ අංක 2 (1) දරණ රෙගුලාසියෙන් එම රෙගුලාසි වල පළමු වන උපලේඛනයෙහි සඳහන් සෑම රක්ෂාවක්ම ආඥා පණතට අසුවන රක්ෂාවක් බව කියවී තිබේ. එම උපලේඛනයට අනුව මෙසේ අසුවන රැකීරක්ෂා නම්: (ඒ) ලංකාණ්ඩුව යටතේ රක්ෂාවක් හෝ (බී) පලාත්පාලක මණ්ඩලයක රක්ෂාවක් හෝ (සී) වෂී 1945 අංක 3 දරණ පලාත්පාලක සේවා ආඥා පණත යටතේ ඇති කළ පලාත්පාලන සේවා කොමිසමේ රක්ෂාවක් හැරුනු විට අනිත් සියල්ල එයට ඇතුළත් වේ.

ආඥා පණතේ 10 වන ඡේදයෙන් මෙම අරමුදලට මාසික ප්‍රදානයක් ගෙවීමට සේවකයා සහ සේවායෝජකයා බැඳී ඇති බව සඳහන් වන ඡේදයෙන් මෙසේ පණතට අසුවන විධිවිධාන පිළිබඳව ගෙවිය යුතු ප්‍රදානය පටන් ගැනෙන දින ආණ්ඩුවේ ගැසට් පත්‍රයෙහි පළකිරීමට අමාත්‍යවරයාට බලය ලැබේ. මේ බලතල අනුව ක්‍රියා කරමින් කම්කරු ඇමති තුමා විසි 1959 ඔක්තෝබර් මස 26 වන දින විශේෂ ගැසට් පත්‍රයකින් ඉහත සඳහන් පැනවීම් අදාල වන රක්ෂාවන් කුමක්ද යන්න පිළිබඳව ප්‍රකාශ කර තිබේ. මෙම උපලේඛනයෙහි 10 වන කොටසින් දුම්කොළ නිෂ්පාදනය හෝ දුම්කොළ වලින් තැනෙන ද්‍රව්‍ය නිෂ්පාදනය මෙම පණතට අසුවන ව්‍යාපාරයක් බව එහි සඳහන් වේ.

යම් හෙයකින් විත්තිකරුගේ ව්‍යාපාරය පණතෙහි සඳහන් විෂයට ඇතුළත් වන ව්‍යාපාරයක් නම් මෙම නඩුවෙහි චෝදනා වල සඳහන් සේවකයන් වෙතුවෙන් පණතේ පැනවීම් වලට අනුව ගෙවිය යුතු ප්‍රදානයට විත්තිකරු වගකිව යුතු ද යන්න ගැන කිසිම තර්කයක් නැත. කලින් සඳහන් කළාක් මෙන් පොන්නඳුරේ, කන්දවානම් සහ අරුලම්බලම් යන වයස 14 ට වැඩි 55 ට අඩු තැනැත්තන්ගේ සේවා යෝජකයා විත්තිකරු බව සාක්ෂි වලින් ඔප්පු කොට තිබේ. එමෙන් ම ඔවුන් විත්තිකරුගේ සූරුට්ටු පැකට්ටරියේ රැකියාවේ නියුතු බව ද ඔවුන්ගේ ප්‍රයෝජනයට මෙම පණතට කලින් විත්තිකරුගේ ව්‍යාපාරයෙහි ඇරඹුණු අනුමතිය ලත් ප්‍රදායක විශ්‍රාම වැටුප් ක්‍රමයක් හෝ පණතේ වගන්ති වල හැටියට ප්‍රදානය කිරීමෙන් විත්තිකරු වැළකෙන වෙන යම් අර්ථසාධක අරමුදලක් හෝ ඇති කොට නොමැති බව ද ඔප්පු වී තිබේ. මේ නිසා විසඳීමට ඇති එකම ප්‍රශ්නය නම් විත්තිකරුගේ සූරුට්ටු පැක්ටෙරිය ආඥා පණතේ සීමා විෂයට අසුවන්නක් ද යන්නය. නඩුවෙහිදී විත්තිකරුගේ නීතිවේදියා විත්තිකරුගේ පැක්ටෙරියෙන් නිපැයෙන සූරුට්ටු දුම්කොළ වලින් නිපැයෙන දේ බව ඔප්පුවී නැති බව කියමින් තර්ක කළ නමුත් පැමිණිලි පක්ෂය මෙම චෝදනාවෙහි සඳහන් දිනයට කලින් දිනක එනම් 15–2–1960 දරණ දින විත්තිකරු විසින් යවන ලද සේවකයන්ගේ විස්තර සඳහන් වෂ 1958–10–29 දරණ දින රෙගුලාසි වලට අනුව යවන ලද ප්‍රකාශය සාක්ෂියක් ලෙස ඉදිරිපත් කළේය. මෙම පෝරමය පුරවා තමාගේ සූරුට්ටු ව්‍යාපාරය පිළිබඳව විස්තර යවමින් විත්තිකරු අනුගමනය කළ ක්‍රියාකලාපය ගැන රජයේ අධිනිතිඥවරයා නදින් කරුණු දක්වූයේ ය. ඔහු කියේ ආඥා පණතේ 10 (3) දරණ ඡේදය යටතේ දැමනිවරයා නිකුත් කළ 26–10–1959 දරණ නියෝගයට අනුකූලව තමාගේ සූරුට්ටු ව්‍යාපාරය දුම්කොළ නිපදවන්නක් හෝ දුම්කොළ වලින් තැනෙන දේ නිපදවන්නක් නියාම විත්තිකරු විසින් එය යවා ඇති බව ය. විත්තිකරුගේ සූරුට්ටු ව්‍යාපාරය දුම්කොළ වලින් සූරුට්ටු නොනිපදවන්නේ නම් එසේ නැතහොත් දුම්කොළ වලින් තැනෙන ද්‍රව්‍ය නොනිපදවන්නේ නම් ඒ ද්‍රව්‍ය වෙන කොළ වර්ගයකින් හෝ වෙනත් යම්කිසි ද්‍රව්‍යයකින් නිපදවන්නේ නම් ඇමතිවරයා විසින් නිකුත් කළ 26–10–1959 දරණ නියෝගයට අනුව කටයුතු කිරීමට විත්තිකරු බැඳී නැත. එපමණක් ද නොව. මෙම පෝරමය විත්තිකරු විසින් පුරවා යවන ලද දිනය වන 15–2–1960 දරණ දින ඇමතිවරයා විසින් දුම්කොළ නිපදවීමේ හෝ දුම්කොළ වලින් තැනෙන ද්‍රව්‍ය නිපදවීමේ ව්‍යාපාරයක් ආරම්භ කළ සේවා යෝජකයෙකුට එබඳු කරුණු සවිස්තරව ලියා එවීමට බල පැවැත්වෙන ලෙස නියෝගයක් නිකුත් කොට තුන්මසකට ආසන්න කාලයකින් මෙය යවා තිබීම ද යැලකිය යුත්තක් සේ මට පෙනේ.

මෙම නඩුවෙහිදී ඉදිරිපත් කරන ලද සූරුට්ටුව ඉංග්‍රීසි වචනය පිළිබඳව ඔක්ස්ඩ් ශබ්දකෝෂයෙහි සඳහන් තේරුමත් මෙම නඩුවෙහි ඉදිරිපත්ව කරුණු අනුව විත්තිකරු විසින් තමාගේ සූරුට්ටු කර්මාන්තය පිළිබඳ විස්තර සපයා යැවීමත් පැමිණිලි පක්ෂයේ නඩුව සැහෙන තත්ත්වයකට ස්ථාපිත කොට තිබෙය යනු මගේ හැඟීමය. මහේස්ත්‍රාත්වරයා මේ විත්තිකරු වරදකරු කළ යුතු ව තිබිනි. මා ඉදිරියෙහි කරන ලද පරිදි මහේස්ත්‍රාත්වරයා ඉදිරියෙහි කරුණු සඳහන් කරන ලද්දේ නම් ඔහු නිසැකවම විත්තිකරු සාපරාධී බව තීන්දු ගනු ඇතැයි මට සහතිකය.

එබැවින් මම මහේස්ත්‍රාත්තුමා විසින් දෙන ලද නිදහස් කිරීමේ නියෝගය නිෂ්ප්‍රභා කර විත්තිකරුට විරුඬව නගා තිබුණු චෝදනාවන්ට ඔහු වැරදිකරු යයි තීරනය කරමි. එක් එක් කරුණකට රු: 100/- බැගින් දඩයක් ගෙවීමට ද මෙම නීන්දුව මෙම අධිකරණය මගින් විත්තිකරුට දන්වූ පසු මේ වරද නවවුරටත් කරගෙන ගියහොත් විත්තිකරුට එක් එක් දිනකට එක් එක් කරුණකට රු: 5/- බැගින් අතිරේක දඩයක් ගෙවීමටද මම නියම කරමි. පණතේ 38 වන ඡේදයෙහි ප්‍රඥප්තීන්ට අනුව ගත යුතු සුදුසු පියවර ගෙන විත්තිකරු විසින් ආඥා පණතේ ප්‍රකාර ගෙවිය යුතු ප්‍රදායක මුදල ලබාගැනීමට නියම කරමින් මෙම නඩුව නැවතත් මහේස්ත්‍රාත්තුමා වෙත යවමි.

නිදහස් කිරීමේ නියෝගය නිෂ්ප්‍රභා කර ආපසු යවන ලදි.