The Ceylon Law Weekly

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with a Section in Sinhala

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WITH A DIGEST

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The plaintiff Company obtained judgment against the 1st and 2nd defendants on two cheques marked 'A' and 'B'. Only the 1st defendant appealed.

Cheque A was for a sum of Rs. 1,000/- drawn by the 1st defendant in favour of the 2nd defendant, Cheque B was also for Rs. 1,000/- drawn by an unknown person and endorsed by the 1st defendant to the 2nd defendant who obtained cash for both cheques from the plaintiff company.

Cheque A was dishonoured on 3.4.62 because payment was stopped by the drawer. B was dishonoured on 11.5.62, with the endorsement "effects not cleared.' A notice of dishonour in respect of both cheques was sent to the 1st defendant on 11.6.62.

Held: (1) That a notice of dishonour in terms of Section 49(12) of the Bills of Exchange Ordinance is a condition precedent to a right of action against an indorser or drawer.

(2) That the said notice sent nearly a month after the date of dishonour is not a notice as required by that section.

(3) That under Section 50(*c*)(*v*) of the Bills of Exchange Ordinance, notice of)dishonour is dispensed with where the drawer countermands payment, therefore the 1st defendant was liable on cheque A.

(4) That as the 2nd defendant did not appeal, judgment against him would stand.

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(1) That the plea that notice of dishonour should be dispensed with, as it was an accommodation bill, could not be raised in appeal as this had not been pleaded nor any issue raised on it at the trial.

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The two appellants were indicted on seven counts, three counts alleged the commission by the 2nd accused of the offences of abetment of the three offences alleged to have been committed by the 1st accused. The remaining count (count 3) alleged the abetment by the 2nd accused of the offence of offering by one Papuraj of a bribe to the 1st accused.

At the close of the case for the prosecution, the trial Judge, after hearing the address of Counsel on one point, remarked that he did not think this was a case for him to call upon the accused for their defence, acquitted both accused, and later set out his reasons.

The Crown appealed against the acquittals of both accused.

At the argument in appeal Counsel who appeared for the Crown, did not seek to press the appeal against the acquittal of the 1st accused on the facts.

Held: (1) That an appeal from an acquittal on a question of fact should only be allowed to succeed in very exceptional cases and where it is perfectly clear to the appellate tribunal that the finding of the inferior court is erroneous. The appeal could be justified only if the misdirection is obvious and has in effect resulted in a miscarriage of justice.

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Buddhist Temporalities

Trustee of devale — Can a de facto *trustee of a devale maintain an action for declaration of title to land belonging to such devale — Buddhist Temporalities Ordinance, Section* 4(1), 4(2), 8 *and* 10.

Held: That a *de facto* trustee of a devale, which has not been brought under the operation of section 4(1) of the Buddhist Temporalities Ordinance, can maintain an action for declaration of title to land belonging to the devale.

Per **G. P. A. Silva, J.** "It would thus appear from a reading of sections 3 and 4 together that the Ordinance contemplates three classes of temples, namely, those that fall within the operation of the Ordinance, those that are exempted from the operation of section 4(1) and those that are exempted from the operation of all the provisions of the Ordinance."

"The Ordinance is therefore silent as regards the vesting of the management of devale property when such devale is exempted from the operation of section 4(1) and it will not be permissible to invoke the provisions of section 8 for the appointment of a trustee to the devale in those circumstances. When, therefore section 8 provides that the trustee for every other devale shall be a person appointed by the Public Trustee, the words "every other devale" must be interpret ted as being applicable only to those devales that are not exempted from the operation of the Ordinance."

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Industrial Disputes Act No. 43 *of* 1960 (*Cap.* 131) *— as amended. Powers given to Labour Tribunals, Industrial Courts, and Arbitrators under the Act — Similarities in the nature of their powers—Classification of such powers, are they judicial or not?—Construction of the ambit of such powers.*

On the 17th September 1962 a Labour Tribunal at Colombo ordered the Respondent to pay three months salary to one R, a member of the appellant union, and to re-instate him in employment. The Respondent petitioned the Supreme Court that this order should be set aside. The matter was ultimately heard by a bench of five judges, who by a majority of 3 to 2 allowed the appeal on the ground that the Tribunal had no jurisdiction to make the order as it had not been appointed by the Judicial Service Commission. The appellant now appealed by way of special leave to the Judicial Committee.

Held: By Viscount Dilhorne, Lord Pearson and Lord Upjohn, (Lord Devlin and Lord Guest dissenting.)

That a Labour Tribunal did not exercise judicial power, and that the office of President of a Labour Tribunal was not a judicial office, for the following reasons:—

(1) The matters with which a Labour Tribunal may be required to deal both on a reference and on an application, do not make it desirable that Presidents of Labour Tribunals should have the same qualifications as those which distinguish the judges of the superior or other Courts.

(The test adumbrated by Lord Simonds in the *Labour Relations Board Case* applied.)

(2) Labour Tribunals were established for the purposes of the Act of 1950, namely to provide for the prevention, investigation and settlement of industrial disputes, The Act making provision for them did not say that they were to perform the functions of a court and give effect to the legal rights of workmen in connection with the employment.

(3) On a reference of an Industrial Dispute, a Labour Tribunal has the same powers and duties as an arbitrator under the Act. It was rightly held by the Supreme Court that when so acting, a Labour Tribunal was not acting judicially and that an arbitrator and a member of an Industrial Court did not hold judicial offices.

(4) On an application, the powers and duties of a Labour Tribunal do not differ from those of an arbitrator and an Industrial Court or a Labour Tribunal

on a reference in any material respect. A Labour Tribunal, an arbitrator and an Industrial Court are required to do what is just and equitable and it is expressly provided that a Labour Tribunal when dealing with an application is not restricted by the terms of the contract of employment on granting relief or redress.

(5) The similarity of the powers and duties of a Labour Tribunal both in relation to a reference and to an application points strongly to the conclusion that its functions are not of a different character on an application to those on a reference or to those of an arbitrator or an Industrial Court.

(6) By Section 31B(2) inserted into the Act of 1950 by the amending Act of 1957, a Labour Tribunal was required to defer making an order on an application if it appeared that the subject-matter of the application was under discussion with the employer until the discussion was concluded, or the Minister referred the matter to an arbitrator, or to an Industrial Court, or a Labour Tribunal.

Section 31B(3) also introduced by the amending Act of 1957 further provides that a Tribunal shall suspend its proceedings on an application if it appears that the subject-matter of the application is similar to or identical with a matter constituting or included in an industrial dispute into which an inquiry under the Act is held, or, if the facts affecting the application are facts affecting any proceedings under any other law. This sub-section further provides that upon the conclusion of the inquiry or of the proceedings under any other law, the tribunal should resume its proceedings and in making its order on the application should have regard to the award or decision in the inquiry or other proceedings.

These two sub-sections showed that, far from being established in substitution for or as an alternative to the ordinary courts, Labour Tribunals were created as part of the machinery for preventing and settling industrial disputes, since it would be novel if proceedings in a Court of Law were required by law to be suspended during discussions between the parties to these proceedings, and if a court of law was required to have regard to awards made in respect of an industrial dispute by non-judicial persons, when making its order on an application.

Per **Lords Guest and Devlin** (dissentiente) that the power given to the Labour Tribunal fell within the accepted definition of judicial power, for the reasons in particular that

(*a*) The power given to the Tribunal was that of giving a binding decision between the parties.

(*b*) The power proceeded from the Sovereign, and was thus the judicial power of the State.

(*c*) The power to make an order that was just and equitable precluded the tribunal from making an arbitrary order, and presupposed the establishment and application of a system of rules of law.

(*d*) The power was to adjudicate on existing rights, and not to create rights for the future. These are rights which arose in respect of a relationship of employer and workman when the statute created the Labour Tribunal with the right in a workman to go before a Tribunal.

(*e*) The power of a Labour Tribunal had to be exercised judicially i.e. it must act in accordance with the principle of natural justice.

(*f*) Upon a consideration of all the provisions of the Statute creating the Tribunal, the only duty upon the Tribunal in making was to consider what was just and equitable between the parties. He was not bound to consider what sort of order, for example, was most likely to promote industrial peace.

UNITED ENGINEERING WORKERS UNION *vs.* DEVANAYAGAM 35

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Ceylon (Parliamentary Election) Order in Council

Election Petition — Agency — Charge of corrupt practice of making or publishing false statements of fact concerning personal character or conduct of rival candidate at meeting — Defence that the speaker was neither agent nor one acting with knowledge or consent of respondent — Production of police report in support of charge — Trial Judge holding that although chairman of meeting was agent of respondent he exceeded authority when he permitted the alleged speaker to make a speech — Can this speaker be regarded as an agent within the meaning of the term to make a speech — Can this speaker be regarded as an agent within the meaning of the term in Election Law—Ceylon (Parliamentary Elections) Order in Council 1946, *sections* 58(1)(*d*) *and* 77(*c*).

Evidence — Police officers on duty at election meetings making reports of speeches made to superiors — Production of such report in proof of such charge — Failure to produce original notes from which report compiled — Effect — Evidence Ordinance — Admissibility of such report under section 35 *thereof — When admissible under section* 159 *of the* 160 *of Evidence Ordinance*

Evidence Ordinance, sections 146, 155 — *Purposes for which such police report is available.*

Proof of charges in election petition — Standard required — Whether same as in criminal case.

Advisability of permitting police officers to confine themselves to their regular and more conventional duties.

In support of a charge of making false statements of fact concerning the personal character or conduct of the rival candidate, evidence was led to show that at a meeting held in support of the Respondent, some person had in the course of a speech made an allegation that M (a rival Candidate) had taken a bribe of Rs. 75,000/- and acted treacherously against the former Prime Minister.

The defence taken up was that the person who made the speech did so neither as agent nor with the knowledge or consent of the Respondent. The trial judge while accepting the position that the speaker had not been expressly appointed an agent of the respondent held;

(*a*) that there was not sufficient evidence from which to conclude that the speaker made the statement with the knowledge and or consent of the respondent;

(*b*) that the chairman of the meeting had no authority to add to or delete from list of speakers previously chosen by the Respondent and that in permitting the particular speaker to make a speech, the Chairman exceeded his authority.

Held: That in view of (i) the evidence establishing that this particular meeting could not have commenced at the scheduled time unless persons not previously selected had been permitted to speak and that only two or three of those earlier selected to speak turned up at the meeting.

(ii) the absence of evidence that the Chairman had been prohibited by the Respondent from permitting speeches to be made by persons other than those previously chosen by the Respondent, and

(iii) the fact that when the Chairman presided as Agent or with the knowledge and consent of the respondent, he had implied authority to supervise and control the meeting and to permit speeches to be made at his discretion,

the speaker in question should be regarded as an agent within the meaning of the term in Election Law.

The petitioner sought to prove an alleged false statement by producing a document in Sinhala marked P56 which was described by a Police Sergeant as the original or a carbon copy of what his brother had written in Sinhala at the former's dictation from notes made by him at the meeting held on 9.3.65 (received at the C.I.D. Office only on 3.4.65).

Held: (1) **(Sri Skanda Rajah, J.,** dissenting) That apart from other suspicions attaching to it, it was unsafe to admit in evidence the police report P56 as the notes taken down at the meeting from which the report is alleged to have been compiled were not produced, either because they were destroyed or deliberately suppressed. The best evidence of what a Police Officer notes at a meeting will be the notes themselves.

(2) That a report of a speech made at an election meeting forwarded by a Police officer to his superior on instructions from him does not constitute an "official book register or record" as contemplated in Section 35 of the Evidence Ordinance and consequently P56 was not admissible under that Section.

(3) That it could not be argued that the evidence of matters stated in P56 was duly given under section 159 or 160 of the Evidence Ordinance because if these two sections were intended to be utilised, both the Judge and the witness should have been made aware that evidence was being given as permitted by one or other of these two sections.

(4) That a police Officer's report of matters said to have been uttered at a meting is not a statement made by such person or reduced into writing within the meaning of section 145 of the Evidence Ordinance. That Section relates only to statements written by the witness himself, or statements made by him and accepted by him at the time to be correctly reduced to writing.

Held further: That a statutory ground of avoidance relied on in an election petition must be established by proof of the same standard as is required in a criminal case.

WIMALASARA BANDA *vs.* YALEGAMA 12

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Ceylon (Parliamentary Elections) Order-in-Council 1946 — *Meaning of term "agent."*

Evidence — Is a party bound by adverse evidence given by his own witness who has been generally disbelieved?

Where, in terms of section 82A of the Ceylon (Parliamentary Elections) Order-in-Council 1946, an appeal to the Supreme Court from the determination of an Election Judge was granted only on a question of law —

Held: (1) That a finding of fact reached **either** in the absence of any evidence to justify it, **or** on the ground that there was no evidence to justify a conclusion to the contrary, forgetful of the existence of such evidence, is liable to be set aside on the ground of an error of law.

(2) That the test to be applied in determining whether a pure finding of fact should be set aside is whether on the facts proved, the contrary conclusion is the true and only reasonable one.

Therefore, where the Election Judge had concluded that one P. L. Chandrasena was not proved to have been an agent of the respondent, and there was on record the evidence of a witness, Abeywickrema, that Chandrasena was one of the main workers for the respondent, and the evidence of Fernando, the election agent, that Chandrasena "did canvassing for the respondent," —

Held: (3) That such evidence sufficed to establish Chandrasena as an agent of the respondent in the sense that expression is understood in the law relating to elections.

The question at issue was whether a pamphlet was printed, distributed and expense incurred thereon with the knowledge of the Election Agent of the respondent. Witness Abeywickrama who was called on behalf of the respondent stated that upon receiving information that the particular pamphlet had been printed without authority, he informed the Election Agent who directed that the pamphlet be not distributed, and that accordingly its distribution was suppressed. The Election Judge disbelieved Abeywickrema, and held that the pamphlet had in fact been distri-

buted, but that there was no evidence that the Election Agent had knowledge of it.

In appeal, it was contended by the petitioner — appellant that upon the evidence of Abeywickrema himself, who was a witness produced by the respondent, it was abundantly clear that the Election Agent had knowledge of the existence of the pamphlet.

Held: (4) That where a witness summoned by a party is disbelieved by the trial judge, it would be wholly unreal to utilise *against* such party the evidence so given merely because such evidence has been produced or led on his behalf.

DAHANAYAKE *vs.* KANNANGARA 62

Election as Member of House of Representatives — Whether seat is vacated by the operation of the Imposition of Civic Disabilities (Special Provisions) Act No. 14 *of* 1965 *— Competence of Parliament to pass the Act imposing disabilities and disqualifications on named individuals — Implied powers of Parliament — Ceylon (Constitution) Order in Council, sections* 29(1) *and* (4) *— Appropriateness of Writ of Mandamus on Clerk to the House of Representatives for payment of salary to a member of the House.*

The appellant, was elected to the House of Representatives on 22nd March, 1965 and was normally entitled to hold office for 5 years unless the Parliament was sooner dissolved. In 1959 the appellant, along with five others, had been found guilty by a Commission of Inquiry of certain allegations of bribery made against them. On 16th November 1965, ihe Parliament passed the Imposition of Civic Disabilities (Special Provisions) Act imposing certain civic disabilities on these six persons in consequence of which, so far as the appellant was concerned, his seat as a Member of the House of Representatives was deemed to have become vacant, In pursuance of these provisions the Clerk to the House of Representatives and the Assistant Clerk refused to recognise the appellant as a member of Parliament and to pay him his remuneration and allowances as a member.

It was contended on behalf of the appellant that the Act was invalid as it was inconsistent with the Ceylon (Constitution) Order in Council 1946, and secondly that although it purported to have been enacted as an amendment of the Constitution in the manner provided by section 29 (4) thereof, it was not an effective amendment for the following reasons:—

(1) That the Act was not law. Instead of being the exercise of legislative power, it was the usurpation of judicial power.

(2) That even if the Act was an exercise of legislative power it cannot be regarded as an amendment of the Constitution because it does not, upon its face, have that character.

(3) That if, upon its proper construction, the Act were both an assumption by the Parliament of judicial power and the exercise of that power, the Act attempted too much, for judicial power would need to be acquired by Parliament under an amendment of the Constitution before it could be exercised by Parliament. This would require two Acts of Parliament.

Held: (1) That although the Act was inconsistent with the constitution it was a proper amendment of the constitution enacted in the manner provided by section 29(1) and (4) thereof.

(2) That when the proviso to section 29(4) proceeded to set out the manner of presentation of a constitutional amendment it did not intend to prescribe a particular form to be present on the face of it.

(3) That in the exercise of Parliament's powers to protect itself, the passing of a law imposing disabilities on a particular member of Parliament for conduct unfitting him to remain as such is not in essence a law punishing him for his conduct, but should be treated as an incident of the legislative function and that the Act was, therefore, not a usurpation of judicial power.

(4) That a mandate in the nature of a Writ of Mandamus did not lie against the respondents as they were servants of the Crown and only owed duties to the House itself or to the Crown as the employer of the respondents but not to the appellant.

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Cheques

See under — BILLS OF EXCHANGE

Civil Procedure Code

Section 406 *— Withdrawal of action without obtaining permission to file fresh action for same subject-matter — Meaning of term "Subject-matter" in the section — Does decree dismissing action on such withdrawal operate as res judicata — Statutory bar in Section* 406 *— Effect of consent decree — Res judicata — Burden of proof.*

The Plaintiff instituted action against the defendant for declaration of title to a land called G alleging that they on 3.3.1963 forcibly entered the said land and erected a house.

The defendants in their amended answer pleaded

(1) that they were entitled to a share of certain lots depicted in the plan made for the purpose of the case and forming a land called J.

(2) that the rest of the lots in the said plan formed the land called G and that they never disputed title to it.

(3) that the plaint and decree in case No. 9808, D.C. Avissawella was *res judicata* between the plaintiff & themselves.

At the trial the question regarding the plea of *res judicata* was raised as a preliminary issue which the learned District Judge decided in favour of the defendants and dismissed the plaintiff's action with costs. The plaintiff appealed.

In support of this plea of *res judicata* the defendants produced only the plaint and the decree in D.C. Avissawella 9808 which showed

(*a*) that the 1st defendant in this action and some other parties had been disputing plaintiff's title to land G. for five years prior to the plaint and put up a boutique despite protests.

(*b*) that that action was withdrawn and dismissed without costs on 30.9.60 without obtaining permission to institute a fresh action for the subject-matter of the action.

Held: (1) That the withdrawal of the said action No. 9808 D.C. Avissawella did not preclude the plaintiff from bringing this action because the subject-matter of the present action is not the same as that of action No. 9808 in that —

(a) the trespass complained of in the present case took place over two years after the termination of the proceedings in Case No. 9808.

(b) in the present case differences relate to the identity of the corpus of the plaintiff's land and there is no dispute as to title as in the earlier case,

(2) That as subject matter of the two actions was not the same, the fact that the decision of the questions raised in the earlier action that was withdrawn would have been decisive in respect of some of the issues in the present action was immaterial.

(3) That the term "subject-matter" in section 406 of the Civil Procedure Code does not mean the property in respect of which the action is brought. It includes the facts and circumstances upon which the plaintiff's rights to the relief claimed by him depends.

(4) That where a plaintiff desires to withdraw his action he is entitled to do so and the Court has to enter an order of dismissal. The dismissal of an action upon its withdrawal by the plaintiff gives rise to the statutory bar provided for in section 406(2). It does not provide the basis for a plea of *res judicata* properly so termed, because there is no adjudication.

(5) That a consent decree supports a plea of *res judicata* properly so termed, even though there was no adjudication by Court, because such a decree implies a decision upon the rights in dispute between the parties to the action.

(6) That inasmuch as no copy of the answer filed by the defendants had been produced the party relying on the plea of *res judicata* had not placed before Court sufficient material to support such a plea.

Per **Samerawickrema, J.** "It is incumbent upon a party who makes a plea of *res judicata* to place before Court material necessary to show what the matters were in dispute in the earlier action and that matters in dispute in the action under consideration are the same."

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Contempt of Court

Publication in newspaper of statement calculated to injure the reputation of courts — Need to protect reputation of courts in public interest and interests of good government — Courts Ordinance, section 47.

In the issue of a newspaper published by the 3rd respondent on 16.10.1966 the following news item appeared:—

MRS. B: MOVES TO KEEP ME OFF POLITICS

"Mrs. Sirima Bandaranaike at a public meeting held at the Bandarawela esplanade on Saturday October 15, 1966) said that the Dudley Senanayake Government had pledged to keep her off politics and that was why it had framed frivolous charges against her two brothers, followed by an election petition against her.

At the time of this publication an election petition presented against one of Mrs· B's brothers had been decided against him and an appeal to the Supreme Court from that determination of the Election Judge had been dismissed. Against another of her brothers there was pending at this time a prosecution initiated by the Attorney-General alleging the Commission of the offence of bribery.

The petitioner prayed for the issue of a rule on Mrs. B, (1st respondent) the Editor of the said newspaper (2nd respondent) and the Publisher, (3rd respondent) to show cause why they should not be punished for contempt of court.

When the matter came up first for hearing *ex parte* to consider whether a rule shall issue, the court while refusing to issue a rule on the 1st respondent as there was no evidence oral or documentary adduced to show that she in truth made the statement attributed to her, ordered a rule to issue against the 2nd and 3rd respondents.

Accordingly the 2nd and 3rd respondents appeared before Their Lordships and presented affidavits. The 2nd respondent in his affidavit stated *inter alia* (*a*) that as Editor he took full responsibility for the publication (*b*) that he approved the publication through inadvertence without realising the possibility of the statement in question being understood by readers as involving a comment on the decision of the election court or of the Supreme Court and that there was a likelihood of it prejudicing the public (mind) in regard to the bribery case.

The 3rd respondent as a working director of the Company accepted full responsibility.

Both respondents pleaded guilty and expressed deep regret and apologised to all three courts concerned. Counsel appearing for them addressed the Court in mitigation of punishment.

Held: (1) That the published statement is capable of the interpretation that the courts are also in some way in collaboration with the Senanayake Government's attempt to keep the Leader of the Opposition out of politics by upholding frivolous charges.

(2) That the public mind must not be permitted to be prejudiced against the courts by an insinuation of bias or impartiality.

(3) That taking into consideration the amplitude of the apology tendered and the circumstances set out in the affidavits a fine of Rs. 1,000/- should be imposed on each of the respondents, in default 2 months' simple imprisonment.

Per **T. S. Fernando, J.** "It is a matter for some surprise that, despite what I believe has been remarked by this Court on earlier occasions, many newspaper offices do not yet appear to have the assistance, in their daily working, of men with knowledge of the law and of legal experience to examine proposed publications so as to avoid the publication of defamatory, contemptuous or other offensive matter."

JAYARATNE *vs* BANDARANAIKE & TWO OTHERS .. 54

Contract

Trusts Ordinance, cap. 87, section 93 — Co-owners agreeing to sell all their interests in a land which was subject matter of a partition action after final decree — Transfer of divided lots allotted in final decree as agreed to plaintiff — After agreement to sell and before dates of final decree and transfer of divided lots, usufructuary mortgage given by same co-owners of their interests to defendant — Action by plaintiff to recover possession — Does mortgage come within the meaning of the word "property" in section 93 of the Trusts Ordinance — After execution of transfer of divided lots is there an existing contract capable of specific performance.

PEIRIS *vs.* MARASINGHE 1

Co-owner

See TRUSTS—PEIRIS *vs.* MARASINGHE 1

Court of Criminal Appeal Decisions

Misdirection — Non-direction amounting to misdirection — Plea of private defence of person — Jury invited to act on conjecture — Facts favourable to defence not fairly and adequately put — Corroborative value of statement by appellant to Police — Non-direction — Versions presented as conflicting when no conflict in fact — Summing-up unfair and unjust.

The prosecution evidence, in an indictment for the murder of one Jayakody against the appellant, established the fact that the appellant dealt one blow on the head of the deceased with the blunt side of an axe. The appellant admitted the assault, but gave in evidence a version of events preceding the assault. This version implied that the axe was not brought by the appellant, but was seized on the spur of the moment, after the deceased pulled out a knife, and that the axe was wielded by the appellant in the exercise of the right of private defence of the person. There was no real conflict between prosecution and the defence versions of the incident.

The two prosecution witnesses denied that they saw a knife in the hands of the deceased. But the defence called one W, who had been a prosecution witness at the non-summary inquiry ,who deposed that when the body of the deceased was lifted, he saw a knife which had been lying under the body. It appeared from the summing-up that the Commissioner was aware that W had given similar evidence in the Magistrate's Court.

Held: That the summing-up contained the following misdirections or non-direction amounting to misdirection:

(1) A commendation to the Jury of a prosecution suggestion that W gave false evidence "to help" the appellant, since this suggestion was not put to W, and there was no evidence of any friendship between W and the appellant. It was, therefore, a mere conjecture, and it was unjust and unfair to invite the Jury to act upon it.

(2) The uncontradicted evidence of the appellant regarding the deceased's previous aggression and acrimony towards the appellant supported the defence version that on the morning of the incident also the deceased had been threatening and aggressive, but the summing-up did not contain even a bare statement of the mode in which that evidence might assist the defence, Instead, the evidence was presented to the Jury as the basis for a motive, and only as being hostile to the defence case. It was unfair thus to present it.

(3) The proper significance of the appellant's evidence that on the spur of the moment he had seized an axe found at the scene was not mentioned in the summing-up and this amounted to a failure to sum up adequately evidence on which the defence relied.

(4) The Jury were not directed that the statement made by the appellant soon after the incident to the Police generally corroborated the appellant's evidence and that it contained the substance of the version that he acted in self-defence; and that W's evidence concerning a knife could explain that the appellant's omission to mention the knife in his statement had been inadvertent.

(5) It was a misdirection to tell the Jury that "if what the accused says is the truth, the version the three witnesses speak to..... is not true", and that they must convict if the prosecution evidence was true, when in fact the defence position in substance was that the prosecution evidence was true, but incomplete.

Held further: That the verdict could not stand in view of the said misdirection, and the omission to present fairly to the Jury evidence which tended to favour the case of the defence.

QUEEN *vs.* PERERA 67

Court of Criminal Appeal — Culpable homicide not amounting to murder — Application to cross-examine prosecution witness by Crown — Deposition and Police statement put to witness — Limitations on power to cross-examine — Statement prejudicial to accused, elicited not to contradict — Illegal, irrelevant and inadmissible — Proper direction — But danger that Jury acted on the illegal evidence — Inducing witness to speak the truth — Limits to right of prosecution — Evidence Ordinance (Cap. 14), sections 154, 155(c) and 155(a), (b), (d), 140, 143, 145, 146, 147 and 132, 148, 149, 150 and 153.

The accused-appellant, J, was convicted of the offence of culpable homicide not amounting to murder. The prosecution and the defence respectively proved two contradictory statements of the deceased as to the cause of death.

The only direct evidence available to the prosecution at the trial appeared to have been that of a witness P. This witness denied the presence of the accused at the scene of the offence, in answer to six leading questions by the prosecution.

Having asked another question (No. 24) whether P saw the accused coming there and picking a quarrel with the deceased, which was answered in the negative Crown Counsel applied to examine P under the provisions of section 154 of the Evidence Ordinance, and this was allowed.

The further examination of P was such that his deposition in the Magistrate's Court was read to him. The witness admitted that evidence, including that relating to the presence of the accused, but repeatedly said that the accused did not come to the scene, and that his different statements to the Magistrate had been lies, one statement to the Magistrate put to P, and categorised by him, as a lie was, "I saw the accused stabbing the deceased." (Q. 63).

Thus, evidence was led which made the Jury aware that, in his deposition to the Magistrate, P had not only alleged that the accused was present, but had further testified directly to the facts that the accused did commit the offence charged, and also that he had some motive against the deceased man. The prosecution also proved the whole of the statement P had made to the Police.

Held: (1) That the prosecution was quite entitled to repair the damage to the prosecution case by proving that the witness P had in the Magistrate's Court stated that the accused had been present, and proof of that former statement was sufficient and necessary to discredit the witness and to invite the Jury to disregard his denial of the accused's presence.

(2) That there was no occasion for the prosecution to prove the remaining statements, including the statement that P saw the accused stabbing the deceased (*Q.* 63), as this did not amount to proof of former statements inconsistent with his evidence nor was there occasion to prove the statements to the Police, as to which the witness had not testified at the trial. Since at the trial the witness had only denied the presence of the accused, the other statements proved by the prosecution did not amount to inconsistent statements within the meaning of section 155(c) of the Evidence Ordinance.

(3) That section 155(c) ,read with section 154, might permit proof of a former inconsistent statement, but does not in law authorise the proof of former staetments which might in advance contradict evidncee which the prosecution feared that the witness might give. In this case, section 155(c) had been utilised by the prosecution illegally.

(4) That even Question 24 could not have been asked by Crown Counsel without the permission of the trial Judge, because at that stage section 154 had not yet been invoked.

(5) That in effect the attempt on the part of the prosecution to discredit its own witness had the consequence that a number of former statements were proved which could well have satisfied the Jury of the guilt of the accused, although in law they were completely irrelevant as evidence of his guilt, and not legally admissible.

(6) That although the trial Judge properly directed the Jury that those statements must not be taken into account against the accused, the Court could not, having regard to the gravely incriminatory nature of the statements, think with any confidence that the Judge's warning must have been heeded by the Jury.

(7) That it was quite likely that the Jury preferred the statement made by the deceased, implicating the accused in preference to the contradictory statement, which did not refer to the accused, by reason of their knowledge of the evidence given by P in the Magistrate's Court.

Per **H. N. G. Fernando, C.J.** "(A).....research into the scope and effect of Section 154 must involve consideration also of Section 155(a), (b) and (d), Section 140, Section 143, Section 145, Section 146, Sections 147 and 132, Section 148, Section 149, Section 153 and perhaps of other sections of the Evidence Ordinance."

(B) "Learned Senior Crown Counsel has submitted that it is the duty of the prosecution to make its best efforts to induce a witness to speak the truth. The argument, in its application in the present context, presupposes that if a witness gives evidence exculpating an accused person, then the witness must be untrue. The argument seems also to be opposed to the presumption of innocence, for evidence exculpating an accused person can be thought to be false only because of a supposition that the accused must be guilty."

QUEEN *vs.* JAYASINGHE 107

Courts Ordinance

Section 47.

JAYARATNE *vs.* BANDARANAIKE & TWO OTHERS .. 54

Criminal Procedure

Application to cross-examine prosecution witness by Crown.

QUEEN *vs.* JAYASINGHE 107

Criminal Procedure Code

Sections 297 *and* 425.

JINADASA & OTHERS *vs.* JOSEPH, INSPECTOR OF POLICE, KANDY 6

Sections 172, 173, 174.

DANAPALA *vs* S.I., POLICE, CINNAMON GARDENS .. 34

Criminal Trespass — Requirement that property should be in 'occupation' of complainant — Penal Code, sections 427, 433 *— Criminal Procedure Code, sections* 171, 425.

The accused was charged with (1) committing criminal trespass "by entering the Deltara Government School playground, property in the custody of K. D. L. Perera" with intent to commit mischief: (2) commiting mischief by damaging a barbed wire fence.

The evidence disclosed that K. D. L. Perera was the Head Master of the school and was not in occupation of the land. The learned Magistrate convicted the accused on a finding that "as Headmaster, he is presumed to be in occupation of this property."

Held: (1) That there was no such presumption known to the law and that the first charge did not disclose an offence punishable under section 433 of the Penal Code.

(2) That where an accused is tried and convicted in a Magistrate's Court for an offence, and the place where the offence is alleged to have been committed falls outside the local limits of the jurisdiction of the court, and the objection to jurisdiction is raised before the Magistrate, not at the commencement of the trial but for the first time on the date fixed for the passing of sentence after the trial had been concluded and the accused found guilty, it was an irregularity under section 423 of the Criminal Procedure Code, if, in fact it occasioned no failure of justice.

Section 181.

WIMALASENA *vs.* INSPECTOR OF POLICE, HAMBANTOTA 75

Section 411.

JAYAKODY *vs.* WIJEWARDENE 82

Sections 210 *and* 336.

ATTORNEY-GENERAL *vs.* RATWATTE & ANOTHER .. 93

Damages

Amount of damages to be awarded for wrongful disposal of a picture.

WIJEWARDENA *vs.* GOMES & OTHERS 99

Decree

Of consent — Effect of.

JAYAWARDENE *vs.* ARNOLISHAMY & ANOTHER .. 58

Deeds

Deeds — Acknowledgment of receipt of consideration by deceased vendor in deed of transfer — Whether proof of valuable consideration—Evidence Ordinance, section 32(3).

Held: That the acknowledgment of the receipt of a sum of Rs. 200/- by the deceased vendor in the Deed P1 was a statement made by him against his pecuniary interest and was, therefore, relevant under section 32(3) of the Evidence Ordinance.

COOMARASWAMY *vs.* THANGARAJAH & TWO OTHERS 66

Deeds — Description in deed inapplicable to land claimed — Application of maxim " falsa demonstratio non nocet" — Does title pass on such deed.

Prescription — When can vendee claim benefit of vendor's possession.

The plaintiff sued the defendants for a declaration of title to a land called lot D of a certain land. The plaintiff had purchased this land on deed P3. The defendants claimed title to the same land on another deed (3D2), in favour of the 3rd defendant.

However, the defendant's deeds purported to convey not Lot D but Lot C. some of the boundaries and the extent of land was also not the same as those of Lot D. The learned trial Judge applied the maxim "*falsa demonstratio non nocet*" and held in favour of the defendants. The plaintiff appealed.

Held: (1) That the maxim "*falsa demonstratio non nocet*" applies only when the words of the instrument are adequate and sufficient of themselves to describe the property. A subsequent erroneous addition will not then vitiate it.

(2) That the maxim was inapplicable on the facts of the present case. Legal title to Lot D therefore lay in the plaintiff.

(3) That in regard to the question of prescription —

(*a*) there was no convincing evidence of possession led an behalf of the defendants;

(*b*) the defendants could not claim the benefit of their vendor's possession as their deed 3D2 did not convey title to Lot D to the 3rd defendant. The conveyance to the defendants must have been of the identical portion of land now in dispute if they were to be permitted to avail themselves of their vendee's possession.

PIYADASA *vs.* SILVA 71

Devale

See under — BUDDHIST TEMPORALITIES ..

Divorce

Evidence — Divorce action — Claim for damages against co-respondent — Confession of adultery by wife — Retracted in evidence — Not admissible against co-respondent — False denial by co-respondent — Proof of adultery — Standard of proof — Beyond reasonable doubt.

Held: (1) A confession by a wife of adultery with the co-respondent, which is retracted by her in her evidence, is not admissible as evidence against the co-respondent.

(2) A false denial by a man that he has ever spoken to a woman does not raise any strong inference that when he did speak to her he did so to entice her to intercourse.

(3) The general standard of proof beyond reasonable doubt applies for proof of adultery.

DHARMASENA *vs.* NAVARATNE 113

Elections

Parliamentary.

See under — CEYLON (PARLIAMENTARY ELECTIONS) ORDER IN COUNCIL

Employer and Employee

See under

INDUSTRIAL DISPUTES

MASTER AND SERVANT

Evidence

Police officers on duty at Election meetings making reports of speeches made to superiors — Production of such report in proof of charge in Election petition — Admissibility.

WIMALASARA BANDA *vs.* YALEGAMA 12

Proof of charges in Election petition — Standard required.

WIMALASARA BANDA *vs.* YALEGAMA 12

Is party bound by adverse evidence given by his own witness who has been generally disbelieved.

DAHANAYAKE *vs.* KANNANGARA 62

Medical Expert's evidence — Grounds for opinion — Insufficient.

SENEVIRATNE *vs.* JOHAN, S.I. POLICE 97

Identity of field passing under last will — Admissibility of extrinsic evidence to establish identity.

WIJEWARDENA *vs.* GOMES & OTHERS 99

Divorce action — Confession of adultery by wife — Retracted in Evidence — Not admisible against co-respondent — Proof of adultery — Standard of proof.

DHARMASENA *vs.* NAVARATNE 113

Evidence Ordinance

Section 105.

JINADASA & OTHERS *vs.* JOSEPH, INSPECTOR OF POLICE KANDY 6

Sections 35, 159, 160.

WIMALASARA BANDA *vs.* YALEGAMA 12

Section 32(3)

COOMARASWAMY *vs.* THANGARAJAH & TWO OTHERS .. 66

Section 114(*a*)

WIMALASENA *vs.* INSPECTOR OF POLICE, HAMBANTOTA 75

Sections, 132, 140, 143, 145, 146, 147, 148, 149, 150, 153, 154 *and* 155.

QUEEN *vs.* JAYASINGHE 107

Section 95

PIYADASA *vs.* SILVA 71

Executors

Distribution of Estate — Proper date for distribution — Dependent on construction of last will.

WIJEWARDENA *vs.* GOMES & OTHERS 99

Falsa Demonstratio non nocet

See under—EVIDENCE ORDINANCE

PIYADASA *vs. Silva* 71

Gaming Ordinance

Gaming — Charges of unlawful gaming against 88 *accused — Charges of aiding and abetting and of assisting in management of common gaming place against other accused — Validity of search warrant — Evidence independent of presumptive proof — Common Gaming place — Public having access to premises — No degree of control — Proprietary Club — Burden on defence — Discharge of absent accused only at conclusion of trial — No prejudice to others — Nature of presumption under section* 7 *of Gaming Ordinance — Misjoinder of accused — When should objection be taken — Evidence Ordinance* (*Cap.* 14) *section* 105 *— Criminal Procedure Code* (*Cap.* 20) *sections* 297 *and* 425 *— Criminal Procedure Code of Kenya, section* 913 *and* 381 *— Penal Code sections* 32, 35, 36, 67, 102, 146, 147, 446 *— Gaming Ordinance* (*Cap.* 46) *sections* 2, 3(*c*), 5(1), 7 *and* 21.

107 accused were charged on three counts under the Gaming Ordinance: (1) The 1st to the 88th accused were jointly charged with committing the offence of unlawful gaming on 18th April 1964 under section 2 of the Ordinance: (2) The 89th to the 107th accused with aiding and abetting the 1st to the 88th accused to commit the said offence — under section 2 of the Ordinance read with section 102 of the Penal Code; (3) The 89th to the 107th accused, in the course of the same transaction with assisting in the management of the said premises to be kept or used as a common gaming place under section 3(c) of the Ordinance.

The Magistrate convicted seventy-eight of the first eighty eight accused on the first count and eighteen of the 89th to the 107th accused on counts 2 and 3. The accused were sentenced to pay various fines. The other accused, who had been absent during the trial, were discharged.

Held: (1) That although the statement in the application for a search warrant under Section 5(1) of the Gaming Ordinance that the Inspector "makes oath and says that he received credible information" was strictly not written information on oath as required by that section, there was sufficient compliance with the requirements of the section, since the evidence of three witnesses had been led on oath before the Magistrate, and the evidence was overwhelming to establish a *prima facie* case for the issue of a search warrant.

(2) (*a*) That there was sufficient evidence in the case, quite independently of the presumptive proof under section 7 of the Gaming Ordinance, that the premises were being used as a common gaming place.

(*b*) That the definition of a common gaming place in the Ordinance is not exhaustive.

(*c*) That even where the premises were a Club, the fact that there was no degree of control over the members of the public who sought access to the precincts to partake in unlawful gaming would justify the finding that it was a common gaming place.

(3) That section 21(a) of the Gaming Ordinance is in the nature of a statutory exception, and under section 105 of the Evidence Ordinance, the burden is on the defence to prove that the club is a proprietary club to which the exception applies.

(4) That although the discharge of the absent accused might have been done earlier when they were absent, no prejudice had been caused to the other accused by this not being done.

(5) That section 7 of the Gaming Ordinance creates presumptive proof that each person present committed the acts which constitute the offence, and the presumption under the section does not merely create a liability to a penalty.

(6) That although it was difficult to maintain that the 1st to the 88th accused who had independently entered the premises for the purpose of committing the offence of gaming had acted jointly and had therefore been rightly charged together, since objection to the joinder had for the first time been taken at the conclusion of the trial, and not when the accused were charged, the objection was belated and, therefore not entitled to succeed.

JINADASA & OTHERS *vs.* JOSEPH, INSPECTOR OF POLICE KANDY 6

Imposition of Civic Disabilities Special Provisions Act

Competence of Parliament to pass Act imposing disabilities and disqualifications on named individuals

KARIAPPER *vs.* WIJESINGHE & ANOTHER .. 84

Industrial Disputes

Act No. 43 *of* 1950 — *Powers given to Labour Tribunals, Industrial Courts and Arbitrators under the Act — Classifications of such powers — Are they judicial or not?*

UNITED ENGINEERING WORKERS UNION *vs* DEVANAYAGAM 35

Interpretation Ordinance

Partition action—New Partition Act coming into force while action pending — Effect thereof on proceedings if continued thereafter — Interpretation Ordinance section 6(3)(*c*).

FERNANDO *vs.* DE SILVA & OTHERS 4

Judicial Power

Nature of.

UNITED ENGINEERING WORKERS UNION *vs.* DEVANAYAGAM 35

Kenya

Criminal Procedure Code sections 913 *and* 381.

JINADASA & OTHERS *vs.* JOSEPH INSPECTOR OF POLICE, KANDY 6

Legal Maxims

Audi Alteram partem.

DURAYAPPAH *vs.* FERNANDO & OTHERS 27

Falsa Demonstratio non nocet

PIYADASA *vs.* SILVA 71

Mandamus

Appropriateness of Writ — on Clerk to the House of Representatives for payment of Salary to member of the House.

KARIAPPER *vs.* WIJESINGHE & ANOTHER .. 84

Master and Servant

Undue influence — When presumption arises — Special relationship where one party is in fiduciary position and other reposes trust in him necessary — Whether presumption attaches in case of employer and employee.

Held: That the presumption of undue influence does not arise because of the relationship of employer and employee. This is a strictly contractual relationship. The presumption would arise only in the case of certain special relationships where one party occupies a position of a fiduciary nature to the other, and the other party reposes a trust or confidence in him.

FERNANDO *vs.* MEL MENDIS LIMITED 57

Misdirection

See also — NON-DIRECTION.

QUEEN *vs.* PERERA 67

Misjoinder

Of accused.

JINADASA & OTHERS *vs.* JOSEPH INSPECTOR OF POLICE, KANDY.

Of accused and charges.

WIMALASENA *vs.* INSPECTOR OF POLICE HAMBANTOTA 75

Mortgage

Trusts Ordinance (Cap. 87), section 93 — Co-owners agreeing to sell all their interests in a land which was subject matter of a partition action after final decree — Transfer of divided lots allotted in final decree as agreed to plaintiff — After agreement to sell and before dates of final decree and transfer of divided lots, usufructuary mortgage given by same co-owners of their interests to defendant — Action by plaintiff to recover possession — Does mortgage come within the meaning of the word "property" in section 93 of the Trusts Ordinance — After execution of transfer of divided lots is there an existing contract capable of specific performance.

PEIRIS *vs.* MARASINGHE 1

Motor Traffic Act

Motor Traffic Act, section 214 — Motor Traffic (Construction of Vehicles) Regulations of 1951 made under Section 19 read with section 237 — Charge for breach of Regulation 10(1), offence under section 214(1)(a) of the Act — Conviction under section 214(2)(b) without conforming to sections 172, 173 or 174 of the Criminal Procedure Code — Validity of conviction.

The accused was charged under Section 214(1)(a) of the Motor Traffic Act, for having driven a car without having affixed to the front of the car two uncoloured lamps showing to the front a white light from a reasonable distance, in breach of rule 10(1) of the Motor Traffic (Construction of Vehicles) Regulations of 1951, but was convicted of having committed an offence under section 214(1)(b). There was no reading and explaining to the accused of the altered charge nor was he afforded an opportunity to plead or to establish a defence thereto.

Held: (1) That the failure to conform to the procedure laid down in Sections 173, 173 and 174 of the Criminal Procedure Code was fatal to the conviction.

(2) That the rule 10(1) of the Motor Traffic (Construction of Vehicles) of 1951 aforesaid prescribes not only the equipment but also the use.

DANAPALA *vs.* S.I. POLICE, CINNAMON GARDENS .. 34

Motor Traffic — Driving Motor car on highway while under influence of alcohol — Medical expert's evidence — Grounds for opinion — Insufficient — Proof necessary in such cases — Incapacity to have proper control of vehicle — Evidence insufficient — Motor Traffic Act (Cap. 203) Section 151(1).

Held: (1) That in a charge of driving a motor-car on a highway while under the influence of alcohol, the mere facts that an accused was strongly smelling of alcohol and that his pupils were semi-dilated and sluggish might indicate that he had consumed alcohol but would not prove the charge. The evidence should justify the inference that the accused was under the influence of drink to such an extent as to be incapable of having proper control of the vehicle.

(2) That where the evidence did not indicate that as a result of the alcohol he had consumed, the accused's powers of co-ordination had been impaired or that his capacity to drive had been prejudicially affected and there was no evidence that either immediately before or after the accident the accused drove his car in such a manner as to show want of control over it, but the evidence showed that the accused drove the car quite competently from the scene of the accident to the Police Station, the accused could not be found guilty of the offence.

SENEVIRATNE *vs.* JAHAN, S.I. POLICE 97

Municipal Councils Ordinance

Municipal Councils Ordinance (Cap. 252) as amended by Act No. 12 of 1959 — Minister's powers under section 277 — Should the Council be given an opportunity of being heard before its dissolution in the exercise of such powers? — Natural Justice — Audi alteram partem rule.

Distinction between a voidable order and an order that is a nullity — Whether Mayor or a member of a Municipal Council can complain to Court independently of Council.

Section 277(1) of the Municipal Councils Ordinance (Chapter 252) as amended by Act No. 12 of 1959 enacts as follows:

"(1) If at any time, upon representation made or otherwise, it appears to the Minister that a Municipal Council is not competent to perform, or persistently makes default in the performance of, any duty or duties imposed upon it, or persistently refuses or neglects to comply with any provision of law, the Minister may, by Order published in the Gazette, direct that the Council shall be dissolved and superseded, and thereupon such Council shall,without prejudice to anything already done by it, be dissolved, and cease to have ,exercise, perform and discharge any of the rights privileges, powers, duties, and functions conferred or imposed upon it, or vested in it, by this Ordinance or any other written law."

In consequence of the receipt of a number of complaints as to the conduct of the Jaffna Municipal Council and the councillors, the Minister of Local Government (4th respondent) sent the Commissioner of Local Government (the 1st respondent) to inquire into these matters with instructions to report immediately. The 1st respondent visited Jaffna on 27th and 28th May, 1966 and the appellant who was the Mayor of the Council gave him every facility for the purpose including access to all the minutes of the Council. The 1st respondent however, did not ask anyone any questions or give any member of the Council any opportunity of expressing their views on any matter. His report was received on 29th May by the Minister (4th respondent) who, on the same day, made an Order stating that it appeared to him that the Jaffna Municipal Council was not competent to perform the duties imposed upon it and that pursuant to the powers conferred upon him by the aforesaid section 277 of the Municipal Councils Ordinance he directed that the Council should be dissolved and superseded on 29th May, 1966. On 30th May, the Governor-General appointed the first, second and third respondents to be special Commissioners to exercise, perform and discharge the rights, privileges, powers and duties conferred upon the Council and the Mayor by the Ordinance.

This Order dissolving the Council was challenged in the Supreme Court by way of certiorari by the appellant (Mayor) on the ground *inter alia* that the said Order was made without giving the Council the right to be heard on its own defence, thus failing to, observe the rule of natural justice also known as the principle of "*audi alteram partem.*"

The Supreme Court, following the decision of three Judges in *Sugathadasa* vs. *Jayasinghe* (59 N.L.R. 457) to the effect that the words "if.....it appears to the Minister" in section 277(2) aforesaid standing by themselves without other words or circumstances of qualification exclude a duty to act judicially, held against the appellant who appealed to the Privy Council.

Held: (1) That it is a well-established principle that where a statute, as in section 277(1), confers power on a person to exercise a measure of control over another and to impose sanctions upon him although there are no positive words in such statute requiring that the other party should be heard, yet the justice of the common law will supply the omission of the legislature in that regard.

(2) That outside the well-known classes of cases such as dismissal from office, deprivation of property and expulsion from clubs, no general rule can be laid down as to the application of the *audi alteram partem* principle in addition to the language of the provision.

(3) That three matters must always be borne in mind when considering whether this principle should be applied or not. viz:

(a) what is the nature of the property, the office held, status enjoyed or services to be performed by the complainant of injustice.

(b) in what circumstances or upon what occasions is the person claiming to be entitled to exercise the measure of control entitled to intervene.

(c) when a right to intervene is proved, what sanctions in fact is the latter entitled to impose upon the other.

(4) That a consideration of the said three requirements in relation to the facts of the instant case and the relevant provisions of the Ordinance show that the above stated common law rule should be applied in this case as undoubtedly the Minister, in making the Order complained of under section 277(1), should have observed the principle *audi alteram partem.* The solution to this matter was not to be found in the opening words of section 277(1) aforesaid as was thought in *Sugathadasa* vs. *Jayasinghe* reported in 59 N.L.R. 457. A deeper investigation was necessary.

Held further: (5) That the said Order of the Minister on 29th May, 1966 was voidable and not a nullity. Being voidable, it was voidable only at the instance of the person against whom the Order was made, that is the Council which had not complained. Though the appellant was the Mayor at the time of the dissolution he has no right to complain independently of the Council, because he held no office that was independent of the Council and therefore he could not maintain this action.

Per **The Judicial Committee:** "Their Lordships will only state that while great urgency may rightly limit such opportunity timeously, perhaps severely, there can never be a denial of that opportunity if the principles of natural justice are applicable."

DURAYAPPA *vs.* FERNANDO & OTHERS 27

Natural Justice

See — DURAYAPPAH *vs.* FERNANDO & OTHERS .. 27

Non-Direction

See also — MISDIRECTION

QUEEN *vs.* PERERA 67

Nullity

Minister order under section 277 *of Municipal Councils Ordinance — Is it void, voidable, or a nullity.*

DURAYAPPAH *vs.* FERNANDO & OTHERS .. 27

Parliament

Competence of — to pass Act imposing disabilities and disqualifications on named individuals — Implied powers of Parliament.

KARIAPPER *vs.* WIJESINGHE & ANOTHER 84

Partition

Trusts Ordinance (Cap. 87), section 93 — Co-owners agreeing to sell all their interests in a land which was subject matter of a partition action after final decree — Transfer of Eivided lots allotted in final decree as agreed to plaintiff — After agreement to sell and)before dates of final decree and transfer of divided lots, usufructuary mortgage given be same co-owners of their interests to defendant — Action by plaintiff to recover possession — Does mortgage come within the meaning of the word "property" in section 93 of the Trusts Ordinance — After execution of transfer of divided lots is there an existing contract capable of specific performance.

PEIRIS *vs.* MARASINGHE 1

Partition action — New Partition Act coming into force while action pending — Effect thereof on proceedings if continued thereafter — Interpretation Ordinance (Cap. 2) section 6(3)(c) — Partition Act (Cap. 69) section 83(1).

Rent Restriction Act (Cap. 274) section 13 — Whether protection afforded to tenant thereby wiped out by decree for sale or certificate under Partition Ordinance.

Held: (1) That where a partition action was commenced under the Partition Ordinance before the Partition Act No, 16 of 1951 came into operation, but was carried on and completed long after the Partition Act came into operation, the decree entered and an order for sale made by Court would nevertheless be under the Partition Ordinance. This would be so notwithstanding the fact that such orders contain a recital that the Court was acting in terms of the Partition Act and the Court did in fact intend to act under it.

(2) That by reason of section 6(3)(c) of the Interpretation Ordinance such a partition action could be carried on and completed as if there had been no repeal of the Partition Ordinance. This section while giving an option to continue as if the repealed was in existence nevertheless was no authority for continuing the action under the new Act. The definition of "partition action" in section F3(1) of the Act, further, would ordinarily exclude action under the Ordinance.

(3) That the certificate of sale issued in the present action being one issued under the Partition Ordinance, the statutory protection conferred on a tenant by section 13 of the Rent Restriction Act was not extinguished either by the decree for sale or by the certificate of sale.

FERNANDO *vs.* DE SILVA & OTHERS 4

Penal Code

Sections 32, 35, 36, 67, 102, 146, 147, 446.

JINADASA & OTHERS *vs.* JOSEPH, INSPECTOR OF POLICE, KANDY 6

Sections 290 and 292.

SEVVATHINATHAN *vs.* NAGALINGAM & THREE OTHERS 69

Section 427 and 433.

SALMAN SILVA *vs.* AMARADASA 73

Criminal Procedure Code, Section 181 — Penal Code, Sections 32, 369, 394 — Evidence Ordinance, Section 114(a) — Misjoinder of accused and charges — Referable to time of accusation — Test of misjoinder — Common intention — Mere presence of accused — When reasonable explanation called for from accused — Convictions for both theft and receiving stolen property with knowledge not legal —Insufficient evidence of housebreaking.

Held: (1) That a question of misjoinder of accused and charges should be considered as at the time of accusation and not on the evidence as found at the conclusion of the trial..

(5) That in order that section 181 of the Criminal Procedure Code might be applicable, the facts must be such as would equally support any one of the several charges.

(3) That the mere presence of the 2nd and 3rd accused in the company of the 1st accused who was in possession of the stolen article was not sufficient to establish common intention.

(4) That on the evidence led it was not possible to draw a presumption against the 2nd or the 3rd accused under section 114(a) of the Evidence Ordinance, and it is only if the prosecution succeeded in establishing conclusively that those accused were in possession of the stolen article that the question of a reasonable explanation by the accused would have arisen for consideration.

(5) That where a Court draws a presumption under section 114(1) of the Evidence Ordinance and finds the accused guilty of theft under section 369 of the Penal Code, he cannot also be convicted, by drawing the alternative presumption, of receiving stolen property, knowing it to be stolen under section 394 of the Code.

WIMALASENA *vs.* INSPECTOR OF POLICE, HAMBANTOTA 75

Police

Police officers — Advisability of permitting them to confine themselves to their regular and more conventional duties.

WIMALASARA BANDA *vs.* YALEGAMA 12

Prescription

When can vendee claim benefit of vendor's possession.

PIYADASA *vs.* SILVA 71

Prevention of Social Disabilities Act

Prevention of Social Disabilities Act, No. 21 *of* 1957 — *Sections* 2 and 3 — *Effect.*

Charges of defiling and trespassing Hindu Temple — Sections 290 *and* 292 *Penal Code.*

Revision, application in — Order of acquittal — When will Court grant such application.

Two accused were charged under sections 290 and 292 of the Penal Code alleging that they defiled a Saivite temple and committed trespass in the temple by entering certain inner portions of the premises with the knowledge that the feeling of the Vellala and other high caste Saivites were likely to be wounded.

After trial the learned Magistrate while recording his findings (a) that the accused entered the inner courtyard of the temple held sacred by the Saivities by climbing the parapet wall and (b) that after entering the flagstaff portion went out of the court-yard, acquitted both accused holding that the evidence led by the prosecution was not sufficient to say beyond doubt that there was defilement of the temple by the act of the accused in entering it or that such act was intended to insult the Saivite religion or to wound the feelings of the Saivities.

After an unsuccessful attempt to obtain the sanction of the Attorney-General, the complainant presented an application to revise the order of acquittal praying for a re-trial before another Magistrate.

Held: (1) That the defilement of the temple by the accused entering the inner courtyard thereof is a question of mixed fact and law and as the Magistrate had answered it against the petitioner, no case has been made out to justify the conclusion that the Magistrate's order has resulted in a miscarriage of justice. Therefore the application must be refused.

Per **T. S. Fernando, J.** — (a) "I am inclined to agree with the argument of Mr. Ranganathan that sections 2 and 3 of the Prevention of Social Disabilities Act, No. 21 of 1957 do not have the effect of conferring on the followers of any religion a right of entering, being present in, or worshipping at any place of worship which they did not have before the Act came into force; in other words, the Act penalised only the prevention or obstruction of the exercise of a right which was an existing right at the time the Act became law."

(b) "Whether a place is holy or not, and whether a place that is holy has been defiled are also matters of belief."

SEVVANTHINATHAN *vs.* NAGALINGAM & THREE OTHERS 69

Privy Council Decisions

DURAYAPPAH *vs.* FERNANDO & OTHERS

See under — MUNICIPAL COUNCILS 27

UNITED ENGINEERING WORKERS UNION *vs.* DEVANAYAGAM

See under — (CEYLON (CONSTITUTION) ORDER IN COUNCIL

KARIAPPER *vs.* WIJESINGHE & ANOTHER

See under — CEYLON (PARLIAMENTARY ELECTIONS) ORDER IN COUNCILS 84

WIJEWARDENA *vs.* GOMES & OTHERS ..

See under — TRUSTS. 99

Prohibition Writ of

Should not be granted against person for taking a step provided by law.

CHAIRMAN MADAMPE TOWN COUNCIL *vs.* AUDITOR-GENARAL & ANOTHER 80

Rent Restriction

Rent Restriction Act, (*Cap.* 274), *section* 13 — *Whether protection afforded to tenant thereby wiped out by decree for sale or certificate under Partition Ordinance.*

FERNANDO *vs.* DE SILVA & OTHERS 4

Res Judicata

See — JAYAWARDENA *vs.* ARNOLISHABY & ANOTHER 58

Revision

Application for — Order of acquittal — When will court grant such application.

SEVVATHINATHAN *vs.* NAGALIGAM & THREE OTHERS 69

Search Warrant

Validity of.

JINADASA & OTHERS *vs.* JOSEPH, INSPECTOR OF POLICE KANDY 6

Social Disabilities

See under — PREVETION OF SOCIAL DISABILITIES ACT

Specific Performance

See — PEIRIS *vs.* MARASINGHE 1

Surety

Surety — Penalty under the bond — When is a Magistrate empowered to impose default sentence on surety — Criminal Procedure Code section 411.

Held: That a Magistrate has no power to impose a default sentence under section 411 of the Criminal Procedure Code, without proceeding to recover the penalty from a surety by issuing a warrant for the attachment and sale of the movable or immovable property belonging to the surety.

JAYAKODY *vs.* WIJEWARDENE 82

Town Council

Writ of Certiorari and/or Prohibition — Delay in applying therefor — Effect — Auditor-General certifying surcharge against Chairman of Town Council — Appeal to Minister — Surcharge affirmed in appeal — Application for Writ of Certiorari to quash order of surcharge and Minister's order — Refusal to quash order of surcharge but Minister's order quashed and sent back for re-hearing as appeal had been dealt with without notice to petitioner — Minister's second order affirming surcharge not challenged — Application by Local Government Commissioner to recover amount of surcharge through Magistrate's Court — Town Councils Ordinance (Cap. 256). *sections* 181(1), 182 (1), 182(2) *and* 182(5).

The Auditor-General (1st respondent), acting under section 181(1) of the Town Council's Ordinance surcharged the petitioner, the Chairman of a Town Council in a sum of Rs. 28,962/48 on 7.8.59. The Commissioner of Local Government (2nd respondent) applied to the Magistrate's Court under section 182(5) to recover the said amount. Thereupon this application for a Writ of Certiorari and/or Writ of Prohibition was made under section 42 of the Courts Ordinance after a lapse of more than six years.

Admittedly the petitioner had in 1959 appealed to the Minister, being one of the remedies open to him under section 182. After the latter's order affiirming the appeal, an application for a Writ of Certiorari to quash the certificate of surcharge and the said order of the Minister was made. The Supreme Court refused the first and allowed the second payer giving the petitioner an opportunity of having his appeal properly heard as the Minister had dealt with the appeal without notice to him.

Held: (1) That the application should be refused as it had been made after the lapse of more than six years after the date of the certificate of surcharge.

(2) That a Writ of Certiorari or Prohibition could not be granted against the 2nd respondent for taking a step provided by law to recover the amount certified by the Auditor as due.

(3) That the Court should not issue this Writ as the petitioner had exhausted the remedies available to him in law when the Minister rejected his appeal after hearing him and which had not been challenged.

CHAIRMAN, MADAMPE TOWN COUNCIL *vs.* AUDITOR-GENERAL & ANOTHER 80

Trusts

Trusts Ordinance (Cap. 87), *section* 93 — *Co-owners agreeing to sell all their interests in a land which was subject matter of a partition action after final decree — Transfer of divided lots allotted in final decree as agreed to plaintiff — After agreement to sell and before dates of final decree and transfer of divided lots, usufructuary mortgage given by same co-owners of their interests to defendant — Action by plaintiff to recover possession — Does mortgage rights come within the meaning of the word "property" in section* 93 *of the Trusts Ordinance — After execution of transfer of divided lots is there an existing contract capable of specific performance?*

A, L. J. and P who were parties to a partition action agreed by deed P1 of 20.9.1956 (duly registered) to sell to the plaintiff within three months of the entering of the final decree in the said action all their interests in the land.

Final decree was entered on 5.3.1963 allotting lots 2, 3 and 4 respectively in the partition plan to A, L and J, who duly conveyed them by deed P4 of 6.4. 1963 in terms of P1 to the plaintiff declaring that the lots were free from all encumbrances whatsoever, P was not declared entitled to any rights in the decree.

After the date of the agreement P1 and before the date of the final decree and the date of execution of the conveyance P4, A and L executed mortgage bonds D1 and D2 respectively (duly registered) in favour of the defendant hypothecating their interests in the land expressly undertaking "to allow the mortgagee, his attorney, his heirs executors administrators assigns to possess the premises in lieu of interest."

In an action by the plaintiff to recover possession of the said lots from the defendant the learned District Judge, influenced by the opinion that the expression "property" in section 93 of the Trusts Ordinance could not include rights on a mortgage held against the plaintiff, who appealed.

Held: (1) That when the defendant entered into possession of lots 2 and 4 by virtue of D1 and D2, he acquired property within the meaning of section 93 of the Trusts Ordinance, Therefore, the plaintiff was entitled to the protection available to him under that section and the defendant should be ejected.

It was contended on behalf of the defendant-respondent:

(*a*) that section 93 of the Trusts Ordinance had no application as P4 was executed before action was filed and therefore there was no contract existing of which specific performance could have been enforced.

(*b*) that defendant being obliged to hold the property for the benefit of the plaintiff only to the extent necessary to give effect to the contract and the contract having been performed by the execution of P4, no question of necessity to give effect to the contract remained.

Held: (2)That in determining whether there was an existing contract of which specific performance could be enforced the relevant date or dates in this

case were the respective dates of the execution of D1 and D2 and as at those dates there existed Contract P1 of which specific performance could have been enforced.

(3) That as the agreement to sell (P1) was a contract to transfer title free from encumbrances and not a title subject to the mortgages D1 and D2, the argument that the effect of the transfer (P4) was that contract (P1) had been performed could not stand.

PEIRIS *vs.* MARASINGHE 1

Devale — De facto trustee of — Can he maintain action for declaration of title to land belonging to devale.

MUDIYANSE *vs.* DINGIRI BANDA & ANOTHER .. 51

Trust — Shares, issued but not allotted, the subject-matter of a voluntary settlement, which shares the settlor is about to be caused to be allotted into the names of the trustees" for the benefit of his son — Absence of agreement to transfer shares to trustees— Can these words alone create an effective trust — Evidence — Identity of field passing under last will — Admissibility of extrinsic evidence to establish identity Trusts Ordinance (Cap. 87) section 6.

Damages — Amount of damages to be awarded under a last will Distribution of Estate — Proper date for Distribution — Dependent on construction of last will.

The late D. R. Wijewardene died on the 13th June, 1950, and his last will was proved on 21st March, 1951. The executors (the respondents to this appeal) applied for a judicial settlement of their accounts, and in those proceedings the appellant (the eldest son of the deceased) raised certain objections. Four objections were raised in the appeal before their Lordships.

(1) The deceased had executed a voluntary settlement for the benefit of his youngest son on the 28th February 1950, which was to include 1,000 shares in the Associated Newspapers of Ceylon Ltd. which had been issued but not yet allotted. By his last will the testator made certain dispositions of shares, but excluded from them any shares which were the subject of the voluntary settlement. At the time of his death the 1,000 shares had not been allotted to the name of the trustees of the settlement. The question was whether these shares passed under the will, or whether the trustees were entitled to call for an allotment to them. The argument before their Lordships was that the testator had agreed with the trustees to allot to them the shares, and that as soon as the shares were capable of being allotted under the law of Ceylon the trustees were entitled to call for the shares even though the agreement was not supported by consideration.

Held: That there was no evidence of such a promise to the trustees, and that therefore the argument failed, accordingly the shares (which now had increased to 2,000 by reason of a bonus issue) should devolve in terms of the last will.

(2) The appellant contended that Field No. 1 of the Galpokuna Estate devolves on him under the will. Under clause 15(1) a half - a - share "of the Galpokuna Division of my Galpokuna Group" was devised to the appellant; the other half share was devised under clause 15(3) to the testators daughter Ranee. By clause 15(2) the testator devised "all that divided portion known as the Udabaddawa Division of the group aforesaid" to his daughter Nalini. The question was under which of these devises the field in question passed.

Held: (*a*) That extrinsic evidence was admissible to resolve this question.

(*b*) That the learned District Judge, after carefully considring the evidence led, had decided that the field had passed under clause 15(3), and these findings had been concurred in by the Supreme Court.

(*c*) That their Lordships substantially concurred with these findings, and in any event would be slow to depart from them, unless there had been some substantial misdirection or error in law. There was no such misdirection or error in law.

(3) The appellant claimed as his a painting which the executors had handed over to a third person. The District Judge had found that this should have been given to the Appellant, and the only question before their Lordships was the value to be placed on the painting.

Held: That the different values placed on the painting by both the District Court and the Supreme Court were based on unsatisfactory evidence, and that the issue should be remitted for a fresh valuation.

(4) The appellant contended that the date for distribution of the testator's estate should be 31st March 1954, while the respondent's claim was that the date should be the 21st December, 1957.

Held: That upon a construction of clauses 15 and 16 of the Will, the distribution of the estate had to be after the estate had been finally assessed for estate duty purposes. Since the final assessment figures had been communicated to the respondents in August 1957, the date for distribution could be taken to be 31st December, 1957.

Per **curiam:** "According to their Lordships' practice, recently restated in *Vander Poorten* vs. *Vander Pootern* 1(963) 1 W.L.R. 945 appeals concerned with the taking of an account will not be entertained where questions of fact rather than principles of law are involved."

WIJEWARDENA *vs.* GOMES & OTHERS 99

Undue Influence

Undue influence — When presumption arises — Special relationship where one party is in fiduciary position and other reposes trust in him necessary — Whether presumption attaches in case of employer and employee.

Held: That the presumption of undue influence does not arise because of the relationship of employer and

employee. This is a strictly contractual)relationship. The presumption would arise only in the case of certain special relationships where one party occupies a position of a fiduciary nature to the other, and the other party reposes a trust or confidence in him.

FERNANDO *vs.* MEL MENDIS LIMITED 57

Vendor and Vendee

When can vendee claim benefit of vendor's possession.

PIYADASA *vs.* SILVA 71

Unlawful Gaming

See—JINADASA & OTHERS *vs.* JOSEPH, INSPECTOR OF POLICE, KANDY 6

Wills

Identity of field passing under last will — Admissibility of extrinsic evidence to establish identity.

WIJEWARDENA *vs.* GOMES & OTHERS 99

Words and Phrases

'Agent in election law.

DAHANAYAKE *vs.* KANNANGARA 62

"Forthwith'

WIJESUNDERA *vs.* KUNJIMOOSA & Co. & ANOTHER .. 83

'If the.....is satisfied that' in section 277 of Municipal Council Ordinance — Does it exclude duty to act judicially.

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'In occupation of complainant' — Criminal trespass.

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CORRECTION

At the following pages and following lines of Vol. 72 of the C.L.W. the word **"reasonably"** should read **"rationally"**.

page 22: columm 2: line 16
page 24: columm 1: line 31
page 25: columm 1: line 15
do columm 2: line 12
do columm 2: line 36

p. 26: col. 1 line 8 **"as"** should read **"was"**
p. 26: col. 1. line 36: **"D2"** should read **"D"**1

Present: **T. S. Fernando, J., Siva Supramaniam, J. and Samerawickreme, J.**

M. R. DON PEIRIS *vs.* M. P. C. MARASINGHE*

S.C. No. 10/65 *(F)* — *D.C. Kurunegala* 1589/*L*

Argued on: 21st, January 1967
Decided on: 11th, February 1967

Trusts Ordinance (Cap. 87), *section* 93—*Co-owners agreeing to sell all their interests in a land which was subject matter of a partition case after final decree—Transfer of divided lots allotted in final decree as agreed to plaintiff—After agreement to sell and before dates of final decree and transfer of divided lots, usufructuary mortgage given by same co-owners of their interests to defendant — Action by plaintiff to recover possession — Does mortgage come within the meaning of the word "property" in section* 93 *of the Trusts Ordinance — After execution of transfer of divided lots is there an existing contract capable of specific.*

A, L, J and P who were parties to a partition action agreed by deed P1 of 20.9.1956 (duly registered) to sell to the plaintiff within three months of the entering of the final decree in the said action all their interests in the land.

Final decree was entered on 5.3.1963 allotting lots 2, 3 and 4 respectively in the partition plan to A, L and J, who duly conveyed them by deed P4 of 6.4.1963 in terms of P1 to the plaintiff declaring that the lots were free from all encumbrances whatsoever, P was not declared entitled to any rights in the decree.

After the date of the agreement P1 and before the date of the final decree and the date of execution of the conveyance P4, A and J executed mortgage bonds D1 and D2 respectively (duly registered) in favour of the defendant hypothecating their interests in the land expressly undertaking " to allow the mortgagee, his attorney, his heirs executors administrators assigns to possess the premises in lieu of interest."

In an action by the plaintiff to recover possession of the said lots from the defendant the learned District Judge, influenced by the opinion that the expression "property" in section 93 of the Trusts Ordinance could not include rights on a mortgage held against the plaintiff, who appealed.

Held: (1) That when the defendant entered into possession of lots 2 and 4 by virtue of D1 and D2, he acquired property within the meaning of section 93 of the Trusts Ordinance. Therefore, the plaintiff was entitled to the protection available to him under that section and the defendant should be ejected.

It was contended on behalf of the defendant-respondent:

(*a*) that section 93 of the Trusts Ordinance had no application as P4 was executed before action was filed and therefore there was no contract existing of which specific performance could have been enforced.

(*b*) that defendant being obliged to hold the property for the benefit of the plaintiff only to the extent necessary to give effect to the contract and the contract having been performed by the execution of P4, no question of necessity to give effect to the contract remained.

Held: (2) That in determining whether there was an existing contract of which specific performance could be enforced the relevant date or dates in this case were the respective dates of the execution of D1 and D2 and as at those dates there existed contract P1 of which specific performance could have been enforced.

(3) That as the agreement to sell (P1) was a contract to transfer title free from encumbrances and not a title subject to the mortgages D1 and D2, the argument that the effect of the transfer (P4) was that contract (P1) had been performed could not stand.

Cases referred to : *Sirisoma* v. *Sarnelis Appuhamy*, (1950) 51 N.L.R. 337; XLII C.L.W. 70
Silva v. *Salo Nona*, (1930) 32 N.L.R. 81
Kameswaramma v. *Sitaramaniya* (1905) 29 I.L.R. Madras 177

H. W. Jayewardene, Q.C., with *D. S. Wijewardene* and *G. S. Marapone*, for the plaintiff-appellant.

W. D. Gunasekera, with *W. S. Weerasooriya*, for the defendant-respondent.

* For Sinhala translation, see Sinhala section, Vol. 14, part 7, p. 1

T. S. Fernando, J.

This appeal came before us for hearing following upon a disagreement between the two judges before whom it was first listed. It raises questions relating to the interpretation of section 93 of the Trusts Ordinance (Cap. 87), and the facts relevant to the determination of these questions are as set out hereunder.

Four persons, Adelaide Stainwall, Agnes Landers, John Pavey and Letitia Pietersz who were parties to partition action No. 10627, as evidenced by notarial agreement P1 of 20th September 1956, agreed to sell to the plaintiff and the plaintiff agreed to purchase within three months of the entering of final decree in the said action all their interests in the land the subject matter of that action. P1 was duly registered, and no question arises here in regard to correctness or priority of registration. Final decree was entered on 5th March 1963, and the first three of the vendors named in agreement P1 were declared entitled to the divided lots 2, 3 and 4 respectively in partition plan No. 1765. Letitia Pietersz was not allotted any interests under that decree. These lots were thereafter conveyed to the plaintiff by the three vendors concerned by transfer deed P4 of 6th April 1963, i.e. within the time specified in agreement P1. The vendors declared in P4 that the three lots were free from all encumbrances whatsoever.

After the date of the agreement P1 and before either final decree was entered or transfer P4 was executed one of the three vendors, Adelaide Stainwall, named in P4 mortgaged to the defendant her interests in the land in respect of which the partition action was pending, receiving from the defendant a sum of Rs. 500/- and executing therefor mortgage bond D1 of 20th April 1961. Another of the aforesaid vendors, John Pavey, also similarly mortgaged to the defendant his interests in the same land. Pavey received from the defendant a sum of Rs. 1,000/- and executed in the latter's favour mortgage bond D2 of 6th July 1961. Both D1 and D2 were usufructuary mortgage bonds, the mortgagors expressly undertaking thereby "to allow the mortgagee, his attorney, heirs executors administrators or assigns to possess the premises in lieu of interest." D1 and D2 were also duly registered, but, of course, subsequent to the registration of P1.

After the signing of transfer P4, the plaintiff appears to have been placed in possession of the said lots 2, 3 and 4 by the Fiscal acting in execution of a writ of possession issued in the partition action for the purpose of placing in possession the three vendors named in P4. In regard to this event, the learned district judge has stated that the plaintiff had no right to be placed in possession in that way by ejecting the defendant who had been there by virtue of the usufructuary bonds D1 and D2 in his favour. The ejectment of the defendant in that way was improper and the tactics adopted by the plaintiff were undoubtedly questionable. However, the defendant regained possession of lots 2 and 4 on 16th August 1963, and the plaintiff would have it that he did so forcibly. The present action came to be filed in consequence of the regaining by the defendant of possession of these two lots. There is now no dispute in respect of lot 3 which did not belong to either of the mortgagors who executed D1 and D2.

The law regarding the validity and effect of transactions relating to interests in land during the pendency of partition proceedings was considered by a bench of three judges of this Court in *Sirisoma* v. *Sarnelis Appuhamy*, (1950) 51 N.L.R. 337 and that bench, in laying down certain propositions as settled law stated *inter alia*,

> "If such an instrument is in effect only an agreement to alienate or hypothecate a future interest, if and when acquired, no rights of ownership or hypothecary rights (as the case may be) pass to the grantee upon the acquisition of that interest by the grantor *unless and until the agreement has been duly implemented*; if, without implementing this agreement, the grantor conveys to a third party the rights which he has acquired under the decree, the competing claims of that third party and of the original grantee must be determined with reference to other legal principles such as the application of section 93 of the Trusts Ordinance."

Now, section 93 of the Trusts Ordinance enacts that where a person acquires property with notice that another person has entered into an existing contract affecting that property, of which specific performance could be enforced, the former must hold the property for the benefit of the latter to the extent necessary to give effect to the contract. In the case of *Silva* v. *Salo Nona*, (1930) 32 N.L.R. 81 this court held that due registration of an agreement to sell land is of itself notice, within the meaning of section 93 of the Trusts Ordinance to a person who acquires the land subsequent

to such agreement. The trial judge, in holding against the plaintiff, has been influenced by the opinion he has formed that the expression "property" in section 93 cannot include rights on a mortgage. If this opinion is correct a mortgagee is in a more advantageous position than even a transferee. On behalf of the plaintiff it has been contended that this opinion is erroneous, and, indeed, that it was erroneous was not seriously disputed by learned counsel for the defendant.

Confining myself to the case before me, we have here not merely a mortgage of immovable property in favour of the defendant, but a usufructuary mortgage at that, the mortgagor undertaking to allow possession of the land and actually giving over possession to the mortgagee.

We were referred to Voet's Classification of Things in Book 1, Title 8, section 27 (1 Gane's translation p. 172) as indicating that the only dispute in regard to debts, whether carrying interest or not, supported by hypothec of immovables was whether they were to be considered movable or immovable, not that they were not within the classification of things or property. The nature of the rights of a usufructuary mortgagee is set out by Voet in Book XX, Title I which deals with the Contract of Pledge and Hypothec. In section 23 (*see* 3 Gane's Translation, p. 499), the *pactum antichreseos* is described as follows:— "But an agreement of *antichresis* is particularly approved in mortgages. It is arranged by such agreement that the creditor shall use the mortgaged property in place of interest until the debt has been paid, whether he wishes himself to reap the fruits or advantages by living in the house or by tilling the farms, or to let them out to others. So much is this so that if he had lost possession before the debt has been fully paid he can either follow up the property put under obligation in a hypothecary action in accord with the common nature of hypothecs, or can employ an action *in factum* to recover his *antichresis* or the reciprocal use of the mortgaged property in return for his advance." I am of opinion that the contention of plaintiff's counsel is correct, and that when the defendant entered into possession of lots 2 and 4 by virtue of bonds D1 and D2 he acquired property within the meaning of section 93 of the Trusts Ordinance. I might here add that, in the case of *Kameswaramma* v. *Sitaramaniya*, (1905) 29 I.L.R. (Madras) 177 the High Court of Madras has held that where a mortgagee, at the time of his mortgage, is aware of circumstances which ought to have put him on enquiry, and such enquiry, if made, would have revealed the existence of an agreement by the mortgagor to mortgage the property to a third party, the mortgagee's rights will, on the principles embodied in section 40 of the Transfer of Property Act and section 91 of the Trusts Act (same as section 93 of our Trusts Ordinance) be postponed to the rights of such third party.

Learned counsel for the defendant endeavoured to support the judgment appealed against by arguing that section 93 had no application in that, (i) P4 having been executed before action was filed, there was therefore thereafter no contract existing of which specific performance could have been enforced and (ii) the defendant being obliged to hold the property for the benefit of the plaintiff only to the extent necessary to give effect to the contract, and the contract having been performed by the execution of P4, no question of necessity to give effect to the contract remained. He relied on certain decisions of the Indian Courts, but it becomes unnecessary to examine them here as in determining whether there was an existing contract of which specific performance could be enforced the relevant date or dates in this case were the respective dates of the execution of D1 and D2. As at those dates there existed contract P1 of which specific performance could have been enforced. As for the contract having been performed by the execution of P4. the argument overlooks the fact that the contract evidenced by P1 was a contract to transfer title free from encumbrances and not a title subject to D1 and D2. I am unable to uphold the argument for the defendant. The plaintiff was, in my opinion, entitled to the protection of section 93 of the Trusts Ordinance. It follows that D1 and D2 cannot prevail over P4, and the plaintiff was entitled to possession as against the defendant.

The decree appealed against is hereby set aside. Let a fresh decree be entered in favour of the plaintiff declaring him entitled to the lands described in the first and third schedules to the plaint and ordering the ejectment of the defendant therefrom, and incorporating therein also an order for damages as from 16th August 1963 till restoration of possession to the plaintiff in such sum as may be determined by the District Court, after further evidence, if necessary. The defendant must pay the plaintiff the costs of the Trial and of this appeal.

Siva Supramaniam, J.

I agree.

Samerawickreme, J.

I agree.

Appeal allowed.

Present: **T. S. Fernando, J., Siva Supramaniam, J. and Samerawickreme, J.**

W. IRENE FERNANDO *vs.* SYBIL DE SILVA & OTHERS

S. C. No. 443/63 (*F*) — *D. C. Colombo* 9237/*L*

Argued on 19th & 20th January, 1967
Decided: 10th February, 1967.

Partition action — New Partition Act coming into force while action pending — Effect thereof on proceedings if continued thereafter — Interpretation Ordinance (*Cap.* 2) *section* 6(3)(*c*) — *Partition Act* (*Cap.* 69) *section* 83(1).

Rent Restriction Act (*Cap.* 274) *section* 13— *Whether protection afforded to tenant thereby wiped out by decree for sale or certificate under Partition Ordinance.*

Held: (1) That where a partition action was commenced under the Partition Ordinance and before the Partition Act No. 16 of 1951 came into operation, but was carried on and completed long after the Partition Act came into operation the decree entered and an order for sale made by Court would nevertheless be under the Partition Ordinance. This would be so notwithstanding the fact that such orders contain a recital that the Court was acting in terms of the Partition Act and the Court did in fact intend to act under it.

(2) That by reason of section 6(3) (c) of the Interpretation Ordinance such a partition action could be carried on and completed as if there had been no repeal of the Partition Ordinance. This section while giving an option to continue as if the repealed was in existence nevertheless was no authority for continuing the action under the new Act. The definition of "partition action" in section F3(1) of the Act, further, would ordinarily exclude action under the Ordinance.

(3) That the certificate of sale issued in the present action being one issued under the Partition Ordinance, the statutory protection conferred on a tenant by section 13 of the Rent Restriction Act was not extinguished either by the decree for sale or by the certificate of sale.

Per T. S. Fernando, J. "In this situation the question does arise whether P12 is therefore a valid certificate of sale at all, but counsel for the respondents expressly stated that he does not wish to put forward at this stage any contention of that nature as certain issues which raised such a contention were expressly withdrawn by the respondents at the trial."

Followed: *Britto* vs. *Heenatigala* (1956) 57 N.L.R. 327; LIII C.L.W. 52

Distinguished: *Cinemas Ltd.* vs. *Ceylon Theatres Ltd.* (1965) 67 N.L.R. 97.

Not followed: *Heenatigala* vs. *Bird* (1954) 55 N.L.R. 280; LI C.L.W. 46

H. V. Perera, Q.C., with *Carl Jayasinghe* and *N. S. A. Goonetilleke*, for the plaintiff-appellant.

C. Ranganathan, Q.C., with *D. C. Amerasinghe*, for the substituted defendants-respondents.

T. S. Fernando, J.

This appeal was referred to us for hearing as a result of disagreement between the two judges before whom it was argued in the ordinary course.

The plaintiff-appellant purchased the allotment of land which is the subject-matter of the action (and which is really residential premises) at a sale held after decree entered in partition action No. 3747. The sale took place on 16th October 1957; it was confirmed on 10th December 1958; and the certificate of sale was issued by the court on 23rd September 1959. It is common ground between the parties that the title of the plaintiff to the premises cannot relate back to any date anterior to 23rd September 1959.

The action was filed on 9th August 1960 against the 1st defendant alleging that he had been the tenant of these premises even prior to the date of sale and had failed to recognise the plaintiff as his landlord although he had been requested to do so. What was claimed in the action was a declaration of title to the premises as against the 1st defendant, ejectment and damages as from the date of action. The 1st defendant filed answer denying any request by the plaintiff after the

date of the certificate of sale to attorn to him in respect of the tenancy and alleging that his landlord was one Sanoon to whom rent was being paid. After this answer had been filed the 1st defendant died on 30th June 1961, and his widow and children, the 2nd to the 4th defendants (the respondents to this appeal) were substituted in his place. In the answer filed by them after their substitution, in addition to the defence disclosed in the answer filed by the deceased 1st defendant, they took up the position that the 2nd defendant gave to the plaintiff notice in terms of section 18 of the Rent Restriction Act of 1948 and is therefore the tenant of the premises. There is no dispute that the Rent Restriction Act applies to these premises.

After trial, the learned District Judge granted a declaration that the plaintiff is entitled to the premises and an order for the payment by way of damages of a sum of Rs. 2,273/75 which sum is equivalent to the authorised rent of the premises (Rs. 107/- per mensem) for the period 23rd September 1959 to 30th June 1961, but he refused to order ejectment of the present respondents. He held also that, as title dates from the issue of the certificate of sale, the plaintiff was not entitled to request payment of rent from a time anterior thereto and, as there was no request by the plaintiff to the 1st defendant after the date of the issue of such certificate to attorn as tenant, that the 1st defendant was not in wrongful possession.

Relying on certain dicta contained in the judgment of this Court in *Cinemas Ltd.* v. *Ceylon Theatres Ltd.*, (1965) 67 N.L.R. 97, it was contended on behalf of the appellant that the purchaser under a decree for sale entered in proceedings under the Partition Act, No. 16 of 1951, gets title free of all encumbrances, and that the effect of the judgment is that the status of the various interests that are not within the definition of "encumbrance" in Section 48(1) of the Act is no different from the status of those within that definition. It does not become necessary to examine this contention unless the certificate of sale with which we are concerned upon this appeal is one issued after a sale pursuant to a decree entered in proceedings contemplated by the Partition Act. Although P 12, the certificates of sale, contains a recital that the court ordered a sale under the Act, and even granting that the court intended to make such an order, learned counsel for the respondents has argued that, as this partition action was filed so long ago as 1944, it was not competent for the court to have made such an order. He has relied on the definition of "partition action" contained in section 83(1) of Act No. 16 of 1951 and on section 6(3)(c) of the Interpretation Ordinance. "Partition action" is defined as meaning "an action instituted under this Act" and must, ordinarily at any rate, exclude actions under the Partition Ordinance. The relevant provision of the Interpretation Ordinance permits an action such as this partition action which was pending or incompleted when the repealing Partition Act came into operation to be carried on and completed as if there had been no such repeal. This provision gives an option to continue a pending action as if the repealed law was in existence but is no authority for a continuation of the pending action under the provisions of the new Act. Mr. Perera, for the appellant, sought to avoid the effect of this provision by suggesting that the Partition Act only affected procedure but, having regard to certain material differences between the Act and the Ordinance, we do not find ourselves able to agree that the suggestion is a sound one. Therefore, notwithstanding the recital in the certificate of sale P12 and certain references to the Act in the record of the partition action, the certificate of sale which is the title of the plaintiff cannot be said to be one issued under the Act. In this situation the question does arise whether P12 is therefore a valid certificate of sale at all, but counsel for the respondents expressly stated that he does not wish to put forward at this stage any contention of that nature as certain issues which raised such a contention were expressly withdrawn by the respondents at the trial.

If this appeal has now, therefore, to be decided as if the certificate of sale is one issued under the Ordinance, the respondents are entitled to the benefit of the decision in the case of *Britto* v. *Heenatigala*, (1956) 57 N.L.R. 327, that the statutory protection conferred on the tenant by section 13 of the Rent Restriction Act is not extinguished either by the decree for sale or by the certificate of sale. Mr. Perera, for the appellant, questioned the correctness of this decision and suggested for our reconsideration at this stage whether the dictum of Pulle, J. in *Heenatigala* v. *Bird*, (1954) 55 N.L.R. at 280, that the certificate of sale had the effect of terminating the relationship of landlord and tenant and of constituting the purchaser an independent title holder to whom the restriction contained in section 13 of the Rent Restriction Act could not apply because the certificate conferred a title which is not subject to the tenancy agreement, does not express

the correct position in law. As to this we must observe that the Court in *Britto* v. *Heenatigala* (*supra*) expressly purported to examine this question afresh, and over ten years have elapsed since that decision. Moreover, we should be reluctant to favour an interpretation of the law which could have the effect of rendering nugatory an important provision of the Rent Restriction Act.

The District Judge has, in my opinion, reached a correct decision and I would dismiss this appeal with costs.

Siva Supramaniam, J.
I agree.

Samerawickreme, J.
I agree.

Appeal dismissed.

Present: **Alles, J.**

JINADASA & 106 OTHERS *vs.* JOSEPH, INSPECTOR OF POLICE, VICE SQUAD, KANDY

S. C. Case No. 425-522/1966 — *M. C. Kandy Case No.* 37413

Argued on: 3rd, 6th and 7th February, 1967
Decided on: 25th February, 1967

Gaming — Charges of unlawful gaming against 88 *accused — Charges of aiding and abetting and of assisting in management of Common gaming place against other accused — Validity of search warrant — Evidence independent of presumptive proof —Common Gaming place—Public having access to premises— No degree of control — Proprietory Club — Burden on defence — Discharge of absent accused only at conclusion of trial—No prejudice to others—Nature of presumption under section* 7 *of Gaming Ordinance — Misjoinder of accused—When should objection be taken—Evidence Ordinance* (*Cap.* 14) *section* 105— *Criminal Procedure Code* (*Cap.* 20) *sections* 297 *and* 425—*Criminal Procedure Code of Kenya, section* 913 *and* 381 — *Penal Code sections* 32, 35, 36, 67, 102, 146, 147, 446 —*Gaming Ordinance* (*Cap.* 46) *sections* 2, 3(*c*), 5(1), 7 and 21.

107 accused were charged on three Counts under the Gaming Ordinance: (1) The 1st to the 88th accused were jointly charged with committing the offence of unlawful gaming on 18th April 1964 under section 2 of the Ordinance; (2) The 89th to the 107th accused with aiding and abetting the 1st to the 88th accused to commit the said offence — under section 2 of the Ordinance read with section 102 of the Penal Code; (3) The 89th to the 107th accused, in the course of the same transaction with assisting in the management of the said premises to be kept or used as a common gaming place under section 3 (c) of the Ordinance.

The Magistrate convicted seventy-eight of the first eighty eight accused on the first count and eighteen of the 89th to the 107th accused on counts 2 and 3. The accused were sentenced to pay various fines. The other accused, who had been absent during the trial, were discharged.

Held: (1) That although the statement in the application for a search warrant under Section 5(1) of the Gaming Ordinance that the Inspector "makes oath and says that he received credible information" was strictly not written information on oath as required by that section, there was sufficient compliance with the requirements of the section, since the evidence of three witnesses had been led on oath before the Magistrate, and the evidence was overwhelming to establish a *prima facie* case for the issue of a search warrant.

Referred to: *Schokman* vs. *Sirisena,* (1944) 46 N.L.R. 7.

(2) (*a*) That there was sufficient evidence in the case, quite independently of the presumptive proof under section 7 of the Gaming Ordinance, that the premises were being used as a common gaming place.

(*b*) That the definition of a common gaming place in the Ordinance is not exhaustive.

(*c*) That even where the premises were a Club, the fact that there was no degree of control over the members of the public who sought access to the precincts to partake in unlawful gaming would justify the finding that it was a common gaming place.

Referred to: *Burmester* vs. *Muttusamy,* (1916) 19 N.L.R. 153.

(3) That section 21(a) of the Gaming Ordinance is in the nature of a statutory exception, and under section 105 of the Evidence Ordinance, the burden is on the defence to prove that the club is a proprietary club to which the exception applies.

(4) That although the discharge of the absent accused might have been done earlier when they were absent, no prejudice had been caused to the other accused by this not being done.

Referred to: *Poole* vs. *The Queen*, (1961) A.C. 223; (1960) 3 A.E.R. 398

(5) That section 7 of the Gaming Ordinance creates presumptive proof that each person present committed the acts which constitute the offence, and the presumption under the section does not merely create a liability to a penalty.

(6) That although it was difficult to maintain that the 1st to the 88th accused who had independently entered the premises for the purpose of committing the offence of gaming had acted jointly and had therefore been rightly charged together, since objection to the joinder had for the first time been taken at the conclusion of the trial, and not when the accused were charged, the objection was belated and, therefore not entitled to succeed.

Referred to: *Babulal Chonkhani* vs. *King-Emperor* L.R. 65 I.A. 168.
King vs. *Dharmasena*, (1950) 51 N.L.R. 481
Kadiri Kunhahammad vs. *The State of Madras*, A.I.R. 1960 S.C. 661.

G. E. Chitty, Q.C., with *Eardley Perera*, *Nimal Senanayake*, and *Bala Nadarajah*, for the 1st to 88th accused-appellants.

E. R. S. R. Coomaraswamy, with *Eardley Perera* and *C. Chakradaran*, for the 89th, 90th and 92nd to 107th accused-appellants.

V. S. A. Pullenayagam, Crown Counsel, with *R. Abeysuriya*, Crown Counsel, for the Attorney-General.

Alles, J.

The 107 accused in this case were charged on three counts under the Gaming Ordinance. On the first count, the 1st to the 88th accused were jointly charged with committing the offence of unlawful gaming on 18th April 1964 at premises No. 34, Sangharājah Māwata, Kandy, an offence punishable under section 2 of the Ordinance. On the second count, the 89th to the 107th accused were charged with aiding and abetting the 1st to the 88th accused to commit the offence set out in the first count, an offence punishable under section 2 of the Ordinance read with section 102 of the Penal Code and on the third count, the 89th to the 107th accused were charged in the course of the same transaction with assisting in the management of the said premises to be kept or used as a common gaming place, an offence punishable under section 3(c) of the Ordinance.

After a protracted and bitterly contested trial, the Magistrate of Kandy convicted the 1st to the 3rd, 5th to the 20th, 22nd to the 25th, 27th to the 32nd, 34th to the 50th, 52nd to the 54th, 56th to the 60th, 62nd to the 77th and 79th to the 88th accused on the first count and the 89th, 90th and the 92nd to the 107th accused on the second and third counts. The accused convicted on the first count were sentenced to pay a fine of Rs. 50/- each and the accused convicted an counts 2 and 3 were sentenced to pay fines of Rs. 100/- and Rs. 500/- respectively on the two counts on which they were convicted. The remaining accused were discharged. The present appeals are from this Order.

The facts leading up to the prosecution of the accused may be summarised as follows:

About a month prior to 13th March 1964, Inspector Joseph of the Vice Squad, Kandy Police received information that unlawful gaming was being carried on at premises No. 34, Sangarājah Māwata also known as the Kandy Lake Club. With the approval of A.S.P. Navaratnam, Inspector Joseph decided to have the premises watched. For this purpose, he engaged the services of three persons — Constables Jayatissa and Amirthalingam and a decoy called Halkewela. These persons were detailed to visit the premises, watch the proceedings, take part in the gambling, enrol themselves as members and report the result of their activities to Inspector Joseph.

On 13th March 1964, Constables Jayatissa and Amirthalingam visited the premises. Jayatissa stood outside in the car park while Amirthalingam who was dressed in a sarong, shirt and coat entered building. At the entrance was a clerk dressed in Western clothes. The clerk gave him two enrolment forms to be filled up. Amirthalingam entered a false name and address in the forms calling himself 'A. Ismail of 40, Fruit Hill, Hatton' and in the cage for profession entered 'Trader.' He did not fill the cages for the names of the proposer and seconder nor did anyone fill these cages in his presence. After filling in the enrolment forms, he signed a register and on payment of the sum of Rs. 2/50 was permitted to enter the building. On his entering the building, he found various games for money stakes being played. In one room, the game called 'Crown & Anchor' was in progress; in another, the game 'Casino' was being played, and in the third room the gamblers were indulging in the game called 'Tombola'. In all three rooms, people of various walks of life and different nationalities were taking part in gambling and helpers were managing the respective games. He watched the proceedings for some time, came back, rejoined Jayatissa and then reported to Inspector Joseph. A detailed account of the activities carried on inside the building is not necessary as the Magistrate has fully analysed the evidence in the course of his judgment.

On 14th March 1964, Constable Jayatissa and Halkewela visited the premises. Jayatissa stood outside while Halkewela was able to enter the building with five or six others without the payment of an entrance fee. He found the same games mentioned by Amirthalingam being played inside the building by people of various communities, nationalities and walks of life for money stakes. He took part in some of the games and about 1 1/2 hours later rejoined Jayatissa outside. Jayatissa noticed cars halted outside in the car park and people alighting from buses and entering the building.

On 20th March, Jayatissa and Amirthalingam entered the building in the company of an unknown man detailed by Inspector Joseph. The man took Jayatissa to the office and after obtaining the permission of the clerk at the office, they both entered the building and found the same games mentioned by Amirthalingam and Halkewela being played by several people.

On 17th April, Inspector Joseph detailed all three persons — Amirthalingam, Jayatissa and Halkewela to visit the premises. Amirthalingam and Halkewela entered the building while Jayatissa stood outside. Amirthalingam went up to the office and after signing the register, showed the receipt for Rs. 2/50 which he had received for the earlier payment and was given the membership card P1. Halkewela was again able to enter the premises with four of five others without paying a fee. Both Halkewela and Amirthalingam saw the same games being played for money stakes which they had witnessed earlier. Halkewela took part in the gambling in all three rooms. In the Casino room there were 80 to 90 people gambling and in the Tombola room, 90 to 100 people were engaged in the game. They found 500 to 600 people on the premises and these people were dressed, some in national costume, and others in Western clothes or shirts and sarongs. The premises were well lit with electric jets and there were several cars parked outside. They then returned to the Station and reported to Inspector Joseph.

The stage having now been set for an application for a search warrant under section 5(1) of the Gaming Ordinance, Inspector Joseph on the evening of 18th April 1964 led the evidence of Constable Jayatissa and Amirthalingam and the decoy Halkewela on oath before the Magistrate, and the latter, being satisfied on the evidence that the premises in question were being used as a common gaming place, issued search warrant P2 to Inspector Joseph. Indeed the evidence led by the Police, which same evidence was led at the trial was overwhelming and the Magistrate was amply justified in the course he took in issuing the search warrant. Mr. Chitty for the 1st to the 88th accused submitted that the issue of the search warrant was invalid because Inspector Joseph had not complied with the requirements of section 5(1) in obtaining the search warrant on 'written information on oath'. It is correct that in his application, Inspector Joseph 'makes oath and says that he received credible information' and that this procedure is strictly not 'written information on oath' as required under the section. It seems to me however that since the evidence of three witnesses has been led on oath before the Magistrate there has been a sufficient compliance with the requirements of the section. As de Krester, J. said in *Schokman* v. *Sirisena*, 46 N.L.R. 7 at page 12:

> ".....the form of approach is not an imperative provision and informality or irregularity should not matter as long as the Magistrate is properly satisfied."

I cannot see how any Judge of fact could fail to be satisfied on the overwhelming evidence that was placed before him that a *prima facie* case had been established for the issue of a search warrant. The objection to the validity of the search warrant therefore fails.

After the search warrant was issued, the same Magistrate decided to hear the case, and on objection being raised by the defence and overruled by the Magistrate, the defence applied by way of revision to the Supreme Court. This objection was considered by my brother, T. S. Fernando, J. in *Saparamadu* v. *Joseph*, 68 N.L.R. 200 and my brother held, if I may so with respect, correctly, that he was not satisfied that in deciding to hear the case the Magistrate had exercised his discretion on any wrong principle.

Since the defence had objected to his hearing the case, I must assume that the learned Magistrate of Kandy would have examined the facts of this case with extra care. I am unable to share the view of learned Counsel for the 1st to the 88th appellants that the Magistrate has adopted the role of investigator. The case against the accused depended almost entirely on the evidence of Halkewela, Amirthalingam and Jayatissa. These three witnesses were severely cross-examined by the defence; there were discrepancies in their evidence which have been fully considered by the trial Judge; he has been impressed by their evidence and as a Judge of fact, he was entitled to accept their evidence and act upon it.

After obtaining the search warrant, the Police arranged to raid the premises on the same night. A large Police party consisting of nearly fifty Constables and eight Inspectors under the orders of Inspector Joseph entered the premises at about 10.15 p.m. Amirthalingam, Jayatissa and Halkewela were sent earlier and Halkewela and Amirthalingam were given money and asked to take part in the gambling and await the arrival of the Police party. It is not necessary to refer to the details of the raid which have been fully dealt with by the Magistrate, except to refer to the part taken by Inspector Anthonypillai who spoke to the complicity of the 107 accused who were subsequently charged.

Inspector Anthonypillai entered the Casino room where he found the occupants placing their bets and participating in the gambling. As he entered the room, he disclosed his identity and placed all the persons in the room under arrest. The 1st to the 88th accused were present in the room and some of them were actively taking part in the gambling and placing bets. The 89th accused was seated at the centre of a set of tables facing the 107th accused with bundles of money in front of them. Helping the 107th accused were the 105th and 106th accused and helping the 89th accused was the 97th accused. The 90th to the 96th accused were standing in the space between the tables with wooden rakes in their hands at one set of tables and the 98th to the 103rd accused were found with similar rakes at another set of tables. The 104th accused was seated on a chair on a platform armed with a paint brush and making markings with various paints on a board on the platform. On the evidence, it was clearly established that the 89th to the 107th accused were assisting the gamblers to commit the offences of unlawful gaming and that they were also assisting in the management of the premises being kept or used as a common gaming place. The Police also took charge of the instruments used for the purpose of gambling — the cash, playing cards, rakes, and other articles, which were later produced in Court.

On the evidence of the Police witnesses and the proof that the instruments of gambling referred to above were found on the premises, it was abundantly clear that unlawful gaming was being carried on at the premises in question; the defence did not deny the presence of the accused in the Casino room at the time of the arrest. The Magistrate has accepted not only the evidence led before him when the application for the search warrant was made, which same evidence was given by the witnesses at the trial, but also the evidence of the Police witnesses who spoke to the events of the 18th April 1964, which quite independently of the presumptive proof that arose under section 7 of the Ordinance, was by itself sufficient to establish that the premises were being used as a common gaming place.

Several questions of law and questions of mixed fact and law have been raised by the defence at the argument before me. It has been submitted by learned Counsel for the appellants that the issue of the search warrant was bad and therefore the presumption under section 7 of the Ordinance does not apply; that the premises were excepted premises within the provisions of section 21(a) of the Gaming Ordinance; that the convicted accused were gravely prejudiced by the discharge of some of the accused at the end of the case which prevented them from calling the discharged

accused as witnesses on their behalf; and finally, that there was a misjoinder of charges and accused person which vitiated the entire trial.

On the evidence that was placed before the Magistrate there was ample justification for the Magistrate arriving at a conclusion that the premises in question were being used as a common gaming place. The definition of a common gaming place in the Ordinance is not exhaustive and includes 'any place kept or used for betting or the playing of games for stakes and to which the public may have access with or without payment.' It has been submitted by Counsel for the appellants that since entry to the club premises was restricted only to members, the public, or to use the words of De Sampayo, J. in *Burmester* v. *Muttumany* (19 N.L.R. 153), the "general body of people in a country" did not have free access to the premises for the purposes of gambling. On the other hand it has been submitted by the Crown that the enrolment of members was only a blind and did not effectively prevent the members of the public from having access to the premises. The fact that Amirthalingam was able to become a member by giving a false name and address, without his credentials being examined, without filling the cages for the names of the proposer and seconder which were subsequently entered by the inclusion of names of persons of whose identity he was ignorant; the fact that Halkewela was able to gain entry on two occasions without being enrolled a member or paying fees and taking part in the gambling, supports the submission of the Crown that in fact there was no degree of control over the members of the public who sought access to the precincts to partake of unlawful gaming. There was therefore justification for a finding that the premises were used as a common gaming place.

Connected with the same question was the submission of the defence that the premises were 'excepted premises' within the provisions of section 21(a) of the Ordinance. Section 21 states, inter alia, that nothing in the Ordinance "shall be held to apply to or in any affect.....any proprietary club, if and so long as no promiscuous gaming takes place therein." The evidence of Inspector Joseph and A.S.P. Navaratnam was to the effect that although the Kandy Lake Club had partaken of legitimate sports activities such as cricket and rugby football against other recognised clubs, an important part of their activities was confined to the conduct of unlawful gaming on the premises. The place was brilliantly lit at night with electric jets and the evidence disclosed that people of various walks of life visited the place and indulged in promiscuous gambling. Learned Crown Counsel submitted that section 21(a) was in the nature of a statutory exception and that under section 105 of the Evidence Act, the burden was on the defence to prove that the club was a proprietary club to which the exception applies. No evidence has been led by the defence to establish that the Kandy Lake Club came within the ambit of the exception. The defence only relied on the answers elicited from some of the Police witnesses that there were legitimate sports activities conducted by the Club. The Magistrate rightly rejected the contention of the defence, in the absence of adequate material, that the exception applied to its activities.

In support of the submission that the discharge of some of the accused at the close of the trial caused grave prejudice to the convicted accused who were thereby deprived of calling any of the discharged accused as their witnesses, reliance was placed on the provisions of section 297 of the Criminal Procedure Code. Admittedly the Magistrate might have discharged some of the accused earlier when they were absent on the dates of trial but the question that arises for determination is whether his failure to do so has amounted to a miscarriage of justice or whether it is an irregularity curable under section 425 of the Criminal Procedure Code. There was no evidence led in the case, nor did the cross-examination of the Police witnesses reveal, that any material prejudice has been caused to the convicted accused by their inability to summon the discharged accused as witnesses. The evidence led on behalf of the prosecution consisted mainly of the presumptive proof of the commission of the offence of unlawful gaming created by the presence of persons at a common gaming place. I cannot see therefore how there can be even potential prejudice to the convicted accused as suggested by Mr. Chitty in the present case. As Lord Tucker remarked in the case of *Poole* v. *The Queen* (1961) A.C. 223 at 235, where the provisions of sections 193 and 381 of the Criminal Procedure Code of Kenya (which corresponded with section 297 and 425 of our Criminal Procedure Code) were considered by the Privy Council, "the decision in such cases must always be a matter of degree." I am unable to say that in the circumstances of the instant case, any prejudice has been caused to the defence by their inability to call as witnesses the discharged accused.

Finally, there remains the submission that has been strenuously argued by Mr. Chitty that the entire trial was an illegality because there was a misjoinder of accused and charges. If on the first count the 1st to the 88th accused were properly charged jointly with the offence of unlawful gaming, the 89th to the 107th accused clearly aided and abetted them to commit that offence because by providing the instruments necessary for gambling, they facilitated the commission of the offence. Again, by so doing the 89th to the 107th accused assisted in the management of the premises to be kept or used as a common gaming place and this offence was committed by them in the course of the same transaction in which the other accused committed the offence of unlawful gaming. The main contention of Mr. Chitty was that the 1st to the 88th accused could not be jointly charged with the offence of unlawful gaming. Admittedly there is no evidence that the 1st to the 88th accused entered the premises in pursuance of a common intention to commit the offence of unlawful gaming. At most what can be urged by the prosecution is that they must have entered the premises with similar intentions to commit the offence, the only basis of the liability for the offence being the presumptive proof created by their presence at a common gaming place. It is quite likely that the majority of the gamblers were unknown to each other and apart from the presumption, the prosecution was not able to particularise the part played by each of those accused persons. Counsel for the appellants submitted that the presumption only created a liability to a penalty but that no presumption arose that the offender did the acts which constituted the offence of unlawful gaming. He submitted that a distinction must be drawn between such of the gamblers who are proved to have committed some act, such as placing a bet, and other gamblers against whom the prosecution was not able to establish the commission of any positive act. I am however unable to agree with this contention.

The presumption under section 7 is that any person found at a common gaming place is guilty of the offence of unlawful gaming. That surely connotes that whether that person gambled or not, there is presumptive proof that he committed the acts which constituted the offence. The difficulty however still remains whether all such persons can be jointly charged. Mr. Pullenayagam for the Crown argued that both on the facts and the law, the joinder of the 88th accused on the first count can be justified. It was his submission that this was not a case to which the provisions of section 32 of the Penal Code would necessarily apply; the joint commission of any offence can be justified not only under section 32 but also under other sections of the Penal Code (vide sections 33, 35, 36, 146, 147 and 446 of the Code). In his submission, there was a gaming session in progress and all those who jointly participated in that session were principals in the first degree who could be jointly charged; he relied on the illustration (a) to section 67 of the Penal Code in support of his submission. On the facts of this case however I find it difficult to accept Crown Counsel's submission. Unlike the illustration to section 67, this was not the case of one individual committing several separate offences which also jointly constituted one offence; this was the case of several individuals each committing a separate offence to which none of the sections relating to joint liability referred to above would apply; nor was the nature of the game 'Casino' such that joint participation by the gamblers in the game was necessary. The only link between the gamblers is that they congregated independently at a common gaming place with the object of each committing the offence of unlawful gaming. If, for instance, several individuals without prior arrangement arrived at a place where unlawful bets were being accepted at the same time, would it be possible for all the persons who placed their unlawful bets to be jointly charged with the commission of the offence of unlawful betting? Similar considerations would apply in the instant case. In both cases, there is an invitation to the general public to enter the premises and commit an offence and it is difficult to maintain that persons who independently entered the premises for the purpose of committing such an offence acted jointly. It is however unnecessary for me to arrive at any definite conclusion on this issue in view of Crown Counsel's legal submissions. He argued with considerable force that it was far too late for Counsel for the appellants to raise any objections to the charges on the ground of misjoinder at the stage he did. If any objections were taken, it should have been done on 18th June 1964 when the accused were charged and not on 12th November 1965 when, after the trial was concluded, the question was raised for the first time at the address stage by Mr. Chitty. The 1st to the 88th accused not only pleaded not guilty to the joint charge but were also content to be jointly represented by learned Queen's Counsel during the course of the entire trial and raised no objections to the joinder until the concluding stages of the case. It is

now settled law that in regard to the joinder of charges and accused persons

> ".....the time at which it falls to be determined whether the condition that the offences alleged had been committed in the course of the same transaction has been fulfilled.....is the time when the accusation is made and not when the trial is concluded and the result known. The charges.....have to be framed for better or worse at an early stage of the proceedings and would be paradoxical if it could not be determined until the end of the trial whether it was legal or illegal. It was for judge bearing these considerations in mind to use his discretion."

(vide the observations of the Privy Council in *Babulal Choukhani* v. *King-Emperor* L.R. 65 I.A. 168 cited with approval in *King* v. *Dharmasena* (1950) 51 N.L.R. 481 at 483-484). The case of *Babul Choukhani* v. *King-Emperor* has been followed by the Supreme Court of India (vide *Kadiri Kunhahammad* v. *The State of Madras*, A.I.R. 1960 S.C. 661). Since it is "on the basis of what appears on the face of the accusation that the Court may proceed to charge and try", the Court was justified in the absence of any objection on the ground of misjoinder, in proceeding with the trial of all the accused on the charges framed. Counsel's objections on the ground of misjoinder is belated and therefore is not entitled to succeed.

For the above reasons, the convictions of all the accused who have been found guilty and the sentences imposed on them are affirmed and their appeals are dismissed.

Appeals dismissed.

Present: **H. N. G. Fernando, S.P.J., T. S. Fernando, J. and Sri Skanda Rajah, J.**

D. M. WIMALASARA BANDA *vs.* M. M. SAMARARATNE BANDARA YALEGAMA

In the matter of an Appeal under section 82(*a*) *of the Ceylon (Parliamentary Elections) Order in Council* 1946.

Election for the Rattota Electoral District No. 36
Holden on the 22*nd day of March* 1965.

Election Petition Appeal No. 10 *of* 1966.

Argued on: 18th, 19th, 22nd, 23rd, 24th & 25th October, 1966.
Decided on: 20th December, 1966.

Election Petition—Agency— Charge of corrupt practice of making or publishing false statements of fact concerning personal character or conduct of rival candidate at meeting — Defence that the speaker was neither agent nor one acting with knowledge or consent of respondent — Production of police report in support of charge — Trial Judge holding that although chairman of meeting was agent of respondent he exceeded authority when he permitted the alleged speaker to make a speech — Can this speaker be regarded as an agent within the meaning of the term in Election Law—Ceylon (Parliamentary Elections) Order in Council 1946, *sections* 58 (1) (*d*) *and* 77 (*c*).

Evidence — Police officers on duty at election meetings making reports of speeches made to superiors — Production of such report in proof of such charge — Failure to produce original notes from which report compiled — Effect — Evidence Ordinance — Admissibility of such report under section 35 *thereof—When admissible under section* 159 *or* 160 *of the Evidence Ordinance.* ?

Evidence Ordinance, sections 145, 155 *— Purposes for which such police report is available.*

Proof of charges in election petition—Standard required—Whether same as in criminal case.

Advisability of permitting police officers to confine themselves to their regular and more conventional duties.

In support of a charge of making false statements of fact concerning the personal character or conduct of the rival candidate, evidence was led to show that at a meeting held in support of the Respondent, some person had in the course of a speech made an allegation that M (a rival Candidate) had taken a bribe of Rs. 75,000/- and acted treacherously against the former Prime Minister.

The defence taken up was that the person who made the speech did so neither as agent nor with the knowledge or consent of the Respondent. The trial judge while accepting the position that the speaker had not been expressly appointed an agent of the respondent held;

(a) that there was not sufficient evidence from which to conclude that the speaker made the statement with the knowledge and or consent of the respondent;

(b) that the chairman of the meeting had no authority to add to or delete from a list of speakers previously chosen by the Respondent and that in permitting the particular speaker to make a speech, the Chairman exceeded his authority.

Held: That in view of (i) the evidence establishing that this particular meeting could not have commenced at the scheduled time unless persons not previously selected had been permitted to speak and that only two or three of those earlier selected to speak turned up at the meeting,

(ii) the absence of evidence that the Chairman had been prohibited by the Respondent from permitting speeches to be made by persons other than those previously chosen by the Respondent, and

(iii) the fact that when the Chairman presided as Agent or with the knowledge and consent of the respondent, he had implied authority to supervise and control the meeting and to permit speeches to be made at his discretion,

the speaker in question should be regarded as an agent within the meaning of the term in Election Law.

The petitioner sought to prove an alleged false statement by producing a document in Sinhala marked P56 which was described by a Police Sergeant as the original or a carbon copy of what his brother had written in Sinhala at the former's dictation from notes made by him at the meeting held on 9.3.65 (received at the C.I.D. Office only on 3.4.65).

Held: (1) (**Sri Skanda Rajah, J.,** dissenting) That apart from other suspicions as attaching to it, it was unsafe to admit in evidence the police report P56 as the notes taken down at the meeting from which the report is alleged to have been compiled were not produced, either because they were destroyed or deliberately suppressed. The best evidence of what a Police Officer notes at a meeting will be the notes themselves.

(2) That a report of a speech made at an election meeting forwarded by a Police officer to his superior on instructions from him does not constitute an "official book register or record" as contemplated in Section 35 of the Evidence Ordinance and consequently P56 was not admissible under that Section.

(3) That it could not be argued that the evidence of matters stated in P56 was duly given under section 159 or 160 of the Evidence Ordinance because if these two sections were intended to be utilised, both the Judge and the witness should have been made aware that evidence was being given as permitted by one or other of these two sections.

(4) That a police Officer's report of matters said to have been uttered at a meeting is not a statement made by such person or reduced into writing within the meaning of section 145 of the Evidence Ordinance. That Section relates only to statements written by the witness himself, or statements made by him and accepted by him at the time to be correctly reduced to writing.

Held further: That a statutory ground of avoidance relied on in an election petition must be established by proof of the same standard as is required in a criminal case.

Per **H. N. G. Fernando, C.J.** "For the sake of completeness, I propose to add an expression of opinion which is *obiter*. I consider that a police report of the nature admitted in this case would be available under S. 155(c) of the Evidence Ordinance to impeach the credit of the officer making the report, if anything stated in the report is inconsistent with evidence given in a Court by the officer. The report may also be utilised under section 145, to cross-examine the officer himself. But such a report does not constitute proof, as against any person, that he made any statement attributed to him in the report."

Per **T. S. Fernando, J.** "At a stage of the development of our Country when parliamentary elections are yet conducted in an atmosphere not devoid of tension and excitement, I venture to suggest that police officers will be well advised to confine themselves to their regular and more conventional duties. The matter of taking notes of speeches which might contain a statement which on verification turns out to be false could well be left to the resources of the candidates themselves or of their agents and supporters."

Per **Sri Skanda Rajah, J.**—(*a*) "When the Election Judge placed the burden of proving the meaning intended by the speaker on the petitioner he seriously misdirected himself on the law. For this reason alone this appeal should be allowed and a trial *de novo* by another Election Judge ordered."

(*b*) "I would rather not restrict the duties of Police officers, whose duties would include the duty to detect election offences as well and to bring such offenders to justice, especially in a country notorious for the making of false statements of fact in relation to the personal conduct or character of candidates. If their duties are restricted this offence may become far more prevalent and go unchecked."

Not followed by majority Court: *Ilangaratne* vs. *de Silva* (1948) 49 N.L.R. 169; XXXVI C.L.W. 97

Cases referred to: *Samaranayake* vs. *Kariyawasam* (1966) 69 N.L.R. p. 1.
King vs. *Silva* (1928) 30 N.L.R. 193; 6 Times of Cey. Reps. 69
Don Philip vs. *Ilangaratne* (1949) 51 N.L.R. 561.
Naidu and Co. vs. *The Commissioner of Income Tax* A.I.R. 1959 (S.C.) 359
Mahavithane vs. *Commissioner of Inland Revenue* (1962) 64 N.L.R. 217
Ram Iswara vs. *Commissioner of Inland Revenue* (1962) 65 N.L.R. 393.
Senanayake vs. *Navaratne* (1954) 56 N.L.R. 5; LI C.L.W. 36 (P.C.)
Ratwatte vs. *Piyasena* (1966) 69 N.L.R. 49
Om Prakash vs. *Emperor* A.I.R. 1930 Lahore 867.

Nimal Senanayake, with *N. S. A. Goonetilleke* and *U. A. S. Perera*, for the appellant.

Colvin R. de Silva, with *Malcolm Perera*, *K. Shanmugalingam*, *Prins Gunasekera* and *Jayatissa Herat*, for the respondent.

H. N. G. Fernando, C.J.

This was an appeal against the determination of an Election Judge holding that the Respondent was duly elected at the March 1965 General Election as Member of Parliament for Electoral District No. 36, Rattota. The grounds of avoidance relied on at the trial of the Election Petition were that the Agents of the Respondents or persons acting with his knowledge and consent had committed the corrupt practice of making or publishing false statements of fact concerning the personal character or conduct of Chandrasena Munaweera who had been one of the other two candidates at the Rattota election.

Evidence was led at the trial in regard to —

(a) one instance where a false statement was alleged to have been made in a pamphlet marked P54;

(b) five instances of false statements alleged to have been made in speeches delivered at meetings held in support of the candidature of the Respondent;

(c) several instances of false statements alleged to have been made by one person at different places in the electorate from a motor car carrying a loudspeaker.

I will deal first with the case of the pamphlet P54. The learned Judge has held that two statements concerning Mr. Munaweera which were made in this pamphlet were not statements which referred to the personal conduct or character of Mr. Munaweera. The finding of the learned Judge was strongly challenged in appeal, on the ground particularly that one of the statements contained in the pamphlet was clearly and beyond doubt an allegation that Mr. Munaweera, who had been a Member of Parliament in December 1964, had at the time "crossed over" and voted against the Government in Parliament, having accepted a bribe for doing so. It was argued I think with much justification that the finding with respect to this statement was perverse and ought to be set aside. For reasons which will presently appear, however, it is not now necessary to consider the validity of this argument.

We understand that although the trial of this petition occupied 13 days and concluded on 8th June 1966, the learned trial Judge reserved his judgment for 11th June, and on that day dictated his judgment from the Bench. This course which the Judge followed perhaps accounts for the fact that in relation to nearly every one of the eight charges which he had to consider, the judgment contains no findings of fact except the particular finding relied on by the learned Judge for holding that the charge had not been established. For instance in the case of the pamphlet P54 there is only a finding that the statements made in the pamphlets did not affect the personal character or conduct of Mr. Munaweera: there

is no finding that the statements were false, nor a finding that they were made by an agent of the Respondent. In regard to some of the other charges also the sole finding relates to the "innocence" of the statements, and there are no findings on other relevant points. In regard to one charge there is a finding that an alleged statement was made by a person not proved to be an agent of the Respondent, but no finding as to whether the statement was false or affected the personal character or conduct of Mr. Munaweera. In the result, if the appellant had satisfied us that a particular finding must be set aside, we would have been left without the benefit of other findings of fact necessary to enable us properly to dispose of this appeal.

As I have stated above, we have no finding of the trial Judge on the question whether P54 was published by an agent of the Respondent. According to the evidence it was published by one Mulan Dunuweera. The witness De Mel testified that P54 was brought to his house by Dunuweera who came in a party of people. As to the time when P54 was handed to De Mel. he testified " I believe it is about mid-January 1965 three or four days after the nomination because I remember the date of the nomination as the 11th of January." An important point in De Mel's testimony was that Dunuweera had on that occasion canvassed De Mel's vote for the Respondent. There was also evidence referred to in the judgment that Mulan Dunuweera had made a speech in support of the candidature of the respondent at a meeting held on 30th January 1965, and evidence that Mulan Dunuweera had caused to be printed another document P51, which although it mentioned no names, referred to the same matter as P54, viz. the betrayal of the Government on an occasion of a vote in Parliament. Had these been the only matters relevant to the question whether Mulan Dunuweera was an agent of the Respondent at the time when he is alleged to have delivered to De Mel the pamphlet P54, the conclusion that he was an agent may have been an obvious one.

On the other hand, there were several matters in evidence which are relevant to this question, but which unfortunately received no consideration in the judgment. Mr. T. B. Illangaratne, who had been a senior member of the Cabinet in the Government which was defeated in Parliament in December 1964, was a witness at this trial. He testified that he had been a member of the nomination board which selected candidates to represent the Sri Lanka Freedom Party at the General Election of 1965, and that Mulan Dunuweera had applied for nomination for the Rattota seat. He said also that some time after the Respondent had been selected as the party candidate and after the date of nomination, the Respondent had told him that a number of persons who had unsuccessfully made application for nomination were not giving support to the Respondent, and that one such person was Mulan Dunuweera. According to Mr. Illangaratne, he himself spoke to Dunuweera about this matter shortly after 21st January 1965; Dunuweera at first told him that he could not support the Respondent's candidature, but later agreed to do so on Mr. Illangaratne's advice. There is also the evidence of the Respondent himself that it was only late in January that Dunuweera agreed to support him, and that Dunuweera did actively support him from about the end of January 1965. The evidence to which I here refer was not challenged in cross-examination.

The pamphlet P54 was printed on 14th December 1964, nearly a full month before Nomination Day, and several weeks before the Respondent had even applied for the Party nomination, and it is perfectly clear that in having it printed Dunuweera had no intention of using the pamphlet to further the Respondent's candidature. On the contrary, the pamphlet P51, also printed early in December, shows that Dunuweera at that stage was motivated partly by bitter personal acrimony towards Mr. Munaweera, and partly by his intention to contest and defeat the latter in the forthcoming General Election. P51 was clearly a challenge to such a contest. At the time when these pamphlets were printed, the Res-

pondent was in Government service and it was not known that he had then any intention of standing for Parliament.

If the learned Judge had addressed his mind to the question whether Dunuweera acted as the Respondent's agent when he handed P54 to De Mel a few days after 11th January 1965, he would have found considerable evidence indicating that Dunuweera had not so acted. There was nothing incredible in Mr. Illangaratne's evidence, which in substance disclosed that Dunuweera, who had long been a Party stalwart but had nevertheless been refused the Party nomination, had been unwilling to support the Respondent who was a complete new-comer in the Party. The dates when P51 and P54 were printed, and the content of P51, show that Dunuweera's motive was purely personal. The fact that only one publication to de Mel of P54 was proved also tends to negative the allegation that Dunuweera was in mid-January seriously supporting the respondent's candidature. Had these matters received consideration by the Election Judge, he would have found in them confirmation of the Respondent's evidence that Dunuweera had not been his agent prior to the end of January, and little or nothing to controvert that evidence. The Judgment indicates that the trial Judge acted on what I consider is the correct principle namely, that a Member chosen by the vote of the people must not be unseated upon an election petition unless a statutory ground of avoidance is established by proof of the same standard as is required in a criminal case. For me now to hold that proof of Dunuweera's agency was not established by the evidence is not to reverse an express finding of the trial Judge. But even if there had been such a finding, I would have been compelled to hold in appeal that the evidence fell far short of establishing agency beyond reasonable doubt. Thus, although for reasons different from those relied on by the trial Judge, I affirm his finding that the charge based on P54 was not proved.

I pass now to consider a different charge. There was evidence that at a meeting held on 9th March 1965 at Udatenne in support of the Respondent, some person had in the course of a speech made an allegation that Mr. Munaweera had taken a bribe of Rs. 75,000/- and acted treacherously against the former Prime Minister. According to the judgment, the Respondent did not at the trial contest the fact that this was a false statement relating to the personal character or conduct of Mr. Munaweera, but the defence taken up was that the person who made the speech did so neither as agent nor with the knowledge or consent of the Respondent. The learned trial Judge accepted the position that the speaker had not been expressly appointed an agent of the Respondent, and held that there was no sufficient evidence from which to conclude that the speaker made the statement with the knowledge and or consent of the Respondent. The Judge held that although the Chairman of the meeting was an agent of the Respondent, the Chairman had no authority to add to or delete from a list of speakers previously chosen by the Respondent, and that in permitting this particular speaker to make a speech the Chairman exceeded his authority. His finding was that the speaker was not an agent of the Respondent. For reasons which have been stated in the judgment in appeal in the Bentara-Elpitiya case, 69 N.L.R. (1966) p.1, the learned Judge in the present case has misdirected himself on the law in reaching that finding. There was no evidence that the Chairman had been prohibited by the Respondent from permitting speeches to be made by persons other than those previously chosen by the Respondent; on the contrary, the evidence establishes that this particular meeting could not have commenced at the scheduled time unless persons not previously selected had been permitted to speak. Indeed out of several persons so previously selected only two or three ultimately turned up at the meeting. When the Chairman presided as agent or with the knowledge and consent of the Respondent, he had implied authority to supervise and control the meeting and to permit speeches to be made at his discretion. I hold therefore that the speaker in question was an "agent"

within the meaning of the term in Election Law. Save for other reasons which will be presently discussed, the election of the Respondent should have been declared void in consequence of the making of false statements by a speaker at this meeting.

The only evidence as to the fact that this statement was made at the Udatenne meeting consisted of a report P56 which was produced at the trial, and I must refer to the circumstances pertaining to this report. One Siribaddana an Inspector of the C.I.D. Colombo produced at the trial a document in Sinhala which was marked P56, which had apparently been received at the C.I.D. office on 3rd April 1965. Subsequently this document was shown to one Sergeant Ratnayake of the Matale Station. When asked in Examination in chief "is that a report made by you," his answer was "I recorded this at the meeting and got them written up and checked them up." Subsequently however, Ratnayake admitted that P56 had not been in fact recorded at the meeting. His later position was that he had made notes at the meeting in an exercise book, and afterwards dictated a report to his brother (not a Police Officer) and that P56 was the original or a carbon copy of what the brother had written at dictation. I must note here that although P56 bears a stamp evidencing its receipt at the C.I.D. office in April 1965, this document bears neither the signature of Ratnayake nor any indication as to the date on which it was written. According to Ratnayake the original notes which he made at several meetings were written into an exercise book during the meetings, and his evidence on this point is interesting (the under-lining is mine):—

"*Q.* **You have with you all the notes of the meetings that you covered?**
A. **Yes, I have.**
Q. You have written down all these in an exercise book?
A. Yes.
(To Court:) *Q.* **Have you got that exercise book?**
A. **I cannot say whether it is there.**
Q. You would keep it?
A. After the Election the book was kept in the office. I do not know whether it is still there.
Q. Did you keep it in the office?
A. Yes.
Q. After you kept it in the office you have up to today not seen it?
A. I have no recollection of having seen it."

The exercise book in which the witness claimed to have entered his original notes was not produced at the trial. In regard to other Police reports produced at this trial, the evidence was that original notes made at meetings by Police Officers had been destroyed after reports compiled from them had been completed.

His Lordship Chief Justice Sansoni in the *Dedigama* Petition refused to allow the production of similar Police reports on the ground that the original notes from which the reports were claimed to have been compiled had been destroyed or were not made available to Court. I am in entire agreement with the principles underlying this ruling. The best evidence of what a Police Officer notes at a meeting will be the notes themselves, and if the notes have been destroyed or deliberately suppressed, it is unsafe (to say the least) to admit in evidence a report alleged to have compiled from the notes. In the case of the document P56 unusual suspicion must attach to it, because it bears no date or signature and it is actually in the handwriting of a civilian, and more particularly because, for reasons unexplained in the trial, it reached the C.I.D. office nearly a fortnight after the date of the General Election, and long after the meeting in question.

Several of these Police reports were produced at the trial, and it is perfectly clear from the judgment that the learned trial Judge acted on these reports as being themselves evidence of the fact that statements attributed in the reports to speakers at Election meetings had actually been made by those speakers. Section 35 of the Evidence Ordinance reads as follows:—

"An entry in any public or other official book, register, or record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty especially enjoined by the law of the country in which such book, register, or record is kept, is itself a relevant fact."

Now any entry referred to in section 35 is itself a relevant fact. Thus a birth registration entry, for example, is itself evidence of the facts stated in the entry, that is to say that X was born on a particular day, that his mother was Y and his father was Z. Those facts are thus established by proof of the entry itself without the need for any oral testimony in proof of the facts.

Learned Counsel who appeared for the Appellant in this case has properly conceded that reports like P56 do not come within the scope of Section 35. It is clear that P56 is not a official book, register or record contemplated in the Section. A public "book" or "register" is something regularly maintained, with the object that entries be made therein in the course of official business; section 35 refers to such books or registers being "kept", the verb, "to keep" in this context having the meaning that the book or register is maintained for the making of particular entries as a matter of regular routine. "Record" in that section must be given a generic meaning as "book" and "register", and a report like P56, or even the original Police note, certainly does not bear such a character. Section 35 occurs in the group of sections 34 — 37, the others in the group dealing with books of account regularly kept, maps and charts, statements in Acts, notifications and Gazettes, and statements in official legal publications. It is because the authenticity of entries or statements in such documents would ordinarily be beyond question that the Evidence Ordinance renders the entries or statements relevant evidence of the facts therein stated — One cannot for a moment concede that the same authenticity attaches to reports like P56.

I have no doubt therefore that the report was not admissible under Section 35 in proof of any statement mentioned in the report.

Counsel for the appellant argued that evidence of the matters stated in P56 was duly given under section 160 of the Evidence Ordinance. Section 159 permits a witness to refresh his memory as to a transaction by reference to a document made at the time of the transaction or soon thereafter. Section 160 permits a witness to testify to facts mentioned in such a document even if he has no specific recollection of the facts themselves.

The record of the evidence of Sgt. Ratnayake does not show that either the trial Judge or counsel intended that P56 was to be used or admitted under section 159 or section 160. Ratnayake was not asked whether he could remember what had been said at the meeting, whether before or after perusing P56. If a writing is used only to refresh memory, then the matters which require consideration by the Judge are the credibility of the witness's testimony and the reliability of his memory. If the writing does not serve to refresh memory, then the matter for consideration is the honesty of the person making the record and the reliability both of his sense of hearing and of his capacity to make an accurate record. Despite decisions in India to the contrary, I much prefer the view that, if section 159 or section 160 is intended to be utilized, both Judge and witness must be made aware that evidence is being given as permitted by one or other of those sections.

In *Ilangaratne* vs. *de Silva* (49 N.L.R. 169) Windham J. held that a police officer's report, purporting to have been made in circumstances substantially similar to those affecting the reports in the instant case, was admissible under section 35 of the Evidence Ordinance as being an "official record." A decision of a Bench of 3 Judges in *King* vs. *Silva* (30 N.L.R. 193) was there relied on as a case in which "the exact point is covered."

In the latter case, which involved a charge of murder, one Mohammadu had been taken before a Superintendent of Police and made to him a statement which was recorded by the Superintendent. At the trial, Mohammadu gave evidence inconsistent with his former statement. Thereupon the Superintendent was called and, having produced the statement, he explained that the statement had been freely made by Mohammadu, who had placed his mark to it after it had been read and explained to him. The accused in the

case was convicted of grievous hurt, and the witness Mohammadu was dealt with for having given false evidence at the trial. A Bench of 3 Judges held that the statement was properly used in evidence —

(a) under S. 145 of the Evidence Ordinance, to cross-examine Mohammadu as to a previous statement made by him in writing or reduced to writing; and

(b) under S. 155(c) of the Evidence Ordinance, to impeach the credit of the witness Mohammadu, by proof of a former statement inconsistent with his evidence.

There is literally not a word in the judgment in *King* vs. *Silva* which refers to section 35 of the Evidence Ordinance, or to the character of the "entries" declared by that section to be relevant evidence of any fact. The statement there proved was the previous statement of a *witness*, and it was proved only for the strictly limited purposes specified in section 145 and section 159. The production of the statement as reduced to writing was necessary under the best evidence rule, and was not in any way related to section 35. I must say, with the utmost respect, that Windham, J. completely misunderstood the judgment if he thought it to be authority for the admission, in proof of the fact that a person made a certain statement at a meeting, of a police officer's report of matters said to have been uttered at the meeting. Such a report is certainly not a "statement made by such person or reduced into writing" (S.145); that section relates only to statements written by the witness himself, or statements made by him and accepted by him at the time to be correctly reduced to writing. Nor was there any witness, in the case heard by Windham J, "whose credit was impeached by proof of former statements inconsistent with his evidence" (S. 155). Nor did Windham, J. examine in any way the purpose and scope of section 35 in deciding that the police report was admissible. For these reasons, I emphatically decline to follow the decision in *Ilangaratne* vs. *de Silva*, and I trust that the judgments in this and other appeals will finally over-rule that decision. I must disapprove also the decision in *Don Phillip* vs. *Ilangaratne* (51 N.L.R. 561), in so far as it placed reliance on police reports in proof of statements alleged to have been made at election meetings. Apart from the strictly legal issue to which I have given consideration above, I must express my agreement with the observations which my brother Fernando proposes to make with regard to the use hitherto made of police reports of election meetings.

For the sake of completeness, I propose to add an expression of opinion which is *obiter*. I consider that a police report of the nature admitted in this case would be available under section 155(c) of the Evidence Ordinance to impeach the credit of the officer making the report, if anything stated in the report is inconsistent with evidence given in a Court by the officer. The report may also be utilised under section 145, to cross-examine the officer himself. But such a report does not constitute proof, as against any person, that he made any statement attributed to him in the report.

Abeyesundere J. who was the trial Judge in the instant case, has authorised me to state that if the grounds of objection which I have now considered had been argued before him he would have held P56 to be not admissible under section 35.

I hold for these reasons that there was misdirection in law in the admission of P56 in evidence; there was accordingly no proof that the alleged false statements to which it refers were in fact made at the Udatenne meeting. The finding of the trial Judge that the charge based on P56 had not been established as against the Respondent has therefore to be affirmed, though again for different reasons.

In relation to the third of the charges mentioned at the commencement of this judgment, I was not impressed by the arguments that there was either misdirection in law or else gross misdirection on the facts.

The remaining charges depended solely on police reports alleged to have been compiled from notes which had subsequently been destroyed or which were not available at the trial. On the same grounds which apply in the case of P56,

I hold that these reports were not legal proof that alleged false statements had been made by agents of the Respondent.

The determination of the Election Judge is affirmed, and the appeal is dismissed with costs.

T. S. Fernando, J.

I agree with the judgment of my Lord dismissing this appeal for the reasons stated by him. The abhorrence with which I view this new phenomenon of copies of police reports where the originals have been destroyed that has obtruded itself upon our courts is so great that I am impelled to add the following observations:—

What is declared a corrupt practice by section 58 of the Ceylon (Parliamentary Elections) Order in Council, 1946 is the making or publishing of any *false* statement of fact in relation to the personal character or conduct of a candidate. I cannot appreciate why instructions have to be given by superior officers of the Police to their subordinates that notes be taken of the contents of speeches made at election meetings that are likely to contain false statements such as those sought to be penalised by section 58. While it is true it is the duty of all police officers to detect and bring offenders to justice, surely at the time a police officer is recording a note of a speech that is being made he is not aware that a statement made in the course of that speech is false. Such a record has then to be attributed to an excess of zeal displayed by the officer unaware as he is of the falsity of the statement. I do not wish to believe that police officers consciously waste their time in the hope that statements in election speeches would ultimately turn out to be false.

What happens after such a recording by a police officer? An election petition is occasionally presented by or on behalf of a defeated candidate. Quite often, as indeed in the case which has given rise to the present appeal, no evidence of any person except the police officer is even attempted to be led to prove that the alleged false statement was made. The police officer himself says he has no independent recollection of the contents of the speech, and the petitioner relies on section 160 of the Evidence Ordinance. As the witness has no specific recollection of the facts he renders himself immune from effective cross-examination. He could say that the speech was correctly recorded in the notes he made at the time. The law allows to the adverse party a right to see the note or writing made by the witness so that, after perusal thereof, the latter may be cross-examined upon it. This right, which has proved itself to be a very important one, is effectively baulked by the eruption of a new practice, a practice that is unfortunately growing and must be unhesitatingly discouraged, of destroying the contemporaneous note or writing. Uneasiness of the mind of the public at such destruction is not allayed when, as sometimes happens, the witness says that the writing was destroyed "on instructions received". What is therefore made available to the cross-examiner is a copy, often a "fair" copy, made sometime after the event. Where, as is often the case, the dispute at the trial relates to an offending word or words and not to the bulk of the rest of the note of the speech, a reference to the original note would be of vital necessity to the adverse party. It would be important, for instance, to examine the original note for any corrections, interpolations or erasures. Imperfections of that nature are swept away in advance if all that is made available at the trial is what goes under the sobriquet of a "copy", sometimes described as a precis alleged to have been made from the contemporaneous note. This procedure whereby the original note or writing is destroyed renders the police officer liable to be accused by the adverse party of distorting the truth or, what may be as objectionable, of undue partiality towards a particular candidate.

At a stage of the development of our Country when parliamentary elections are yet conducted in an atmosphere not devoid of tension and

excitement, I venture to suggest that police officers will be well advised to confine themselves to their regular and more conventional duties. The matter of taking notes of speeches which might contain a statement which on verification turns out to be false could well be left to the resources of the candidates themselves or of agents and supporters.

Sri Skanda Rajah, J.

This is an appeal from the determination of an Election Judge dismissing the petition with costs and declaring the respondent duly elected and returned as a Member of Parliament.

The hearing commenced on 16th May, 1966, and concluded on 8th June, 1966, which was the end of the week. The order itself was dictated from the Bench after the week-end. Counsel for the Appellant complains, not without justification, that there has been a denial of justice.

An appeal to this Court lies only on any question of law: *v.* section 82 A of the Ceylon (Parliamentary Elections) Order-in-Council, 1946. The jurisdiction conferred on this Court is, therefore, limited. It would be the same as in a case stated by the Board of Review for the opinion of this Court on questions of law under the Income Tax Ordinance. The scope and nature of the power which this Court has to reject conclusions reached by the Board of Review on questions of law, of fact and of mixed law and fact was set down by Gajendragadkar, J. in *Naidu and Co.* vs. *The Commissioner of Income Tax* 1959 A.I.R. 359 (S.C.) at 362 and 363. This passage was adopted by this Court in *Mahavithane* vs. *Commissioner of Inland Revenue* (1962) 64 N.L.R. 217 and *Ram Iswara* vs. *Commissioner of Inland Revenue* (1962) 65 N.L.R. 393. It runs thus:—

"There is no doubt that the jurisdiction conferred on the High Court by section 66(1) is limited to entertaining references involving questions of law. If the point raised on reference related to the construction of a document of title or to the interpretation of the relevant provisions of the statute, it is a pure question of law; and in dealing with it, though the High Court may have due regard for the view taken by the tribunal, its decision would not be fettered by the said view. It is free to adopt such construction of the document or the statute as appears to it reasonable. **In some cases the points sought to be raised on reference may turn out to be a pure question of fact and if that be so, the finding of fact recorded by the tribunal must be regarded as conclusive in proceedings under section 66 (1). If, however such a finding of fact is based on an inference drawn from primary evidentiary facts in the case, its correctness or validity is open to challenge in reference proceedings within narrow limits. The assessee or revenuee can contend that the inference has been drawn on considering inadmissible evidence or after excluding admissible and relevant evidence: and, if the High Court is satisfied that the inference is the result of improper admission or exclusion of evidence, it would be justified in examining the correctness of the conclusion, it may also be open to the party to challenge a conclusion of fact drawn by the tribunal on the ground that it is not supported by any legal evidence or that the impugned conclusion drawn from the relevant facts is not rationally possible: and if such a plea is established, the Court may consider whether the conclusion in question is not perverse and should not, therefore, be set aside. It is within these narrow limits that the conclusions of fact recorded by the tribunal can be challenged under section 66(1). Such conclusions can never be challenged on the ground that they are based on misappreciation of evidence.** There is yet a third class of cases in which the assessee or the revenuee may seek to challenge the correctness of the conclusion reached by the tribunal on the ground that it is a conclusion on a question of mixed law and fact. Such a conclusion is no doubt based upon the primary evidentiary facts, but its ultimate form is determined by the application of relevant legal principles. The need to apply the relevant legal principles tends to confer upon the final conclusion its character of a legal conclusion and that is why it is regarded as a conclusion on a question of mixed law and fact. In dealing with findings on questions of mixed law and fact the High Court would no doubt have to accept the findings of the tribunal on the primary questions of fact; but it is open to the High Court to examine whether the tribunal has applied the relevant legal principles correctly or not; and in that sense the scope of inquiry and the extent of the jurisdiction of the High Court in dealing with such points is the same as in dealing with pure points of law."

The passage relevant for the consideration of the submissions made by Counsel for the appellant is underlined above.

The ground relied on by the petitioner was corrupt practice as defined by section 58(1)(d) and read with section 77(c).

In order to succeed the petitioner had to prove that the statement in question

(1) is a statement of fact;
(2) it relates to the personal character or conduct of another candidate, viz., Munaweera;
(3) it is false
(4) it was made or published
  (a) by an agent of the respondent, or
  (b) with the knowledge or consent of the respondent;
  and
(5) it was made or published for the purpose of affecting the return of Munaweera.

It will be seen that what meaning the speaker intended by the words he uttered is not an element of this charge. Therefore, no burden rested on the petitioner to prove either beyond reasonable doubt or even on the balance of probability that the utterance was made intending a sinister meaning. The real test is, "What would be the impression created by the words in question on the mind of a reasonable man or the ordinary voter?" When the Election Judge placed the burden of proving the meaning intended by the speaker on the petitioner he seriously misdirected himself on the law. For this reason alone this appeal should be allowed and a trial *de novo* by another Election Judge ordered.

An Election Judge owes a duty not only to the parties but also to this Court, to which an appeal lies, and even to the electorate, to specify the point or points for determination, the decision thereon and the reasons for the decision. An Election Judge trying the above charge (of false statement) should consider and decide whether each one of the five elements specified above has been proved. It is not sufficient for him to say that one of the elements has not been proved and to refrain from deciding the other elements.

If the Court of Appeal sets aside his finding in respect of the only element he had chosen to decide, then it will have to order a retrial. Such a course will involve the parties in unnecessary expense and at the same time defeat the object of the legislature, viz., the constitution of the Legislative Assembly should be distinctly and speedily known *vide* [*Senanayake* vs. *Navaratne* (1954) 56 N.L.R. 5 (P.C.) and the Balangoda Election Petition Appeal No. 3. of 1966 : S.C. Minutes of 11.8.1966*)

I am unable to subscribe to the view that the judgment is not vitiated by the failure to determine all the questions involved, ("though the ideal would be to determine all of them"; nor to the view that the Election Judge must be assumed to have considered all the elements for the astonishing, and, to my mind even amusing, reason that "he is one of us". This proposition will not, obviously, be applicable in the case of an Election Judge who is only a District Judge. This assumption does not appear to have been made ever before. Such an assumption is not warranted by law and is pregnant with danger. Besides, even if such an assumption is permissible, can it be invoked in the case of a Judge who does not ordinarily do trial work — not even Assize trials?

Another view to which I cannot subscribe is that we should strain to uphold the validity of an election. What this Court has to do is to ascertain whether

(a) on a pure question of law the finding is correct;
(b) on a pure question of fact whether the finding impugned is "not reasonably possible; if such a plea is established, ...the conclusion in question is not perverse and not, therefore, be set aside," or
(c) on mixed questions of fact and law the relevant legal principles have been correctly applied, regardless of consequences.

There was much argument regarding the admissibility of documents P 56 — the report made by Police Sergeant Ratnayake of a meeting held on 9th March, 1965, at Udatenne, at which one of the alleged false statements was made. Counsel for the appellant first argued that it was admissible under Section 35 of the Evidence Ordinance, but later abandoned that submission, when the majority of the Court indicated that P 56 would not be admissible under that section. He, however, submitted that it was evidence under sections 159 and 160 of the Evidence Ordinance. Before considering these provisions I would express my respectful dissent from the very general proposition that a Member of Parliament should not lose his seat on the report or even on the evidence of a Police Officer.

Section 35 *of the Evidence Ordinance:* An entry in any public or other official book, register, or record, stating a fact in issue or relevant fact, made by a public servant in the discharge of his official duty or any other person in performance of a duty especially enjoined by the law of the country in which such book, register, or record is kept is itself a relevant fact.

Section 159(1) *of the Evidence Ordinance:* A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned or

* See 69 N.L.R. 49.

so soon afterwards that the Court considers it likely that the transaction was at that time fresh in his memory.

Section 159(2): The witness may also refer to any such writing by any other person, and read by the witness within the time aforesaid, if when he read it he knew it to be correct.

Section 159(3): Whenever a witness may refresh his memory by reference to any document, he may, with the permission of the Court, refer to a copy of such document:

Provided the Court be satisfied that there is sufficient reason for the non-production of the original.

Section 160 *of the Evidence Ordinance:* A witness may also testify to facts mentioned in any such document as is mentioned in Section 159, although he has no specific recollection of the facts themselves, if he is sure that the facts were correctly recorded in the document.

Illustration: A book-keeper may testify to facts recorded by him in books regularly kept in the course of business, if he knows that the books were correctly kept, although he has forgotten the particular transaction entered.

In *Ilangaratne* vs. *G. E. de Silva* (1948) 49 N.L.R. 169 Windham, J., held that a Police Officer's official report of a speech at an election meeting is admissible under section 35 of the Evidence Ordinance and is not any the less admissible from the fact that his original rough note made during the actual course of the speech, and a rough draft of the report made immediately afterwards, have since been lost or destroyed. It is the report itself which is admissible, and nothing in the law requires the production of the rough note or draft of such a report.

This decision was arrived at after a Lahore case was considered (*v.* p. 173). Our attention was drawn to the order made by Sansoni, C.J., in the trial of the Dedigama Election petition wherein he had stated that he prefers to follow the Lahore case and said that the police report is not admissible under section 35. With respect, I find it difficult to dissent from the considered view expressed by Windham, J.

Commenting on section 35 in his Law of Evidence, Monir says:—

"*Reports made by public servants* — Every isolated document is not a book, register or record, but in certain cases a single document, e.g., a report by a public servant made within the discharge of his duty, may be considered an official book, register or record. Where there is a statutory duty laid upon public officers to investigate and report facts, a report of the facts elicited by their investigation is an official record within the meaning of the section and entitled to great weight". (4th Edition pp. 199 and 300).

Under the Police Ordinance it is the duty of Police officers to detect and bring offenders to justice (*v.* Police Ordinance Chap. 53 section 56). Making a false statement before or during an Election is an offence. Therefore it was P. S. Ratnayake's official duty to detect it and bring the offender to justice. Besides P56 was a report made in pursuance of official directions issued by his superiors. It was sent to the Assistant Superintendent of Police, Criminal Investigation Department, in charge of the elections. It was filed in his office. P.S. Ratnayake said that P56 and P56A are true and correct copies of what he heard at that meeting. — He got the report written out by his brother Seelaratne and checked it and found it to be correct. — According to P56 Sunil Karunadasa alleged that Munaweera had received a bribe of Rs. 75,000/-. This is not an allegation which can be misunderstood or easily forgotten. This report (P56) is also receivable in evidence under section 160 of the Evidence Ordinance because P.S. Ratnayake said that P56 is a true and correct record of what he heard at that meeting.

Monir comments on this section as follows:— "According to the section, if the witness, though having no recollection of the facts is sure that the facts were correctly represented in the document at the time he wrote it or read it, the document may be evidence on the witness swearing to that fact." — p. 939.

In *Om Prakash* vs. *Emperor*: A.I.R. 1930 Lahore 867 it was held that section 159 does not render the notes of a speech inadmissible in evidence. At p. 869 Tapp., J., said, "It was then contended on behalf of the appellant that the notes of the speech were not admissible in evidence as Nasar Hussain should have testified orally as to the speech and under section 159, Evidence Act, refreshed his memory from those notes.

I fail to see how section 159, relied upon by the learned Counsel and urged by him, renders the notes of the speech inadmissible in Evidence. This provision of law merely provides for a witness, while under examination, refreshing his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned or so soon afterwards that the Court considers it likely that the transaction was at that time fresh in his memory. Instead of deposing orally as to the speech made by the appellant, Constable Nazar Hussain put in the notes made by him of that speech, and I confess I can see no differences between this procedure and Nazar Hussain deposing orally after reference to those notes. For all practical purposes this would be one and the same thing."

In my opinion, therefore, P56 was rightly received in evidence. It contains the false statement of fact that "Munaweera had taken a bribe of Rs. 75,000/- and acted treacherously against the Lady Prime Minister", as was held by the Election Judge, who further held that it related to the personal character of Munaweera, another candidate, and it was made with the purpose of affecting the return of Munaweera. He had also rightly held that this was made at an election meeting held in support of the respondent's candidature. But his conclusion that Sunil Karunadasa was not an agent of the respondent was not only "not reasonably possible" but even "perverse", especially after he had rightly held that the chairman of the meeting was an agent of the respondent.

The document R8. shows that the meeting was held in support of the respondent's candidature. It certainly did not include Sunil Karunaratne's name as one of the speakers. Nine speakers were determined by the respondent and named therein. But, it contained also the proclamation "and other accomplished speakers will address you." Of the nine speakers mentioned in R 8 only Anver turned up at the meeting and he was the first speaker. The only other of the nine speakers was Illangaratne, who arrived along with the respondent, who attended the meeting long after its commencement.

If the chairman of the meeting who was agent of the respondent had no authority to allow other speakers to address the meeting, the meeting would have had to be abandoned long before the respondent turned up in the company of Illangaratne. At that meeting seven persons who were not in the list contained in R 8 spoke. In answer to the Election Judge the respondent said, "I have empowered my workers in my office at Matale to do all the necessary work connected with meetings held in my support." The respondent admitted in the course of his evidence that he could not possibly be present all the time at every meeting held to further his candidature and in his absence his organisers looked after his meetings (i.e. when he is moving round the electorate and he remained at this meeting for only about half an hour or forty five minutes). On 9.3.56, besides the meeting at Udatenne, the respondent had two other meetings and so he had to rely on somebody locally to keep the meeting going and he expected his supporters to put in other speakers in place of the speakers mentioned in R 8, who did not turn up. Also he admitted that his supporters at the spot had done their best to keep the meeting going till the respondent arrived.

Even without this evidence, it was clear that the chairman of that meeting was agent of the respondent — agent to promote the interests of the respondent. Therefore, he had authority to decide as to whom he should permit to speak. Sunil Karunadasa came within the category of "and other accomplished speakers."

The evidence in the case was sufficient to establish beyond any manner of doubt — not merely beyond reasonable doubt — Sunil Karunadasa's agency.

I would, therefore, hold that the charge in respect of the false statement attributed to Sunil Karunadasa has been proved beyond reasonable doubt and on that ground alone the respondent's election should be declared void.

Another charge is in respect of the pamphlet P 54 proved to have been published by one Mulan Dunuweera. The Election Judge has not rejected the evidence of one de Mel, a draughtsman in the Public Works Department, that this pamphlet was handed to him "four or five days after the Nomination Day in January 1965 by Mulan Dunuweera who came with some other persons to canvas his vote for the respondent." He appears to have accepted this evidence and acted on it. But he did not decide the question of agency, though there was the evidence of Illangaratne and the respondent himself tending to show that Mulan Dunuweera was not the respondent's agent at the time in question.

Was it because that evidence was rejected that the Election Judge acted on the footing that de Mel was canvassed by Mulan Dunuweera as agent for the respondent?

"In the last paragraph of P54 Munaweera is told that he had filled the pockets of his trousers". When he did the despicable act "of voting against the Government — by raising that hand of yours unkempt and festered owing to the blood and pus of the ultimate corruption.....".

The Election Judge's interpretation of this passage with reference to an earlier passage in the pamphlet to the effect that the passage in question referred to meant that he had been hired to write to the *Silumina* is patently wrong and "not reasonably possible." The conclusion that it refers to a bribe taken before voting is irresistible. It is also noticed that Munaweera's evidence on this matter has been ignored altogether. His evidence was that (though the voting was on 3.12 1964) he wrote to the *Silumina* only after that explaining his conduct regarding the vote and it was published in the *Silumina* of 13.12.64. (P65).

This charge should be tried afresh before another Election Judge, because not merely the validity of the respondent's election but also the question whether Sunil Karunadasa has been guilty of a corrupt practice making him liable to be reported, is involved. Besides, that is a duty owing to the electorate itself.

P57 is the report made by P.C. Kulapala of a meeting held at Kaikawala on 28.1.1965 in support of the respondent. The report states that M. K. Liyanage said, "Mr. Rajaratne, Mr. C. P. de Silva and his follower Munaweera subdued by the money of Mr. Hema Basnayake, Gunasena Book-stall and the Lake House paper people and performing the antagonistic act of raising the hand against the Sri Lanka Coalition Government has made it a matter for regret for him to come to battle with him."

According to P.C. Kulapala the respondent was present when Liyanage made this speech — the respondent being there from the beginning till the end of the meeting. P 57 is evidence for the reasons I have given in regard to P 56. The Election Judge said, "The meaning assigned on behalf of the petitioner to the aforesaid utterance of Liyanage was that Munaweera was subdued by bribes given by the persons mentioned in that utterance. It cannot be said that such utterance was made intending such meaning in view of the fact that such utterance can mean that Munaweera was subdued because the persons mentioned in such utterance were providing him with funds to defray his election expenses. I hold that aforesaid utterance of Liyanage does not relate to the personal character or conduct of Munaweera."

The passage in question relates to the money, that had been paid before the voting. Before the voting there would have been no election expenses in contemplation. The meaning attributed by the Election Judge was not only "'not reasonably possible" but also "perverse."

Besides, as already pointed out earlier in this order, what meaning the speaker intended by the words he uttered is not an element of this charge. Therefore, there was no burden on the petitioner to prove what Liyanage intended. How would an ordinary voter have understood this utterance. There can be only one answer to it, viz., that Munaweera voted in this manner because he had been bribed with money to do so. This would, therefore, clearly relate to the personal character of Munaweera.

There was ample evidence of agency. In fact, the respondent was present when Liyanage made the speech. The evidence also establishes that it is a statement of fact and it is false. This charge too has been proved beyond reasonable doubt and the respondent's election is void on this ground also.

Another finding which is" not reasonably possible". is in regard to the statement embodied in the report P58, viz., "14 members becoming slaves for money left the Government."

The Election Judge has stated that the word "money" "refers to money in general" and therefore the statement means "having become slaves to capitalism". In addition he has held that the word "Government" means the Cabinet and because Munaweera was not a member of the Cabinet this statement could not refer to Munaweera. It is perfectly clear that the only meaning that can be given to the word is the party in power. No reasonable man would consider the word "Government" (*Aāndu*) to mean the Cabinet. This charge too (in respect of the statement alleged to have been made by Podiappuhamy) should be retried.

The appeal should be allowed, the order appealed from should be set aside with costs both here and below. Action should be taken as indicated in this order.

After the above judgment was prepared I had the opportunity of reading the judgment prepared by my Lord the Chief Justice in which he says, "Abeyesundere J. who as the trial Judge in the instant case, had authorised me to state that if the grounds of objection which I have now considered had been argued before him he would have held P 56 to be not admissible under Section 35."

This course does not appear to be right. It would seem objectionable. The fact is that the Election Judge admitted it in evidence, without indicating under what provision he did so, and acted on it. I wonder if he can be heard to say now that he would not have admitted it under Section 35, especially when he had not himself heard the submissions. This may be construed as affording him an opportunity to deliver a supplementary judgment in respect of a point which had already been argued in appeal or consulting him in regard to the judgment of this Court.

Addendum

After the above order was prepared judgment was delivered in S.C. 496(F) of 1964: D.C. Jaffna No. TR/52 on 13.12.66 by my brother T. S. Fernando, with my concurrence, where the provisions of Section 35 of the Evidence Ordinance were the subject of decision. There the question was whether the contents of the document D1, a list of temples in the Islands division, were relevant and properly received in evidence, D2 was prepared in pursuance of an order issued by the Government Agent to the Maniagar, who gathered the information through the Village Headman, who reported the name of the founder of the temple and that of its then manager, as required in the Government Agent's order, which was not based on duty especially enjoined by law. We have answered this question in the affirmative.

This decision supports the view I have expressed earlier in this order in respect of Section 35 of the Evidence Ordinance. The police reports in question were prepared in pursuance of orders received from superior officers who were competent to issue such orders.

I have this day (15.12.66) had the opportunity of reading the opinion of my brother T. S. Fernando agreeing with my Lord the Chief Justice that the appeal should be dismissed.

While conceeding that "it is the duty of all Police officers to detect and bring offenders to justice" — to which duty I have referred earlier in my order — he "suggests that Police officers will be well advised to confine themselves to their regular and conventional duties. The matter of taking notes of speeches which might contain a statement which on verification turns out to be false could well be left to the resources of the candidates themselves or their agents and supporters." I regret that I am unable to share this view.

This suggestion, if carried out, may well lead to serious breaches of the peace, whereas when a Police officer takes down notes of speeches he can do so unmolested. Besides, the evidence of candidates, their agents and supporters is vulnerable on the score of interest or partiality, which may not ordinarily be imputed to Police officers.

I would rather not restrict the duties of Police officers, whose duties would include the duty to detect election offences as well and to bring such offenders to justice, especially in a country notorious for the making of false statements of fact in relation to the personal conduct or character of candidates. If their duties are restricted this offence may become far more prevalent and go unchecked.

Certainly the best course for Police officers would be to preserve the original notes. Had they been preserved the question of admissibility of P56, etc., could not have arisen. The situation that arose from the failure to preserve them it was which was the subject of consideration by Windham, J., in *Illangaratne* vs. *G. E. de Silva* (supra). Such reports appear to have been consistently admitted thereafter. They were admitted in the Bentara-Elpitiya and the Balangoda petitions, the appeals in which were dismissed.

Appeal dismissed.

Privy Council Appeal No. 29 *of* 1966

Present: **Viscount Dilhorne, Lord Guest, Lord Devlin, Lord Upjohn, Lord Pearson**

A. T. DURAYAPPAH, MAYOR OF JAFFNA *vs.* W. J. FERNANDO AND OTHERS

From
THE SUPREME COURT OF CEYLON

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

Heard on: 13*th*, 14*th and* 15*th December*, 1966
Delivered the 15th December, 1966

Municipal Councils Ordinance (Cap. 252) *as amended by Act No.* 12 *of* 1959 — *Minister's powers under section* 277 — *Should the Council be given an opportunity of being heard before its dissolution in the exercise of such powers ?—Natural Justice—Audi alteram partem rule.*

Distinction between a voidable Order and an Order that is a nullity — Whether Mayor or a member of a Municipal Council can complain to Court independently of Council.

Section 277(1) of the Municipal Councils Ordinance (Chapter 252) as amended by Act No. 12 of 1959 enacts as follows:

"(1) If at any time, upon representation made or otherwise, it appears to the Minister that a Municipal Council is not competent to perform, or persistently makes default in the performance of, any duty or duties imposed upon it, or persistently refuses or neglects to comply with any provision of law, the Minister may, by Order published in the Gazette, direct that the Council shall be dissolved and superseded, and thereupon such Council shall, without prejudice to anything already done by it, be dissolved, and cease to have, exercise, perform and discharge any of the rights, privileges, powers, duties, and functions conferred or imposed upon it, or vested in it, by this Ordinance or any other written law."

In consequence of the receipt of a number of complaints as to the conduct of the Jaffna Municipal Council and the councillors, the Minister of Local Government (4th respondent) sent the Commissioner of Local Government (the 1st respondent) to inquire into these matters with instructions to report immediately. The 1st respondent visited Jaffna on 27th and 28th May, 1966 and the appellant who was the Mayor of the Council gave him every facility for the purpose including access to all the minutes of the Council. The 1st respondent however, did not ask anyone any questions or give any member of the Council any opportunity of expressing their views on any matter. His report was received on 29th May by the Minister (4th respondent) who, on the same day, made an Order stating that it appeared to him that the Jaffna Municipal Council was not competent to perform the duties imposed upon it and that pursuant to the powers conferred upon him by the aforesaid section 277 of the Municipal Councils Ordinance he directed that the Council should be dissolved and superseded on 29th May, 1966. On 30th May, the Governor-General appointed the first, second and third respondents to be special Commissioners to exercise, perform and discharge the rights, privileges, powers and duties conferred upon the Council and the Mayor by the Ordinance.

This Order dissolving the Council was challenged in the Supreme Court by way of certiorari by the appellant (Mayor) on the ground *inter alia* that the said Order was made without giving the Council the right to be heard on its own defence, thus failing to observe the rule of natural justice also known as the principle of "*audi alteram partem.*"

The Supreme Court, following the decision of three Judges in *Sugathadasa* vs. *Jayasinghe* (59 N.L.R. 457) to the effect that the words "if.....it appears to the Minister" in section 277(2) aforesaid standing by themselves without other words or circumstances of qualification exclude a duty to act judicially, held against the appellant who appealed to the Privy Council.

Held: (1) That it is a well-established principle that where a statute, as in section 277(1), confers power on a person to exercise a measure of control over another and to impose sanctions upon him although there are no positive words in such statute requiring that the other party should be heard, yet the justice of the common law will supply the omission of the legislature in that regard.

(2) That outside the well-known classes of cases such as dismissal from office, deprivation of property and expulsion from clubs, no general rule can be laid down as to the application of the *audi alteram partem* principle in addition to the language of the provision.

(3) That three matters must always be borne in mind when considering whether this principle should be applied or not. viz:

(a) what is the nature of the property, the office held, status enjoyed or services to be performed by the complainant of injustice.

(b) in what circumstances or upon what occasions is the person claiming to be entitled to exercise the measure of control entitled to intervene.

(c) when a right to intervene is proved, what sanctions in fact is the latter entitled to impose upon the other.

(4) That a consideration of the said three requirements in relation to the facts of the instant case and the relevant provisions of the Ordinance show that the above stated common law rule should be applied in this case as undoubtedly the Minister, in making the Order complained of under section 277(1), should have observed the principle *audi alteram partem*. The solution to this matter was not to be found in the opening words of section 277(1) aforesaid as was thought in *Sugathadasa* vs. *Jayasinghe* reported in 59 N.L.R. 457. A deeper investigation was necessary.

Held further: (5) That the said Order of the Minister on 29th May, 1966 was voidable and not a nullity. Being voidable, it was voidable only at the instance of the person against whom the Order was made, that is the Council which had not complained. Though the appellant was the Mayor at the time of the dissolution he has no right to complain independently of the Council, because he held no office that was independent of the Council and therefore he could not maintain this action.

Per **The Judicial Committee:** "Their Lordships will only state that while great urgency may rightly limit such opportunity timeously, perhaps severely, there can never be a denial of that opportunity if the principles of natural justice are applicable."

Overruled: *Sugathadasa* vs. *Jayasinghe* (1958) 59 N.L.R. 451.

Cases referred to: *Cooper* vs. *The Board of Works for the Wandsworth District* (1863) 14 C.B.N.S. 180 ; 8 L.T. 278 ; 32 L.J.C.P. 185
Capel vs. *Child* (Crompton and Jarvis 558).
Ridge vs. *Baldwin* (1964) A.C. 40; (1963) 2 A.E.R. 66; (1963) 2 W.L.R. 935
Rex vs. *Electricity Commissioners* 1964 A.C. 76
Fisher vs. *Jackson* (1891) 2 Ch. 84; 64 L.T. 782; 7 T.L.R. 358
Wood vs. *Woad* (1874) L.R. 9 Exchequer 190; 30 L.T. 815; 43 L.J. Ex. 153
Macfoy vs. *United Africa Company Limited* (1961) 3 W.L.R. 1405.
C. Devan Nair vs. *Yong Kuan Teik* (1967) 2 W.L.R. 846

T. O. Kellock, Q.C., with *M. Solomon* and *M. I. Hamavi Haniffa*, for the appellant.

E. F. N. Gratiaen, Q.C., with *R. K. Handoo*, for the 4th respondent.

E. F. N. Gratiaen, Q.C., with *Walter Jayawardena*, for the 1st, 2nd and 3rd respondents.

Lord Upjohn

The first and principal question in this appeal is whether the fourth respondent who is the Minister of Local Government (who will be referred to as the Minister) was justified in exercising his powers under section 277 of the Municipal Councils Ordinance (chapter 252) as amended by Act No. 12 of 1959 (this Ordinance as amended will be referred to as the Municipal Ordinance) to dissolve the Jaffna Municipal Council (hereafter referred to as the Council) without giving it the right to be heard in its own defence. In other words was the Minister before exercising his powers under section 277 bound to observe that rule of natural justice, which is neatly and briefly stated in the recently resuscitated Latin expression "*audi alteram partem*". While it was an issue in the lower courts, it is now no longer disputed that the Minister acted in complete good faith and that in fact he would have given the Council the opportunity of being heard but for the urgency of the case as he or his advisers regarded it and it is not in doubt that if he was bound to observe the principle *audi alteram partem* he failed to do so. Their Lordships will only state that while great urgency may rightly limit such opportunity timeously, perhaps severely, there can never be a denial of that opportunity if the principles of natural justice are applicable.

The Council was constituted under the Municipal Ordinance as the municipal authority for the district of Jaffna, a very large and important town, and there was thereby conferred upon it all the usual powers and duties of a local authority in their area. Only a brief review of the provisions of the Municipal Ordinance constituting these particular local authorities is necessary. By Part I the Minister was empowered to declare any area to be a municipality, to define the limits of any municipality so declared and to assign a name and designation to the Municipal Council to be constituted for the municipality so declared (sections 2 and 3). The Municipal Council constituted for each municipality was (subject to reserved powers irrelevant to this judgment) to be the local authority within the administrative limits of the municipality charged with the regulation, control and administration of all matters relating to the public health, public utility services, public thoroughfares and generally with the protection and promotion of the comfort, convenience and welfare of the people and amenities of the municipality (section 4).

By Part II elaborate provisions were made for the election of Councillors, their terms of office and for the election by the Councillors of the Mayor and Deputy Mayor, from time to time.

Section 34 is important:

"(1) Every Municipal Council shall be a corporation with perpetual succession and a common seal and shall have power, subject to this Ordinance, to acquire, hold and sell property, and may sue and be sued by such name and designation as may be assigned to it under this Ordinance.

(2) The common seal of the Council shall remain in the custody of the Commissioner, and shall not be affixed to any contract or other instrument on behalf of the Council, except in the presence of the Mayor or Deputy Mayor and the Commissioner who shall sign their names to such contract or other instrument in token of their presence."

Sections 35 and 37 provided for the vesting in the Council of much immovable property, waste lands, quarries, lakes and waterworks, Crown Lands (made over with sanction of the Governor-General), public parks, gardens and open spaces, all streets, public markets and public buildings.

The following Parts of the Municipal Ordinance expanded in great detail these all important general powers and duties conferred upon Municipal Councils to which detailed reference is unnecessary. By Part IX (section 185 onwards) every Municipal Council was bound to establish a Municipal Fund and its powers and duties in relation thereto were elaborated. Then by Part XII (section 230 onwards) every Municipal Council was empowered to levy rates (with the sanction of the Minister) on property within the municipality.

By Part XIV headed "Central Control" section 277(1) enacted:

"(1) If at any time, upon representation made or otherwise, it appears to the Minister that a Municipal Council is not competent to perform, or persistently makes default in the performance of, any duty or duties imposed upon it, or persistently refuses or neglects to comply with any provision of law, the Minister may, by Order published in the Gazette, direct that the Council shall be dissolved and superseded, and thereupon such Council shall, without prejudice to anything already done by it, be dissolved, and cease to have, exercise, perform and discharge any of the rights, privileges, powers, duties, and functions conferred or imposed upon it, or vested in it, by this Ordinance or any other written law."

There was a general local election for Councillors to the Council in December of 1963 and 18 members were by the constitution of the Council elected to it for the term of three years expiring at the end of 1966.

There is no doubt that this Council went through troublous times; within the period of 2 1/2 years of its election four Mayors were successively elected, the appellant having been elected as recently as 31st March 1966. Although their Lordships are not directly concerned with such matters it may be stated as a matter of history that a number of complaints, whether justifiable or not, as to the conduct of the Council and the councillors were made to the Minister. He therefore sent the Commissioner of Local Government to inquire into these matters with instructions to report immediately. The Commissioner of Local Government visited Jaffna on 27th and 28th May 1966 and it is fair to say that the appellant, who had been informed by the Minister of his impending visit gave to him every facility that he required for this purpose. He had full access to all the minutes of the Council but he did not ask anyone any questions or give any member of the Council any opportunity of expressing their views on any matter. His report, first orally and then in writing, was received by the Minister on 29th May who on the same day made an Order stating that it appeared to him that the Jaffna Municipal Council was not competent to perform the duties imposed upon it and that pursuant to the powers conferred upon

him by section 277 as amended he directed that the Council should be dissolved and superseded on 29th May 1966. On 30th May 1966 the Governor-General appointed the first, second and third respondents to be special commissioners to exercise perform and discharge the rights privileges powers duties and function conferred upon the Council or the Mayor by the Municipal Ordinance. This Order dissolving the Council is challenged by the appellant and indeed by another councillor but your Lordships are not concerned with that second challenge.

Upon the question of *audi alteram partem* the Supreme Court followed and agreed with the earlier decision of *Sugathadasa* vs. *Jayasinghe* (1958) 59 N.L.R. 457, a decision of three judges of the Supreme Court upon the same section and upon the same issue namely whether a Council was not competent to perform its duties. That decision at p. 471 laid down "as a general rule that words such as 'where it appears to' or 'if it appears to the satisfaction of' or 'if the . . . considers it expedient that' or 'if the . . . is satisfied that' standing by themselves without other words or circumstances of qualification, exclude a duty to act judicially."

Their Lordships disagree with this approach. These various formulae are introductory of the matter to be considered and are given little guidance upon the question of *audi alteram partem*. The statute can make itself clear upon this point and if it does *cadit quaestio*. If it does not then the principle stated by Byles J. in *Cooper* vs. *The Board of Works for the Wandsworth District* 14 C.B.N.S. 180 at 194 must be applied. He said this:

> "A long course of decisions, beginning with *Dr. Bentley's* case, and ending with some very recent cases, establish, that, although there are no positive words in the statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature."

If the law were otherwise then such cases as *Capel* vs. *Child* (Crompton and Jarvis 558), where the words are in fact very similar to the words of section 277, must have been differently decided. That case is in fact an important landmark in the history of the development of the principle *audi alteram partem*. The solution to this case is not to be found merely upon a consideration of the opening words of section 277. A deeper investigation is necessary. Their Lordships were of course referred to the recent case of *Ridge* vs. *Baldwin* (1964) Appeal Cases page 40 where this principle was very closely and carefully examined. In that case no attempt was made to give an exhaustive classification of the cases where the principle *audi alteram partem* should be applied. In their Lordships' opinion it would be wrong to do so. Outside well-known cases such as dismissal from office, deprivation of property and expulsion from clubs, there is a vast area where the principle can only be applied upon most general considerations. For example, as Lord Reid when examining the case of *Rex* vs. *Electricity Commissioners* at page 76 of 1964 Appeal Cases pointed out, Bankes L.J. inferred the judicial element from the nature of the power and Atkin L.J. did the same. Pausing there however, it should not be assumed that their Lordships necessarily agree with Lord Reid's analysis of that case or with his criticism of the *Nakkuda* case. Outside the well-known classes of cases, no general rule can be laid down as to the application of the general principle in addition to the language of the provision. In their Lordships' opinion there are three matters which must always be borne in mind when considering whether the principle should be applied or not. These three matters are: First what is the nature of the property, the office held, status enjoyed or services to be performed by the complainant of injustice. Secondly in what circumstances or upon what occasions is the person claiming to be entitled to exercise the measure of control entitled to intervene. Thirdly when a right to intervene is proved what sanctions in fact is the latter entitled to impose upon the other. It is only upon a consideration of all these matters that the question of the application of the principle can properly be determined. Their Lordships therefore proceed to examine the facts of this case upon these considerations.

As to the first matter it cannot be doubted that the Council of Jaffna was by statute a public Corporation entrusted like all other Municipal Councils with administration of a large area and the discharge of important duties. No one would consider that its activities should be lightly interfered with. Their Lordships may notice here an argument addressed to them that as this was a local authority subject to the superior power of the Minister under section 277, the exercise of this power was a matter properly left to him as the one responsible to the Legislature to whom he was answerable for his actions and he could not be responsible to the Courts under the principle *audi alteram partem*. Their Lordships dissent

from this argument. The legislature has enacted a statute setting up municipal authorities with a considerable measure of independence from the central government within defined local areas and fields of government. No Minister should have the right to dissolve such an authority without allowing it the right to be heard upon that matter unless the statute is so clear that it is plain it has no right of self-defence. However this consideration is perhaps one of approach only. The second and third matters are decisive. Upon the second matter it is clear that the Minister can dissolve the Council on one of three grounds: that it (*a*) is not competent to perform any duty or duties imposed upon it (for brevity their Lordships will refer to this head as incompetence); or (*b*) persistently makes default in the performance of any duty or duties imposed upon it; or (*c*) persistently refuses or neglects to comply with any provision of law.

A preliminary argument was addressed to their Lordships on the footing that incompetence was the equivalent of inability to perform its duties. This argument was based on certain observations in the *Sugathadasa* case at page 475 where the judges expressed the opinion that the Council became not competent to perform the duties imposed upon it when circumstances arose that rendered it incapable of performing them. It was argued that the words in the statute "not competent" were equivalent to "not able to undertake" and it was said that in the circumstances of this case it had not been shown that the Council were not able to undertake their duties and so could not be found to be incompetent. Their Lordships do not agree with this argument and do not think that the judges in the *Sugathadasa* case intended to go as far. It may be that a Council is so incompetent that it is not able to undertake anything, but inability to undertake its duties (which may arise from circumstances outside anyone's control) is not the test as to incompetence.

While their Lordships are only concerned with the question of incompetence, the true construction of the section must be considered as a whole and its necessary intendment in the light of the common law principles already stated. It seems clear to their Lordships that it is a most serious charge to allege that the Council, entrusted with these very important duties, persistently makes default in the performance of any duty or duties imposed upon it. No authority is required to support the view that in such circumstances it is plain and obvious that the principle *audi alteram partem* must apply.

Equally it is clear that if a Council is alleged persistently to refuse or neglect to comply with a provision of law it must be entitled (as a matter of the most elementary justice) to be heard in its defence. Again this proposition requires no authority to support it. If, therefore, it is clear that in two of the three cases, the Minister must act judicially, then it seems to their Lordships, looking at the section as a whole, that it is not possible to single out for different treatment the third case namely incompetence. Grammatically too any differentiation is impossible. The Section confers upon the Minister a single power to act in the event of one or more closely allied failures and he can only do so after observing the principle *audi alteram partem*. Had the Minister been empowered to dissolve the Council only for incompetence and on no other ground it might have been argued that as "incompetence" is very vague and difficult to define Parliament did not intend the principle *audi alteram partem* to apply, in the circumstances, but their Lordships would point out that charges of inefficiency or failing to be diligent or to set a good example have been held subject to the principle see *Fisher* vs. *Jackson* (1891) 2 Ch. 84. The third matter can be dealt with quite shortly. The sanction which the Minister can impose and indeed, if he is satisfied of the necessary premise, must impose upon the erring Council is as complete as could be imagined; it involves the dissolution of the Council and therefore the confiscation of all its properties. It was at one moment faintly argued that the Council was a trustee and that it was not therefore being deprived of any of its property but this argument (soon abandoned) depended upon a complete misconception of the law of corporations. A statutory corporation such as a Municipal Corporation, like every trading corporation owns its property and the corporators have no proprietary interest in it but like them it can deal with its property only in accordance with its constitution. In the case of a trading company that is laid down in its memorandum and articles of association. In the case of a statutory corporation it is laid down in the Statute, or Municipal Ordinance, by virtue of which it is incorporated but it is important to remember throughout that it owns its property (it may hold property as a trustee see section 37 of the Municipal Ordinance but that is quite a different matter). The Council owned large areas of land, had a Municipal Fund and was empowered to levy rates from its inhabitants though it was bound to apply them in accordance with its constitution. In their Lordships' opinion this case falls within

the principle of *Cooper* vs. *Wandsworth Board of Works* (supra) where it was held that no man is to be deprived of his property without having an opportunity of being heard. For the purposes of the application of the principle it seems to their Lordships that this must apply equally to a statutory body having statutory powers, authorities and duties just as it does to an individual. Accordingly on this ground too the Minister should have observed the principle.

For these reasons their Lordships have no doubt that in the circumstances of this case the Minister should have observed the principle *audi alteram partem*. The case of *Sugathadasa* vs. *Jayasinghe* (supra) was wrongly decided.

Had the matter remained there their Lordships would have allowed the appeal and held the Order of 29th May 1966 to have been inoperative. However during the hearing of the appeal, their Lordships raised the question, not taken in the Court below, whether the appellant was entitled to maintain this action and appeal. This question is of some general importance. The answer must depend essentially upon whether the Order of the Minister was a complete nullity or whether it was an Order voidable only at the election of the Council. If the former, it must follow that the Council is still in office and that, if any councillor, ratepayer or other person having a legitimate interest in the conduct of the Council likes to take the point, they are entitled to ask the court to declare that the Council is still the duly elected Council with all the powers and duties conferred upon it by the Municipal Ordinance.

Apart altogether from authority their Lordships would be of opinion that this was a case where the Minister's Order was voidable and not a nullity. Though the Council should have been given the opportunity of being heard in its defence, if it deliberately chooses not to complain and takes no step to protest against its dissolution, there seems no reason why any other person should have the right to interfere. To take a simple example to which their Lordships will have to advert in some detail presently, if in the case of *Ridge* vs. *Baldwin* (supra) the appellant Ridge who had been wrongly dismissed because he was not given the opportunity of presenting his defence, had preferred to abandon the point and accept the view that he had been properly dismissed, their Lordships can see no reason why any other person, such, for example, as a ratepayer of Brighton should have any right to contend that Mr. Ridge was still the Chief Constable of Brighton. As a matter of ordinary common sense, with all respect to other opinions that have been expressed, if a person in the position of Mr. Ridge had not felt sufficiently aggrieved to take any action by reason of the failure to afford him his strict right to put forward a defence, the Order of the Watch Committee should stand and no one else should have any right to complain. The matter is not free of authority, for it was much discussed in that case. Lord Reid at page 80 reached the conclusion that the Committee's decision was void and not merely voidable and he relied upon the decision in *Wood* vs. *Woad* L.R. 9 Exchequer 190. Their Lordships deprecate the use of the word void in distinction to the word voidable in the field of law with which their Lordships are concerned because, as Lord Evershed pointed out in *Ridge* vs. *Baldwin* at page 92, quoting from Sir Fredrick Pollock, the words void and voidable are imprecise and apt to mislead. These words have well understood meanings when dealing with questions of proprietary or contractual rights. It is better, in the field where the subject matter of the discussion is whether some Order which has been made or whether some step in some litigation or quasi litigation is effective or not, to employ the verbal distinction between whether it is truly a "nullity", that is to all intents and purposes, of which any person having a legitimate interest in the matter can take advantage or whether it is "voidable" only at the instance of the party affected. On the other hand the word "nullity" would be quite inappropriate in questions of proprietary or contractual rights; such transactions may frequently be void but the result can seldom be described as a nullity. In the field now under consideration there are many cases illustrating the difference, see for example *Macfoy* vs. *United Africa Company Limited* (1961) 3 W.L.R. at page 1405 where it was held that a failure to comply with certain rules of the Supreme Court rendered the proceedings voidable and not a nullity. On the other side, is the very recent decision of their Lordships Board in *C. Devan Nair* vs. *Yong Kuan Teik** where a failure to comply with a rule was held to make purported subsequent proceedings a nullity. Their Lordships understand Lord Reid to have used the word "void" in the sense of being a nullity. In the same case Lord Hodson at page 135 took the view that the decision of the Watch Committee in *Ridge* vs. *Baldwin* was a nullity. On the other hand Lord Evershed, though he differed on the main question as to whether the principle *audi alteram partem* applied, devoted a considerable part of

* See (1967) 2 W.L.R. 846

his judgment to the question whether the decision was voidable or a nullity and with this part of his judgment Lord Devlin expressly stated his agreement. Lord Evershed at page 88 onwards examined the case of *Wood* vs. *Woad* in some detail and he reached the conclusion (page 90) that in *Wood* vs. *Woad* the question whether the purported exclusion from the association by the Committee was void or voidable was not essential or indeed material to the claim made in the action by the plaintiffs for damages against the members of the Committee. He continued, speaking of that case "Certainly in my judgment it cannot be asserted that the judgments in the case cited or indeed any of them support or involve the proposition that where a body such as the Watch Committee in the present case, is invested by the express terms of a statute with a power of expulsion of any member of the police force and purports in good faith to exercise such power, a failure on their part to observe the principle of natural justice, *audi alteram partem*, has the result that the decision is not merely voidable by the Court but is wholly void and a nullity."

Lord Morris of Borth-y-Gest also considered this question and reached the conclusion that the Order of the Watch Committee was voidable and not a nullity. He examined the question as to the nature of the relief that the party aggrieved (Ridge) would apply for, which would be that the decision was invalid and of no effect and null and void. Their Lordships entirely agree with that and with the conclusions which he drew from it, namely that if the decision is challenged by the person aggrieved on the grounds that the principle has not been obeyed, he is entitled to claim that as against him it is void *ab initio* and has never been of any effect. But it cannot possibly be right in the type of case which their Lordships are considering to suppose that if challenged successfully by the person entitled to avoid the Order yet nevertheless it has some limited effect even against him until set aside by a court of competent jurisdiction. While in this case their Lordships have no doubt that in an action by the Council the Court should have held that the Order was void *ab initio* and never had any effect, that is quite a different matter from saying that the Order was a nullity of which advantage could be taken by any other person having a legitimate interest in the matter.

Their Lordships therefore are clearly of opinion that the Order of the Minister on 29th May 1966 was voidable and not a nullity. Being voidable it was voidable only at the instance of the person against whom the Order was made, that is the Council. But the Council have not complained. The appellant was no doubt Mayor at the time of its dissolution but that does not give him any right to complain independently of the Council. He must show that he is representing the Council or suing on its behalf or that by reason of certain circumstances such for example as that the Council could not use its seal because it is in the possession of the Municipal Commissioner or for other reasons it has been impracticable for the members of the Council to meet to pass the necessary resolutions, the Council cannot be the plaintiff. Had that been shown then there are well known procedures whereby the plaintiff can sue on behalf of himself and the other corporators making the Council a defendant and on pleading and proving the necessary facts may be able to establish in the action that he is entitled to assert the rights of the Council. That however is not suggested in this case. The appellant sets up the case that as Mayor he is entitled to complain but as such he plainly is not. If the Council is dissolved, the office of Mayor is dissolved with it and he has no independent right of complaint, because he holds no office that is independent of the Council. If the Mayor were to be heard individually he could only deal with complaints against the Council with which *ex hypothesi* the Council itself did not wish to deal. So accordingly, it seems to their Lordships that on this short ground the appellant cannot maintain this action.

For these reasons which differ entirely from those in the Court below their Lordships have therefore humbly advised Her Majesty that the appeal should be dismissed. In the circumstances however there will be no Order as to the costs of this appeal.

Appeal dismissed.

Present: **Manicavasagar, J.**

DANAPALA *vs.* S.I. POLICE, CINNAMON GARDENS

S.C. 660/'66 — *M.C. Narahenpita* 53580

Argued and Decided on: September 7, 1966.

Motor Traffic Act, section 214—*Motor Traffic (Construction of Vehicles) Regulations of* 1951 *made under Section* 19 *read with section* 237 — *Charge for breach of Regulation* 10(1), *offence under section* 214(1)(a) *of the Act —Conviction under section* 214(2) (b) *without conforming to sections* 172, 173 *or* 174 *of the Criminal Procedure Code — Validity of conviction.*

The accused was charged under Section 214(1)(a) of the Motor Traffic Act, for having driven a car without having affixed to the front of the car two uncoloured lamps showing to the front a white light from a reasonable distance, in breach of rule 10(1) of the Motor Traffic (Construction of Vehicles) Regulations of 1951, but was convicted of having committed an offence under section 214(1)(b). There was no reading and explaining to the accused of the altered charge nor was he afforded an opportunity to plead or to establish a defence thereto.

Held: (1) That the failure to conform to the procedure laid down in Sections 172, 173 and 174 of the Criminal Procedure Code was fatal to the conviction.

(2) That the rule 10(1) of the Motor Traffic (Construction of Vehicles) of 1951 aforesaid prescribes not only the equipment but also the use.

Cases referred to: *Don Thomas Singho* vs. *S. I. Police, Gampaha* (1954) 55 N.L.R. 395
Sri Lanka Omnibus Company Ltd. vs. *Perera* (1956) 59 N.L.R. 452

M. M. Kumarakulasinham, with *F. N. D. Jayasuriya*, for the accused-appellant.
S. W. B. Wadugodapitiya, Crown Counsel, for the Attorney-General.

Manicavasagar, J.

The appellant was charged with having driven car No. CN 9735 at Cambridge Place in Colombo on the night of the 21st May, 1965, without having affixed to the front of the said car two uncoloured lamps showing to the front a white light from a reasonable distance, and thereby committed a breach of rule 10(1) of the Motor Traffic (Construction of Vehicles) Regulations of 1915 made under Section 19 read with Section 237 of the Motor Traffic Act, an offence punishable under Section 214(1)(a) of the Act.

The appellant was convicted of having committed an offence not in violation of section 214(1)(a) but of section 214(1)(b). He was not afforded an opportunity, which he undoubtedly had, of pleading to the altered charge. The learned Magistrate did not conform to the provisions of section 172(2) of the Criminal Procedure Code by reading and explaining to the appellant the altered charge, and he did not adopt either of the courses laid down in section 173 or 174 of the Code; instead he proceeded to convict the appellant on the altered charge, observing that no prejudice has been caused to the appellant, and that the defect in the original charge was covered by section 425 of the Code.

The Magistrate has erred in the procedure he adopted, for, not only has he not followed the procedure laid down in the Code I have referred to, but by omitting to do so, he has caused a failure of justice, for the appellant was not afforded an opportunity of establishing such facts, if any, by way of defence which may have brought him within the ambit of proviso 1 to section 214(2) of the Motor Traffic Act.

On this ground alone the conviction cannot stand. I therefore, set aside the conviction of the appellant and acquit him.

It is unnecessary, in view of the decision I have just reached, to consider fully a further submission made by Counsel for the appellant which was based on the decisions in two cases reported in 55 N.L.R. 396 and 59 N.L.R. 452 respectively; nevertheless, I shall briefly advert to the submission and give my opinion thereon.

The learned Magistrate's finding on the evidence is that there were two lights in front of the car but

* For Sinhala translation, see Sinhala section, Vol. 14, part 2, p. 7.

they were not alight. The charge is based on regulation 10(1) and is in the terms set out in the first paragraph of this judgment. Regulation 10(1) is one several regulations which comes under the heading 'Construction of Vehicles Regulations framed under the Motor Traffic Act'. The charge relates to the driving of the vehicle, and Counsel's submission is that regulation 10(1) prescribes the equipment of Motor Vehicles and not to its use. In my view, unlike the regulations in the two decisions cited by Counsel, in which there was an absence of prohibition against user, the words of regulation 10(1) point clearly to use as well; that it occurs in a set of Regulations entitled Construction of Vehicles Regulations does not affect the meaning of the words "whether in motion" which referes to the vehicle being driven.

Set aside.

Privy Council Appeal No. 20 *of* 1966

THE UNITED ENGINEERING WORKERS' UNION

vs.

K. W. DEVANAYAGAM,

PRESIDENT, EASTERN PROVINCE AGRICULTURAL CO-OPERATIVE UNION LIMITED

Present: **Viscount Dilhorne, Lord Guest, Lord Devlin, Lord Upjohn and Lord Pearson**

From

THE SUPREME COURT OF CEYLON

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

DELIVERED THE 9TH MARCH, 1967

Constitution—Ceylon (Constitution) Order in Council 1946 (*Cap.* 379)—*Part VI of the Constitution Sections* 52, 53 *and* 55—*Appointment of Judicial officers—Part VII of the Constitution, sections* 57, 58 *and* 60—*Appointment of public officers—Industrial Disputes Act No.* 43 *of* 1950 (*Cap* 131) *as amended—Appointment of Presidents of Labour Tribunals created by Act — Is the office of President a Judicial office—Powers and functions of a Tribunal—Construction of the Act—Nature of Judicial power—Distinction from arbitral power.*

Industrial Disputes Act No. 43 *of* 1950 (*Cap.* 131)—*as amended powers given to Labour Tribunals, Industrial Courts, and Arbitrators under the Act—Similarities in the nature of their powers—Classification of such powers, are they judicial or not — Construction of the ambit of such powers.*

On the 17th September 1962 a Labour Tribunal at Colombo ordered the Respondent to pay three months salary to one R, a member of the appellant union, and to re-instate him in employment. The Respondent petitioned the Supreme Court that this order should be set aside. The matter was ultimately heard by a bench of five judges, who by a majority of 3 to 2 allowed the appeal on the ground that the Tribunal had no jurisdiction to make the order as it had not been appointed by the Judicial Service Commission. The appellant now appealed by way of special leave to the Judicial Committee.

Held: By **Viscount Dilhorne, Lord Pearson and Lord Upjohn, (Lord Devlin and Lord Guest** dissenting.)

That a Labour Tribunal did not exercise judicial power, and that the office of President of a Labour Tribunal was not a judicial office, for the following reasons:-

(1) The matters with which a Labour Tribunal may be required to deal both on a reference and on an application, do not make it desirable that Presidents of Labour Tribunals should have the same qualifications as those which distinguish the judges of the superior or other Courts.
(The test adumbrated by Lord Simonds in the *Labour Relations Board Case* applied.)

(2) Labour Tribunals were established for the purposes of the Act of 1950, namely to provide for the prevention, investigation and settlement of industrial disputes. The Act making provision for them did not say that they were to perform the functions of a court and give effect to the legal rights of workmen in connection with their employment.

(3) On a reference of an Industrial Dispute, a Labour Tribunal has the same powers and duties as an arbitrator under the Act. It was rightly held by the Supreme Court that when so acting, a Labour Tribunal was not acting judicially and that an arbitrator and a member of an Industrial Court did not hold judicial offices.

(4) On an application, the powers and duties of a Labour Tribunal do not differ from those of an arbitrator and an Industrial Court or a Labour Tribunal on a reference in any material respect. A Labour Tribunal, an arbitrator and an Industrial Court are required to do what is just and equitable and it is expressly provided that a Labour Tribunal when dealing with an application is not restricted by the terms of the contract of employment on granting relief or redress.

(5) The similarity of the powers and duties of a Labour Tribunal both in relation to a reference and to an application points strongly to the conclusion that its functions are not of a different character on an application to those on a reference or to those of an arbitrator or an Industrial Court.

(6) By Section 31B(2) inserted into the Act of 1950 by the amending Act of 1957, a Labour Tribunal was required to defer making an order on an application if it appeared that the subject-matter of the application was under discussion with the employer until the discussion was concluded, or the Minister referred the matter to an arbitrator, or to an Industrial Court, or a Labour Tribunal.

Section 31B(3) also introduced by the amending Act of 1957 further provides that a Tribunal shall suspend its proceedings on an application if it appears that the subject-matter of the application is similar to or identical with a matter constituting or included in an industrial dispute into which an inquiry under the Act is held, or, if the facts affecting the application are facts affecting any proceedings under any other law. This sub-section further provides that upon the conclusion of the inquiry or of the proceedings under any other law, the tribunal should resume its proceedings and in making its order on the application should have regard to the award or decision in the inquiry or other proceedings.

These two sub-sections showed that, far from being established in substitution for or as an alternative to the ordinary courts, Labour Tribunals were created as part of the machinery for preventing and settling industrial disputes, since it would be novel if proceedings in a Court of Law were required by law to be suspended during discussions between the parties to these proceedings, and if a court of law was required to have regard to awards made in respect of an industrial dispute by non-judicial persons, when making its order on an application.

Per **Lords Guest and Devlin** (dissentiente) that the power given to the Labour Tribunal fell within the accepted definition of judicial power, for the reasons in particular that

(*a*) The power given to the Tribunal was that of giving a binding decision between the parties.

(*b*) The power proceeded from the Sovereign, and was thus the judicial power of the State.

(*c*) The power to make an order that was just and equitable precluded the tribunal from making an arbitrary order, and presupposed the establishment and application of a system of rules of law.

(*d*) The power was to adjudicate on existing rights, and not to create rights for the future. These are rights which arose in respect of a relationship of employer and workman when the statute created the Labour Tribunal with the right in a workman to go before a Tribunal.

(*e*) The power of a Labour Tribunal had to be exercised judicially i.e. it must act in accordance with the principle of natural justice.

(*f*) Upon a consideration of all the provisions of the Statute creating the Tribunal, the only duty upon the Tribunal in making was to consider what was just and equitable between the parties. He was not bound to consider what sort of order, for example, was most likely to promote industrial peace.

Cases referred to: *The Bribery Commissioner* vs. *Ranasinghe* (1965) A.C. 172; LXVI C.L.W. 1 ; 66 N.L.R. 73.
Labour Relations Board of Saskatchewan vs. *John East Iron Works* (1949) A.C. 134
Huddart, Parker & Co. Proprietary Ltd. vs. *Moorhead* (1908) 8 C.L.R. 330.
Shell Co. of Australia Ltd. vs. *Federal Commissioner of Taxation* (1931) A.C. 275; 144 L.T. 421; 47 T.L.R. 115
Richard Pieris & Co. vs. *Wijesiriwardena* (1960) 62 N.L.R. 233; LVIII C.L.W. 53
The Electric Equipment and Construction Co. vs. *Cooray* (1961) 63 N.L.R. 164; LX C.L.W. 30.
Shell Co of Ceylon Ltd. vs. *Pathirana* (1962) 64 N.L.R. 71; LXII C.L.W. 83
Moses vs. *Parker* (1896) A.C. 245; 74 L.T. 112; 12 T.L.R. 254
C.P.R. Co. vs. *Corporation of City of Toronto* (1911) A.C. 461.
Attorney-General for Australia vs. *R.* (1957) A.C. 288; (1957) 2 A.E.R. 45; (1957) 2 W.L.R. 607
Waterside Workers, Federation of Australia vs. *Alexander (J.W.) Ltd.* (1918) 25 C.L.R. 434
Russel vs. *Duke of Norfolk* (1949) 1 A.E.R. 109
Ridge vs. *Baldwin* (1964) A.C. 40; (1963) 2 A.E.R. 66; (1963) 2 W.L.R. 935
R. vs. *Deputy Industrial Injuries Commissioner ex parte Moore* (1965) 1.Q.B. 465.

N. Satyendra, with *N. Chinivasagam*, for the appellants.

E. F. N. Gratiaen, Q.C., with *Walter Jayawardane* and *Mark Fernando*, for the respondents.

Viscount Dilhorne

On 17th September 1962 a Labour Tribunal at Colombo ordered the respondent to pay three months' salary to one Rasamanickam, a member of the appellant union, and to reinstate him in employment.

The respondent petitioned the Supreme Court of Ceylon that this order should be set aside. The matter came before T. S. Fernando, J. who permitted the respondent to argue that the Labour Tribunal had no jurisdiction to make the order as it had not been appointed by the Judicial Service Commission. T. S. Fernando, J. reserved the matter for consideration by more than one judge and it was heard by a bench of five judges who by a majority of three to two allowed the appeal on this ground. The appellant now appeals with special leave.

Part VI of the Ceylon (Constitution) Order in Council 1946 is headed "The Judicature". In this Part, s. 52 provides that the Chief Justice and Puisne Judges and Commissioners of Assize are to be appointed by the Governor-General and are to hold office during good behaviour. S. 53 provides for the creation of a Judicial Service Commission which is to consist of the Chief Justice, a Judge of the Supreme Court and one other person who is or has been a Judge of the Supreme Court and which by s. 55 is made responsible for the appointment, transfer, dismissal and disciplinary control of judicial officers. S. 55(5) defines a judicial officer as the holder of any judicial office but states that it does not include a Judge of the Supreme Court or a Commissioner of Assize. They are excluded from the definition for they are appointed not by the Judicial Service Commission but by the Governor-General. S. 56 makes it an offence to seek to influence the decision of the Judicial Service Commission or of a member of it.

Part VII of this Order in Council is headed "The Public Service". S. 57 in this Part provides that save as otherwise provided in the Order, "every person holding office under the Crown in respect of the Government of the Island shall hold office during Her Majesty's pleasure." S. 58 provides for the establishment of a Public Service Commission which by s. 60 is made responsible for the appointment, transfer, dismissal and disciplinary control of public officers (*i.e.*, holders of paid offices, other than judicial offices, as servants of the Crown in respect of the Government of the Island; s. 3).

Thus the Constitution Order in Council provides for the independence of the Ceylon civil service from the Executive and for the independence of the Judicature from the Executive and from the civil service.

No guidance is directly given by the Order in Council as to the meaning of the words "judicial officer" other than definition in s. 55(5) but it is apparent from the Order in Council that holders of judicial offices are to be regarded as members of the Judicature and not of the civil service.

The Presidents of Labour Tribunals have always been appointed by the Public Service Commission. If the majority of the Supreme Court of Ceylon are right in holding in this case that they are judicial officers and so should have been appointed by the Judicial Service Commission, then it follows that the acts and orders of the Labour Tribunals were without jurisdiction and so invalid.

At the time the Order in Council was made, civil and criminal justice in Ceylon was administered in the Supreme Court, District Courts, the Courts of Requests and Magistrates' Court (See Courts Ordinance Cap: 6. s. 3). Those discharging judicial functions in these courts are clearly holders of judicial offices but it does not follow that they are the only holders of such offices for the legislature may create new ones. The Bribery Amendment Act 1958 created Bribery Tribunals for the trial of persons prosecuted for bribery and in *The Bribery Commissioner* vs. *Ranasinghe* (1965) A.C. 172 it was held that the members of a Bribery Tribunal held judicial offices and that, as they had not been appointed by the Judicial Service Commission, they had no power to try a person accused of bribery and to sentence him to imprisonment.

There is no single test that can be applied to determine whether a particular office is a judicial one. In *Labour Relations Board of Saskatchewan* vs. *John East Iron Works* (1949) A.C. 134 the question was whether that Labour Relations

Board exercised judicial power and, if so, whether in that exercise it was a tribunal analogous to a superior, district or county court. Lord Simonds, delivering the judgment of the Board, stated that their Lordships without attempting to give a comprehensive definition of judicial power, accepted the view that its broad features were accurately stated by Griffiths C.J. in *Huddart, Parker and Co. Proprietary Ltd.* vs. *Moorhead* (1908) 8 C.L.R. 330, 357, which was approved by the Privy Council in *Shell Co. of Australia Ltd.* vs. *Federal Commissioner of Taxation* (1931) A.C. 275. Lord Simonds went on to say at page 149:

> "Nor do they doubt, as was pointed out in the latter case, that there are many positive features which are essential to the existence of judicial power, yet by themselves are not conclusive of it, or that any combination of such features will fail to establish a judicial power if, as is a common characteristic of so-called administrative tribunals, the ultimate decision may be determined not merely by the application of legal principles to ascertained facts but by considerations of policy also."

Earlier he had said at page 148:

> "Nor can a more difficult question be posed (but their Lordships can find no easier test) than to ask whether one court is 'analogous' to another."

and at page 151;

> "It is as good a test as another of 'analogy' to ask whether the subject-matter of the assumed justiciable issue makes it desirable that the judges should have the same qualifications as those which distinguish the judges of the superior or other courts."

That test appears an appropriate one to apply in relation to the question now before the Board.

In *Shell Co. of Australia* vs. *Federal Commissioner of Taxation* (supra) the Board approved the definition of Griffiths C.J. in *Huddart, Parker and Co.* vs. *Moorhead* (supra) when he said:

> "I am of opinion that the words 'judicial power' as used in section 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action."

and in relation to this, Lord Sankey L.C. delivering the judgment of the Board, enumerated a number of negative propositions on this subject (at page 297):

> 1. A tribunal is not necessarily a court in this strict sense because it gives a final decision. 2. Nor because it hears witnesses on oath. 3. Nor because two or more contending parties appear before it between whom it has to decide. 4. Nor because it gives decisions which affect the rights of subjects. 5. Nor because there is an appeal to a Court. 6. Nor because it is a body to which a matter is referred by another body."

The holder of a judicial office exercises judicial power but the fact that some judicial power is exercised does not establish that the office is judicial. As Tambiah J. pointed out in his dissenting judgment in this case, there were in Ceylon at the time the Constitution Order in Council was made, a number of persons and tribunals performing some judicial functions and those persons and the members of those tribunals have not been regarded as judicial officers. He gave as one instance the Divisional Registrar under the Kandyan Marriage and Divorce Act who, apart from his other duties, acts as a judge in contested divorce proceedings between Kandyans.

To determine whether the office of President of a Labour Tribunal is a judicial office, it is necessary to consider the powers, functions and duties entrusted to those tribunals and to have regard to the test adumbrated by Lord Simonds in the *Labour Relations Board* case (supra) by considering whether the nature of the matters those tribunals have to deal with makes it desirable that their Presidents should have the same qualifications as judges of the ordinary courts.

The long title of the Industrial Disputes Act (Cap: 131) No. 43 of 1950 reads as follows:

> "An Act to provide for the Prevention, Investigation and Settlement of Industrial Disputes, and for matters connected therewith and incidental thereto."

That Act provided for the reference of industrial disputes to arbitration or to an Industrial Court. It was amended by the Industrial Disputes (Amendment) Act No. 62 of 1957. By the amending Act the Commissioner of Labour was given power to refer an industrial dispute to a Labour Tribunal as an alternative to referring it to arbitration and the Minister was given power to refer a minor industrial dispute to a Labour Tribunal as an alternative to referring it to arbitration or to an Industrial Court. On any such reference the Labour

Tribunal has the same powers and duties as an arbitrator under the Act (s. 15A).

An industrial dispute was defined by s. 48 as meaning any dispute or difference between employers and workmen or between workmen and workmen connected with the employment or non-employment, or the terms of employment or with the conditions of labour of any person. The Act of 1957 amended this definition by adding connected with the termination of the services or the reinstatement in service of any person and in 1962 a further amendment was made which made it clear that the definition included a dispute between an employer and a workman.

An industrial dispute may arise over a number of matters connected with employment. In many cases, it may be the majority of cases, the dispute will be over wage rates and matters connected therewith. In other cases it may be over the dismissal of a workman or workmen and it is clear that an industrial dispute within the meaning of the Act may arise even though the employer has done no more than exercise his legal rights. Satisfactory provision for the settlement of industrial disputes must cover all industrial disputes whether they arise over wages or on account of the dismissal of a workman or for other causes.

S. 17 provides that when a dispute has been referred to arbitration by the Commissioner of Labour or the Minister, the arbitraror

> "shall make all such inquiries into the dispute as he may consider necessary, hear such evidence as may be tendered by the parties to the dispute, and thereafter make such award as may appear to him just and equitable."

S. 24(1) similarly provides that it is the duty of an Industrial Court (which consists of one or three persons: s. 22(4)),

> "to which any dispute, application or question...is referred or made under this Act... to make all such inquiries and hear all such evidence, as it may consider necessary, and thereafter to take such decision or make such award as may appear to the court just and equitable."

The powers and duties of an arbitrator under the Act, of an Industrial Court and of a Labour Tribunal on a reference of an industrial dispute are thus the same. In relation to an arbitration, the arbitrator must hear the evidence tendered by the parties. So must a Labour Tribunal on a reference. An Industrial Court has to hear such evidence as it considers necessary. In each case the award has to be one which appears to the arbitrator, the Labour Tribunal or the Industrial Court just and equitable. No other criterion is laid down. They are given an unfettered discretion to do what they think is right and fair.

S. 33(1) of the Act provides that any award under the Act, whether made by an arbitrator, an Industrial Court or since the Act was amended in 1957, by a Labour Tribunal may contain decisions on a variety of matters, including decisions that wages shall be paid by an employer in respect of a period of absence from work by reason of a strike or lock-out.

S. 19 provides that the award of an arbitrator is to be binding on the persons named therein and that the terms of the award are to be implied terms in the contract of employment between the employers and workmen bound by the award. S. 26 similarly prescribes that every award of an Industrial Court is to be binding on the persons referred to therein and that the terms of the award are to be implied terms in the contract of employment.

The fact that the terms of the award are to be implied terms of the contract of employment led Sansoni C.J. with whose judgment T. S. Fernando J. agreed, and H. N. G. Fernando S.P.J. to the conclusion that the awards were only intended to have effect in the future. H. N. G. Fernando S.P.J. said that they were "concerned not with the reparation of wrongs but instead with the determination of future terms and conditions." Their Lordships are unable to agree with this. Where the terms of an award relate to wages or holidays it is no doubt appropriate that the terms should be implied terms of the contract of service but the industrial dispute may be over something that has happened in the past and something unrelated to the future, as, for instance, over the question whether wages should be paid in respect of a period of absence from work due to a strike or a lock-out or over the dismissal of a workman who has received all to which he is legally entitled. S. 33(1) expressly gives power to order the payment of wages for a period of absence due to a strike or a lock-out and neither an arbitrator, nor an Industrial Court nor a Labour Tribunal on a reference is restricted to awarding a dismissed workman no more than is legally due to him for they may consider that his legal rights give him less than is just and equitable.

It would therefore appear that the provision in ss. 19 and 26 that the terms of the award are

to be implied terms of the contract of employment should be read with some qualification, for the terms of some awards may be quite inappropriate for treatment as implied terms of the contract of service.

Now it is agreed that an arbitrator under the Act, a member of an Industrial Court and the President of a Labour Tribunal when a dispute is referred to it do not hold a judicial office. The three Judges who formed the majority in the Supreme Court in this case, Sansoni, C.J., H. N. G. Fernando, S.P.J. and T. S. Fernando J, so held.

If on the examination of the powers and functions of a Labour Tribunal, they are found not to differ in any material respect from those of an arbitrator or of an Industrial Court, then it is to be inferred that the legislature did not intend to create and did not create when it provided for the establishment of Labour Tribunals, a different kind of office to that held by arbitrators and the members of an Industrial Court.

The Amending Act of 1957 inserted Part IVA into the Act of 1950, and it is now necessary to consider the terms of the sections contained in that part.

The first section in it, s. 31A reads as follows:

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

Regulation 10(2) of the Industrial Disputes Regulations made under s. 39 of the 1950 Act provides that the person constituting a labour tribunal is to be designated President of the Tribunal.

It was thus for the Minister to decide how many tribunals there should be and then for the Public Service Commission or the Judicial Service Commission to make the necessary appointments. The tribunals were established "for the purposes of this Act" *i.e.* the Act of 1950. They were therefore intended to be part of the machinery for the prevention, investigation and settlement of industrial disputes. The legal rights and obligations of employers and workmen can be determined in the ordinary courts. If it had been the intention of the legislature to create judicial tribunals in substitution for or as an alternative to the ordinary courts for the determination of legal rights, it is to be expected that the statutory provision creating them would have indicated that. No such inference is to be drawn from the language of s. 31A and the statement in that section that the tribunals were to be established for the purposes of the Act indicates that that was not the intention of the legislature. That however is not conclusive for the legislature may have provided for the creation of a judicial office by attaching to that office powers and duties of a judicial character.

S. 31B(1) introduced into the 1950 Act by the amending Act of 1957 reads as follows:

> "A workman or a trade union on behalf of a workman who is a member of that union, may make an application in writing to a Labour Tribunal for relief or redress in respect of any of the following matters:
>
> (*a*) the termination of his services by his employer;
>
> (*b*) the question whether any gratuity or other benefits are due to him from his employer on termination of his services and the amount of such gratuity and the nature and extent of such benefits;
>
> (*c*) such other matters relating to the terms of employment or the conditions of labour as may be prescribed."

The right given by this section to a workman and to his union acting on his behalf to apply to a Labour Tribunal does not depend on the existence of an industrial dispute and it is exercisable without the intervention of the Commissioner of Labour or the Minister.

The power to prescribe other matters relating to employment and conditions of labour in relation to which an application can be made, has not been exercised. If it was exercised to the full, then it would seem that a Labour Tribunal could hear applications in respect of all, or substantially all, the matters that might form the subject of an industrial dispute. The fact that it is at present restricted to hearing applications under s. 31B(1) relating to the termination of employment and coming within (*a*) or (*b*) above is of no significance in relation to the question whether a tribunal when dealing with such applications exercises judicial power with the result that, if this was the only function of such a tribunal, the President of it is to be regarded as the holder of a judicial office.

It was strongly argued on behalf of the respondent that s. 31B(1) only gives a workman the right to apply if he has a cause of action *i.e.* if he is

alleging a breach by his employer of the contract of service or of some obligation imposed by law on his employer. It was thus argued that a Labour Tribunal when dealing with such applications discharged the functions of a court of law and was therefore to be regarded as analogous to a court.

If that were the case, one would not expect access to the tribunal to be limited to one part to a dispute arising out of employment.

In their Lordships' view this argument is not well founded and it is not right to say that a workman can only apply if he has a cause of action.

In this connection regard must be had to two other sub-sections in Part IVA, s. 31B(4) and s. 31C(1).

S. 31B(4) reads as follows:

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

Sansoni C.J. in the course of his judgment in this case, said that he thought that this provision gave the tribunal power to give relief against any harsh terms the employer might have imposed in the contract of service. H. N. G. Fernando S.P.J. thought that this sub-section was intended to overcome provisions in a contract excluding an application to a tribunal. While this provision enables a tribunal to disregard harsh terms in the contract and terms excluding an application to a tribunal, it is not limited to that. It clearly provides that the relief or redress that a tribunal may grant is not to be restricted in any way by the terms of the contract.

S. 31C(1) defines the powers and duties of a tribunal on an application and provides that it:

> "shall be the duty of the tribunal to make all such inquiries into that application and hear all such evidence as the tribunal may consider necessary, and thereafter make such order as appears to the tribunal just and equitable."

The similarity between the wording of s. 31C(1) and that of ss. 17 and 24 is significant and striking. An arbitrator by s. 17 and an Industrial Court by s. 24 are required to make such an award as appears just and equitable. A Labour Tribunal is required to do the same on a reference (s. 15A) and also by s. 31C (1) on an application. The same meaning must be given to the words "just and equitable" in these sections. Ss. 17 and 24 give an arbitrator and an Industrial Court unfettered discretion to do what they consider to be right and fair. S. 31C(1) gives a similar discretion to a Labour Tribunal on an application and s. 31B(4) makes it clear that in doing so it is not restricted by the terms of the contract.

S. 31B(1) is the gateway through which a workman must pass to get his application before a tribunal but it is ss. 31B(4) and 31C(1) which state the powers and duties of a tribunal on an application.

In support of his argument that a workman could only apply if he had a cause of action, counsel for the respondent drew attention to the fact that the words "relief" and "redress" are to be found in ss. 5 and 6 of the Civil Procedure Code which respectively define an action in the civil court as "a proceeding for the prevention or redress of a wrong" and an "application to a Court for relief or remedy obtainable through the exercise of the Court's power or authority." It does not, however, follow that the relief or redress obtainable on an application is obtainable only where a workman has a cause of action or that it is limited to relief or redress in respect of a breach of contract or of an obligation imposed by law. Ss. 31B(4) and 31C(1) show that that is not so.

Counsel for the respondent particularly relied on the wording of s. 31B(1)(*b*). That provides that an application can be made in relation to "the question whether any gratuity or other benefits are due.....". He contended that the words "are due" mean "are legally due" and in support of this contention he cited *Richard Pieris and Co.* vs. *Wijesiriwardena* (1960) 62 N.L.R. 233, where T. S. Fernando J. held that they meant legally due. In that case the respondent was not represented and so the contrary view was not argued. In *The Electric Equipment and Construction Co.* vs. *Cooray* (1961) 63 N.L.R. 164, H. N. G. Fernando J. followed the *Pieris* case and set aside an order of a Labour Tribunal for the payment of two months' wages in lieu of notice on the ground that the workman was only entitled to one month's wages in lieu of notice under his contract of employment and held that a Labour Tribunal could only award what was legally due. In neither of these cases were ss. 31B(4) and 31C(1) referred to. If these decisions are right, then full

effect cannot be given to these sub-sections for, instead of being free to order what it considers just and equitable in the way of relief or redress, a tribunal is bound by the terms of the contract and only able to order payment of what is legally due.

In *Shell Co. of Ceylon* vs. *Pathirana* (1962) 64 N.L.R. 71 Abeyesundere, J. held that a Labour Tribunal had jurisdiction on an application, under s. 31B(1), to order the payment of six weeks' wages in lieu of notice instead of two weeks' wages which had been offered to him in accordance with the terms of the contract of service. His attention does not appear to have been drawn to the decisions in the *Pieris* case and in the *Electric Equipment* case.

S. 31B(1) does not say that a workman can apply for relief in respect of the wrongful termination of his services. It merely says that he can apply in respect of the termination of his services. The omission of the word "wrongful" is significant. In their Lordships' opinion the decision in the *Shell Co.* case was right and the decision in the *Pieris* and *Electric Equipment* cases were wrong.

If, as in their Lordships' opinion is the case, a workman can apply for relief or redress in respect of the termination of his employment even when termination is in accordance with the terms of his contract and not in breach of them and the tribunal can order what it considers to be just and equitable even though that is in excess of his legal rights, it would be odd if the powers of a tribunal in respect of a gratuity or other benefits on the termination of his services, were limited to ordering payment of what is legally due to him. S. 31B(1)(*b*) is curiously worded. It does not say that a workman can apply for a gratuity or other benefits legally due to him but that he can apply in respect of the question whether they are due. The question is one for the tribunal to determine and, in the light of s. 31C(1) to decide on the basis of what appears to it just and equitable. If s. 31B(1)(*b*) stood alone then the words "are due" might be interpreted as meaning "are legally due" but this sub-section must be read with ss. 31B(4) and 31C(1) and reading it with these sub-sections it is clear that the tribunal's decision is not to be whether a gratuity or other benefit is legally due but whether it is just and equitable that it should be paid. It is not whether it is legally due but whether it ought to be paid that the tribunal is required to decide.

In their Lordships' opinion s. 31B(1)(*b*) when properly construed lends no support to the view that on an application a Labour Tribunal has to determine legal rights.

Counsel for the respondent also relied on the fact that s. 31B(5) provides that where a workman applies to a Labour Tribunal, he is debarred from any other legal remedy. It does not, however, follow from the fact that if he makes such an application and is consequently unable to sue in the Courts, that the Labour Tribunal in dealing with an application exercises judicial power. If he applies to a Labour Tribunal, he will get what the Tribunal thinks just and equitable and he can apply even when there has been no breach of contract. If he sues in the Courts he will have to show that he has a cause of action and he can only get what is legally due to him. It is not to be inferred from the fact that the legislature has prevented a duplication of claims by a workman, that a Labour Tribunal deals with an application as a judicial body.

It was also argued for the respondent that the fact that, although the decision of a Labour Tribunal is made final by s. 31D(1) and cannot be called in question in any court, provision is made by s. 31D(2) for an appeal to the Supreme Court on a question of law, shows that a Labour Tribunal when dealing with an application, acts as a court of law. This, in their Lordships' opinion, is not a necessary inference from the provision of a right of appeal on a question of law. Provision is made in the Arbitration Acts for the determination of questions of law by the courts but arbitrators are not judicial officers.

Sansoni C. J., with whose judgment T. S. Fernando J. agreed, held that a Labour Tribunal was not acting judicially when dealing with an industrial dispute referred to it by that it was acting judicially when dealing with an application under s. 31B(1). It follows from his judgment that the Public Service Commission would be the right body to appoint the President of a Tribunal when that Tribunal was required to deal with an industrial dispute but that the Judicial Service Commission would be required to appoint him when it had to deal with applications.

In their Lordships' view this cannot be right. Each Labour Tribunal may have to deal with both industrial disputes and applications. Each Labour Tribunal is one tribunal with one member designated the President. The Act creating them lends

no support to the view that the President should be appointed by a different body depending on the nature of the work coming before the Tribunal.

In determining whether or not the office of President is a judicial office, regard must be had to all the functions such a tribunal may be required to discharge. It is one office.

While the matter is not free from difficulty and as has been said, no single test can be applied to determine whether an office is judicial, in their Lordships' opinion the office of President of a Labour Tribunal is not a judicial office within the meaning of those words in the Constitution Order in Council. Their reasons for this conclusion may be summarised as follows:

1. Labour Tribunals were established for the purposes of the Act of 1950, namely to provide for the prevention, investigation and settlement of industrial disputes. The Act making provision for them did not say that they were to perform the functions of a court in giving effect to the legal rights of workmen in connection with their employment.

2. On a reference of an industrial dispute, a Labour Tribunal has the same powers and duties as an arbitrator under the Act. It was rightly held by the Supreme Court that when so acting, a Labour Tribunal was not acting judicially and that an arbitrator and a member of an Industrial Court did not hold judicial offices.

3. On an application, the powers and duties of a Labour Tribunal do not differ from those of an arbitrator and an Industrial Court or a Labour Tribunal on a reference in any material respect. A Labour Tribunal, an arbitrator and an Industrial Court are required to do what is just and equitable and it is expressly provided that a Labour Tribunal when dealing with an application is not restricted by the terms of the contract of employment in granting relief or redress.

   In the course of hearing an application a Tribunal may be informed of the terms of the contract but it is not restricted to giving effect to legal rights.

4. The similarity of the powers and duties of a Labour Tribunal both in relation to a reference and to an application points strongly to the conclusion that its functions are not of a different character on an application to those on a reference or to those of an arbitrator or an Industrial Court.

5. By s. 31 B(2) inserted into the Act of 1950 by the amending Act of 1957 a Labour Tribunal was required to defer making an order on an application if it appeared that the subject-matter of the application was under discussion with the employer until the discussion was concluded or the Minister referred the matter to an arbitrator, or to an Industrial Court or a Labour Tribunal. A new sub-section was substituted for this sub-section by the Industrial Disputes (Amendment) Act No. 4 of 1962.

   S. 31B(3) introduced by the amending Act of 1957 further provides that a Tribunal shall suspend its proceedings on an application if it appears that the subject-matter of the application is similar to or identical with a matter constituting or included in an industrial dispute into which an inquiry under the Act is held, or, if the facts affecting the application are facts affecting any proceedings under any other law. This sub-section further provides that upon the conclusion of the inquiry or of the proceedings under any other law, the tribunal should resume its proceedings and in making its order on the application should have regard to the award or decision in the inquiry or other proceedings.

   These two sub-sections show that, far from being established in substitution for or as an alternative to the ordinary courts,

Labour Tribunals were created as part of the machinery for preventing and settling industrial disputes. It would indeed be novel if proceedings in a court of law were required by law to be suspended during discussions between the parties to those proceedings and if a court of law was required to have regard to awards made in respect of an industrial dispute by non-judicial persons, when making its order on an application; so novel, indeed, as to lead to the conclusion that Labour Tribunals were not intended to, are not required to and do not act as courts of law.

6. Applying the test adumbrated by Lord Simonds in the *Labour Relations Board* case (supra), the matters with which a Labour Tribunal may be required to deal both on a reference and on an application, do not make it desirable that Presidents of Labour Tribunals should have the same qualifications as those which distinguish the judges of the superior or other courts.

Their Lordships will, for the reasons stated, humbly advise Her Majesty that this appeal be allowed and the case remitted to the Supreme Court of Ceylon to deal with the respondent's appeal to the Court on questions of law. The respondent must pay the appellants' costs of this appeal except for the costs of the petition for special leave to appeal.

(*Dissenting judgment by* **Lord Guest** *and* **Lord Devlin**)

We have the misfortune to differ from the conclusion of the majority of our colleagues on the Board. This decision and others like it will effect the future shape of the law and in particular will help to determine whether the growing body of law which regulates industrial relations is to be administered within the judicial or within the executive sphere. We propose therefore to state with out going into much detail the basis of our dissent.

It is commonplace that with respect to industrial relations the common law of master and servant has fallen into disuse. Disputes about conditions of employment are not usually settled by the Courts in accordance with the terms, express or implied, of the contract of service .Trade unionism could no doubt have used its increased bargaining power to obtain more realistic and elaborate contracts of service within the framework of the old common law, but it preferred to use it to seek advantages irrespective of contract and enforceable not by legal machinery but by the threat of the strike. The law has therefore had to make a new entry into the field of industrial relations. It has had to start again from the beginning, and, as in the field of international relations, has had to make its way in by formulating methods of securing the peaceful settlement of disputes.

As the Chief Justice has recorded, the law of Ceylon was late in entering the industrial field with the Industrial Disputes Act 1950. The Act set up a Commissioner with the function of promoting the settlement of industrial disputes. He was empowered to do so by means of conciliation procedure and of arbitration when the parties agreed to submit to it. The Act provided also for the making and registration of collective agreements, whose terms were to become implied terms of the contract of employment between those employers and workmen who were covered by it. All these were voluntary procedures, but the Act provided also for the compulsory settlement of disputes by an Industrial Court. If the Minister referred a dispute to a court, the court could make an award, whose terms like those of a collective agreement, would become implied terms of the contract of employment. Provision was made for the subsequent variation of such terms at the instance of any of the parties.

The Act thus employed the known ways of settling the ordinary trade dispute. But it did not include any simple way of remedying a grievance which an individual workman might have against his employer. Suppose, for example, that a workman was dismissed with such notice as the common

law thinks reasonable but which a fair-minded employer nowadays probably accepts as inadequate; or suppose he was dismissed because of reduction in the labour force but without the *ex gratia* payment which a reasonably generous employer would nowadays think appropriate. The aggrieved workman in such a case could seek the help of his trade union which could threaten industrial action. Then there might be a reference which might result in the workman obtaining better treatment and in an award to govern similar cases in the future. But there might be no question of principle involved calling for s general award; the case might involve nothing more than a decision on what the fair thing to do in the particular circumstances. A swift way of dealing with an individual grievance without calling out the whole force of trade unionism would certainly help to promote industrial peace. It was supplied by an amending Act of 1957. This Act enlarged the definition of industrial dispute so as to make it clear that it included a dispute or difference between an individual employer and an individual workman. It inserted into the Act a new part, Part IV A, entitled "Labour Tribunals". The function of the Labour Tribunal is to entertain applications by a workman for relief or redress in respect of such matters relating to the terms of employment or the conditions of labour as may be prescribed. The particular matters specified in the Act are those which we have already mentioned by way of example, namely, questions arising out of the termination of the workman's services and relating to gratuities or other benefits payable on termination. On such matters the Tribunal is to make such order as may appear to it to be just and equitable. The workman has to make his choice between the remedy afforded by the Act and any other legal remedy he may have; he cannot seek both. If he goes to the Tribunal, the Tribunal's order settles the matter and is not to be called in question in any court except that there may be an appeal to the Supreme Court on a question of law. Any money which the Tribunal orders to be paid to a workman can be recovered summarily through a magistrate's court in the same manner as a fine.

The question for the Board is whether the Labour Tribunal, which under the Act is to consist of a single person, is a "Judicial Officer" within Section 55 of the Constitution. If so, he can be appointed only by the Judicial Service Commission, in which is also vested the power of transfer, dismissal and disciplinary control. If not, he is a servant of the administration to be appointed by the Public Services Commission. In this way there is maintained, as the Board said in *The Bribery Commissioner* vs. *Ranasinghe* (1964) 2 A.E.R. 785 at 787, a dividing line between the judiciary and the executive.

It is not disputed that the Labour Tribunal is an office. If the power that is conferred on him by Part IV A derives from the judicial power of the State, then he is a judicial officer. It is true that judicial power can be entrusted to someone who is not a judicial officer and the person so entrusted is then generally spoken of as acting quasi-judicially. So also, administrative power can be given to a judge. The character of the office depends on the character of the chief function. Apart from his function under Part IV A the Labour Tribunal can act as an arbitrator to whom the Commissioner can with consent refer disputes (a role that before 1957 was filled by the District Judge) and in the case of a minor dispute can act in place of an Industrial Court by virtue of a reference by the Minister. But these are ancillary duties that may or may not come his way. The Commission that has to make the appointment has to do so before it is known whether they will or not. It is not therefore seriously contested that the character of the office of the Labour Tribunal must be decided by reference to the powers granted and the duties put upon him by Part IV A. So the question is whether these powers and duties are judicial or administrative in character.

It must be remembered that this is a constitutional question so that Parliament, when it passed the amending Act, had not a free hand. It may be thought convenient that all officers under the Act should belong to the same category and that, as Tambiah, J. suggested, they should be filled by

persons acquainted with labour practices rather than with practice in the courts. On the other hand, it may be an advantage that those who are creating the law, so to speak, in the form of general awards should be different in character to those who have to apply it in individual cases; and that those who have to give just decisions in whatever sphere should come from the profession that is experienced in the administration of justice. If this were not a constitutional point, these are the sort of considerations that might be weighed in order to ascertain the intent of the Act. But on the constitutional point the presumed intention of Parliament can have only a very limited effect. If Parliament wants disputes under Part IV A to be settled judicially. the persons who settle them must be appointed by the Judicial Commission whether Parliament thinks it convenient or not. Of course if there be any doubt whether the language of Part IV A does or does not confer judicial power, the intent of the Act is relevant to determine that point: but beyond that it is immaterial.

We think with respect that there is nothing to be gained by comparing the functions of the Labour Tribunal with those of the Industrial Court on the assumption that the latter is not a judicial body. Although the language of the Act suggests that the primary function of the Industrial Court is arbitral (we shall consider later the exact meaning of this rather dubious word) rather than judicial, the Court is empowered to make orders affecting the existing rights of an individual workman. On the other hand there is in the case of the Industrial Court no provision for appeal to a court of law or for ousting the jurisdiction of a court of law on the same subject-matter. It seems to us to be unnecessary to decide whether an Industrial Court, when dealing with a dispute which is also within the jurisdiction of the Labour Tribunal. is exercising judicial power. If it is, we think that the exercise is ancillary to the main function of the court which is arbitral; and consequently that the officers of the court would not be judicial officers.

Thus in our opinion the question whether a body is exercising judicial power is not to be determined by looking at its functions in conjunction with those of other bodies set up by the Act and forming a general impression about whether they are judicial or administrative. Nor is it to be answered by totting up and balancing resemblances between the Labour Tribunal and other judicial or administrative bodies. Judicial power is a concept that is capable of clear delineation. It has to be, since it is the basis of a constitutional requirement and legislation which falls on the wrong side of the line can be completely avoided. It has been considered many times in relation to those constitutions, particularly the Australian, which provide for the separation of powers. We propose therefore to take the basic definition and consider whether or not the power of the Labour Tribunal falls within it. In the authorities there is also a discussion of a number of identifying marks distinguishing the judicial from the executive and legislative powers and we shall consider those that appear to us to be relevant.

The accepted definition of judicial power is that given by Griffiths C.J. in *Huddart* vs. *Moorhead* (1908) 8 C.L.R. 330 at 357. It is the power "which every Sovereign Authority must of necessity have to decide controversies between its subjects, or between itself and its subjects. whether the rights relate to life, liberty, or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action." The power of the Labour Tribunal clearly falls within these general terms, but it is worth noting some particular aspects of it.

There must be a controversy about rights or, as it is sometimes put, a *lis*. Part IV A covers controversies between a workman and his employer about the rights arising out of that relationship. The power of the Tribunal is that of giving a binding and authoritative decision. In this respect the procedure is to be distinguished from the conciliation procedures provided under the Act.

The power proceeds from the Sovereign, *i.e.* it is the judicial power of the State. In this respect it is to be distinguished from the power of an arbitrator whose authority is derived from the consent of the parties themselves. This factor — that it is the judicial power of the State — carries with it another consequence. Justice can be done in an individual case without creating any principle applicable to other cases of the same sort. But the Judicial power of the State is concerned with justice for all and that is not attained if there are inexplicable differentiations between decisions in the same type of case. The judicial power of the State must therefore be exercised in conformity with principle. In *Moses* vs. *Parker* (1896) A.C. 245 there was vested in the Supreme Court of Tasmania jurisdiction to deal with disputes regarding claims to grants of land. Such disputes

had previously been dealt with by the Governor on the report of commissioners, the Governor being "in equity and good conscience" entitled to make a grant. The statute which gave jurisdiction to the Supreme Court provided that it should not be "bound by the strict rules of law or equity in any case, or by any technicalities or legal forms whatever". The Board held that a decision of the Supreme Court given under the statute was not "a judicial decision admitting of appeal". Explaining this case in the later case of *C. P. R. Co.* vs. *Corporation of City of Toronto* (1911) A.C. 461 the Board said at 471 that "as the tribunal from which it was desired to appeal was expressly exonerated from all rules of law or practice, and certain affairs were placed in the hands of the judges as the persons from whom the best opinions might be obtained, and not as a court administering justice between the litigants, such functions do not attract the prerogative of the Crown to grant appeals".

These decisions indicate the importance of the provision in the Ceylon statute which gives a right of appeal from the Tribunal on questions of law. In *Moses* vs. *Parker* the Board, after observing at 248 that the Court was expressly exonerated from all rules of law, continued: "How then can the propriety of their decision be tested on appeal? What are the canons by which this Board is to be guided in advising Her Majesty whether the Supreme Court is right or wrong? It seems almost impossible that decisions can be varied except by reference to some rule: whereas the Court making them is free from rules. If appeals were allowed, the certain result would be to establish some system of rules: and that is the very thing from which the Tasmanian legislature has desired to leave the Supreme Court free and unfettered in each case. If it were clear that appeals ought to be allowed, such difficulties would doubtless be met somehow." In the present case it is clear that appeals are allowed and the corollary is that there must be established a system of rules. It is true that the only requirement in the Act is that the orders of the Tribunal must be such as appear to them to be just and equitable. But this imports a judicial discretion, albeit a very wide one. If an order was made arbitrarily, this would be, as Tambiah, J. says, a good ground of appeal. Experience shows that out of a jurisdiction of this sort there grows a body of principles laying down how the discretion is to be exercised and thus uniformity is created in the administration of justice. In this fashion, as was said in *Moses* vs. *Parker*, there emerges inevitably a system of law.

But this does not mean that unless the Tribunal from the first applies an existing system of law it cannot be judicial. The distinction is not between old law and new law but between law and no law. It is quite plain to us that in doing justice and equity under the Act, the Tribunal will have to have regard to many novel considerations and to pay only limited regard to matters, such as the contract of employment, which under the existing law of master and servant would be determinative. The directions given to the Tribunal under s. 31B(2) and (3) are, if addressed to a court of law, unprecedented and we shall consider them in greater detail later. Other maters to be considered are novel only in the sense that they have never been accepted as part of the common law. The power to order reinstatement, for example, conferred by s. 33 is well known to most systems of law but not to the common law. In the United Kingdom the deficiencies of the common law in this respect are gradually being made good by statutes such as the Contracts of Employment Act 1963 and the Redundancy Payments Act 1965. What the Ceylon statute appears to us to be doing is to substitute for the rigidity of the old law a new and more flexible system. In some such fashion English equity gave relief from the common law. Those who made equity were judges and not administrators.

Another characteristic of the judicial power is that it is concerned with existing rights, that is those which the parties actually have at the inception of the suit and not those which it may be thought they ought to have; it is concerned with the past and the present and not with future. This distinction between the judicial and the arbitral power has been elaborated in a number of authorities. The word "arbitral" is not used to distinguish between judge and arbitrator in the ordinary sense, for the arbitrator like the judge ordinarily deals with disputes about existing rights. But most industrial arbitrations are concerned with settling conditions of employment as they should be in the future and "arbitral" is used to describe that function. In *Attorney-General for Australia* vs. *R.* (1957) A.C. 288 the Board at 310, after saying that "the function of an industrial arbitrator is completely outside the realm of judicial power and is of a different order", went on to cite the well known passage from the judgment of Isaacs and Rich JJ. in *Waterside Workers' Federation of Australia* vs. *Alexander (J. W.) Ltd.* (1918) 25 C.L.R. 434 at 463.

> "The essential difference is that the judicial power is concerned with the ascertainment, declaration and

enforcement of the rights and liabilities of the parties as they exist, or are deemed to exist, at the moment the proceedings are instituted; whereas the function of the arbitral power in relation to industrial disputes is to ascertain and declare, but not enforce, what in the opinion of the arbitrator ought to be the respective rights and liabilities of the parties in relation to each other."

Tambiah J., we think with respect, errs in supposing that because the Tribunal is not administering the old law it is not giving decisions on existing rights but creating future ones. It is the statute which creates the right to equitable relief by giving to the workman the option of going to the Labour Tribunal to ask for it instead of taking what the common law will give him. One method of altering the law on master and servant would be to enact a new set of rules, as has been done to some extent in the United Kingdom by the statutes we have mentioned, leaving to the court only the task of interpretation and application. Another method, frequently employed, is to give fresh powers to the court. Under the latter method the right comes into existence as soon as there is created the relationship, in this case that of employer and workman, from which it springs; it does not have to wait for life until the relief granted is spelt out in words by the court.

Another and essential characteristic of judicial power is that it should be exercised judicially. Put another way, judicial power is power limited by the obligation to act judicially. Administrative or executive power is not limited in that way. Judicial action requires as a minimum the observance of some rules of natural justice. Exactly what these are will vary with the circumstances of the case as Tucker L.J., said in *Russel* vs. *Duke of Norfolk* (1949) 1 A.E.R. 109 at 118 in a passage which has several times been approved. Whatever standard is adopted, Tucker L.J. said, one essential is that the person concerned should have a reasonable opportunity of presenting his case. Lord Hodson in *Ridge* vs. *Baldwin* (1964) A.C. 40 at 132 after quoting Tucker L.J's dictum, added:— "No one, I think, disputes that three features of natural justice stand out — (1) the right to be heard by an unbiased tribunal ; (2) the right to have notice of charges of misconduct; (3) the right to be heard in answer to those charges." These are not necessarily features of administrative decisions. The administrator is not required to be unbiased and his decision may often affect these who have no opportunity of presenting their views.

Under s. 31C(2) the Labour Tribunal is empowered, subject to regulations which have not yet been made, itself to lay down the procedure to be observed by it. We think it is clear from the authorities, — indeed, the contrary was not suggested, — that the nature of its enquiry is such that it must act in conformity with natural justice. A recent example of the applicability of the rules in this type of case is *R.* vs. *Deputy Industrial Injuries Commissioner ex parte Moore* (1965) 1 Q.B.. 456 at 476. It is arguable that the rules of natural justice are not applicable at all unless there is an obligation to act judicially and that if such a limitation is imposed on the power, it must be a judicial power. Parker C.J. said recently in *re Habib Khan* that it may be that where there is no duty to act judicially or quasi-judicially there is no power in the Court to interfere. But the point was not explored in argument before the Board and we shall not therefore say more than that to hold that the Labour Tribunal is bound by the rules of natural justice is going a long way towards holding that it is a judicial tribunal.

Finally there is the principle that the judicial power must be exercised so as to do justice in the case that is being tried and the judge must not allow himself to be influenced by any other consideration at all. Considerations of policy or expediency which are permissible for the administrator must be altogether excluded by the judge. The Labour Tribunal is, as we have said, empowered by the statute to enquire into matters that have hitherto been regarded as outside the purview of courts of law and as relevant only to the making of collective bargains. If these inquiries, although unusual and opening up a new source of law, are all subordinate to the Tribunal's task of making a just and equitable order upon the workman's application for relief, well and good. But if they impose upon the Tribunal the duty of making an order that is politic or expedient rather than one which is just and equitable, then the Tribunal is in effect being told that it is not a judicial tribunal. To our minds this is the crucial question in this case. We must now review the provisions in the Act which are said to introduce extraneous considerations inconsistent with the judicial task.

We do not attach importance to the fact that by s. 31A(1) Labour Tribunals are established for the purposes of the Act. The purposes of the Act as set out in the preamble are "the prevention, investigation and settlement of industrial disputes, and for matters connected therewith or incidental thereto". It is argued that this means only the arbitral settlement of industrial disputes

but this seems to us to beg the question. That was what it meant when the Act was first drafted because the Act then provided only for conciliation and arbitral settlement. But the preamble does not prescribe the mode of settlement and if Parliament decided by the amending Act of 1957 to introduce judicial settlement, there would be no call to alter the preamble.

Nor do we consider that the exercise of any of the powers conferred by section 33 requires the Tribunal to act unjudicially. The power to reinstate, or to grant compensation in lieu of reinstatement, is new but there is nothing unjudicial about it. Likewise, the provision in s. 31B(4) that the Tribunal may in granting relief or redress override the terms of the contract of service is in this branch of the law startlingly new; but it is not contrary to modern ideas of justice. The idea that freely negotiated contracts should be conclusively presumed to contain just and equitable provisions began to die with the end of the 19th century. Long before then equity had refused to give effect to provisions in a contract which it considered to be harsh and unconscionable. From the beginning of the 20th century legislatures all over the Commonwealth have been writing terms into contracts and taking them out, whatever the parties may think about them. No doubt it is taking the process a step further to leave it to the discretion of the court to say for istelf what terms of the contract it will enforce, but there is nothing in this that is contrary to principle. Indeed in this sub-section the statute is doing no more than accepting and recognising the well known fact that the relations between an employer and his workman are no longer completely governed by the contract of service.

The provisions in the Act which appear to us to be questionable fall into two categories. First, there are those which may appear to divert the attention of the Tribunal from the demands of justice to what may be called the politics of industrial bargaining. Secondly, there are those which seem to subordinate the new process under Part IV A to the other arbitral activities provided for by the Act.

If any of these provisions can fairly be construed as a direction to the Labour Tribunal that in framing his order he is not simply to decide what is just and equitable as between the parties but that he is also to consider what sort of order is most likely to promote industrial peace generally and that if the just order might give rise to conflict he is not to make it, we should not hesitate to conclude that the Labour Tribunal was not a judicial body. But all these provisions are *prima facie* subordinate to the definitive words in s. 31C(1) which make it the duty of the Tribunal to enquire into the application for relief and to make such order as may appear to it to be just and equitable. These words in their natural and ordinary meaning require the Tribunal to do justice between the parties to the application. That is the dominating duty and the dominion can be overthrown only if there is a strong inference from other provisions in Part IV A that justice between the parties is not to be the only object of the order. We have to take into consideration not only the positive words of s. 31C(1) but also the other indications to which we have drawn attention that the Tribunal is vested with judicial power, especially the provision for appeal to the Supreme Court and the fact that the Tribunal must observe the rules of natural justice. Finally, it is to be remembered that Part IV A ousts at the option of the workman the jurisdiction of the ordinary courts. It would require very strong words to satisfy us that an Act of Parliament, which deprived the employer of his rights at common law in any dispute which he might have with one of his workmen, offered him no alternative way of getting justice as distinct from administrative treatment.

It is not in our opinion inconsistent with the dominating duty to make a just and equitable order that the statute should prescribe the sources of equity to which the Tribunal must have regard. This in our opinion satisfactorily accounts for the presence in the statute of two provisions which are said to require the Tribunal to have regard to extraneous considerations. The first is s. 31B(3) which requires the Tribunal before making its order to consider any relevant arbitral award and then have regard to it. We can see nothing contrary to justice in this. A good guide to what is fair and equitable in a particular case must be furnished by settlements which bodies of employers and workmen have made or are making in similar cases. The terms of collective bargains must be a source to which the Tribunal can properly resort. It is true that the terms of such bargains may reflect the operation of considerations of policy or expediency which have induced the assent of one side or the other. But that does not involve the Tribunal in questions of policy any more than the application of a statute involves a court of law in the issues of policy that have led up to its enactment.

The other provision is s. 46(4) which allows the Commissioner to be present and heard in any proceedings before the Labour Tribunal. If this means that the Commissioner is entitled to express his opinion on how the claim should be treated, it would indeed be a serious matter to consider, for it is to be presumed that the Commissioner would concern himself with questions of general policy rather than of individual justice. But there is no need to suppose that the function of the Commissioner is more than that of informing the court about the results of collective bargains which, as we have said, the Tribunal may properly regard as a source of equity and of assisting the Tribunal in the inquiries which it is told to make about other similar proceedings.

In the second category there are two provisions in s. 31B(2) which allow the arbitral or conciliatory procedure to take precedence over the Tribunal's procedure. One is the provision in s.s. (*a*) which requires the Tribunal to give effect to any settlement of the matter which is reached with the employer by the workman's trade union. The other is the provision in s.s. (*b*) which requires the Tribunal to dismiss the workman's claim if its subject matter forms part of an industrial dispute referred by the Minister under the arbitral provisions of the Act. This dismissal does not preclude the workman from pursuing his rights at common law since under s. 31B(5) they are excluded only where proceedings before the Tribunal are taken and concluded.

These provisions are designed to avoid a conflict of jurisdiction between the bodies set up under the Act. It would, for example, plainly be absurd if the Tribunal was to decide a dispute in favour of an applicant and the Industrial Court was to decide it against him, making its decision or award under Sections 10 or 26 a term of the applicant's contract of employment. Parliament resolves the conflict by limiting the jurisdiction of the Tribunal. It is difficult to say that this limitation is unfair since, if the workman dislikes the limitation, he need not resort to the Tribunal at all; he can, if he prefers, exercise his common law right. But whether it is unfair or not is not to the point. A limitation on the jurisdiction cannot affect the quality of decisions given within the jurisdiction.

The second provision s.s. (*b*), in terms ousts the jurisdiction of the Tribunal, leaving the matter to be settled either as an industrial dispute or by the workman's action at common law. The first provision is a less obvious way of ousting the jurisdiction but that is what in substance, though not in form, it is doing. A court of law has no doubt the formal power of refusing to make an order in accordance with a settlement reached by the parties, but it is a power which is exercised only in exceptional cases, as for example when one of the parties is under the protection of the court. Otherwise the Court does not enquire whether the proposed settlement achieves a just result; it assumes that it does. It assumes also that counsel has authority to make a settlement on behalf of his client; if he has not, it is a matter that they must settle between themselves. The Act is based on a similar assumption that a trade union has a similar authority from its members. This is evident not only in s.s. (*a*) but more significantly in s. 8 which empowers a trade union to make a collective settlement which will alter the terms of individual contracts. If s.s. (*a*) had provided that any settlement made by the applicant's trade union was deemed to be authorised by him, it would have ahieved the same result without affording any scope for the suggestion that the Tribunal was being asked to adopt a practice not normally followed by courts of law.

S. 31B(2) is therefore removing from the jurisdiction of the Tribunal disputes which Parliament considers are better settled by other means. It is true that in such settlements by other means what is thought to be politic and expedient may play a large part. It often does in settlements of ordinary actions. But this does not inject expediency into the deliberations of the Tribunal. There is nothing in s. 31B(2) which affects the duty of the Tribunal under s. 31(C)1 to decide in accordance with justice and equity all such matters as it has to decide.

Accordingly we conclude that the orders which the Tribunal is to make under Part IV A are judgments and not administrative orders. Since the whole function of the Tribunal under Part IV A is to consider applications and hold inquiries which are to end in judgments, it must follow that the Tribunal is a judicial Tribunal and that the person constituting the Tribunal is a judicial officer.

Appeal allowed.

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

E. A. MUDIYANSE, *KAPURALA & DE FACTO TRUSTEE OF ERAGODA PATHINI DEWALE*

vs.

T. M. DINGIRI BANDA & ANOTHER*

S. C. No. 192/1965 (*F*) — *D. C. Kandy Case No.* 2783/*L*

Argued on: 15th October, 1966.
Decided on: 22nd November, 1966.

Trustee of devale — Can a de facto trustee of a devale maintain an action for declaration of title to land belonging to such devale — Buddhist Temporalities Ordinance, Section 4(1), 4(2), 8 *and* 10.

Held: That a *de facto* trustee of a devale, which has not been brought under the operation of section 4(1) of the Buddhist Temporalities Ordinance, can maintain an action for declaration of title to land belonging to the devale.

Per **G. P. A. Silva, J.** "It would thus appear from a reading of sections 3 and 4 together that the Ordinance contemplates three classes of temples, namely, those that fall within the operation of the Ordinance, those that are exempted from the operation of section 4(1) and those that are exempted from the operation of all the provisions of the Ordinance."

"The Ordinance is therefore silent as regards the vesting of the management of devale property when such devale is exempted from the operation of section 4(1) and it will not be permissible to invoke the provisions of section 8 for the appointment of a trustee to the devale in those circumstances. When, therefore, section 8 provides that the trustee for every other devale shall be a person appointed by the Public Trustee, the words "every other devale" must be interpreted as being applicable only to those devales that are not exempted from the operation of the Ordinance."

Cases referred to: *Peter Singho* vs. *Appuhamy*, (1940) 41 N.L.R. 527
Siddhartha Unnanse vs. *Udayara*, (1919) 6 C.W.R. 29.
Abdul Azeez vs. *Abdul Rahiman*, (1911) 14 N.L.R. 317.
Changarapillai vs. *Chelliah*, (1905) 5. N.L.R. 270

T. B. Dissanayake, with *S. Moonesinghe*, for the plaintiff-appellant.

V. Jonklaas, Q.C., with *G. Candappa*, for the defendants-respondents.

G. P. A. Silva, J.

The plaintiff-appellant, calling himself a hereditary Kapurala and *de facto* trustee of the Eragoda Paththini Devale, brought this action in his capacity as such trustee for a declaration of title and for ejectment of the defendant-respondent from a portion of land said to belong to the devale alleging that the latter and her husband had entered into this land as a lessee of the former and was wrongfully disputing his title. Several issues were framed at the trial but the parties agreed that the issue whether the plaintiff had any right or title to maintain the action should be first decided as it would go to the root of the case. The learned District Judge accordingly tried this as a preliminary issue and held that the plaintiff was not entitled to maintain the action. The plaintiff appeals from this order. The only question that this court is called upon to decide, therefore, is whether a *de facto* trustee of the devale who has not received an appointment as such from the Public Trustee can maintain an action for a declaration of title to any land said to belong to the devale. The question turns on an interpretation of the relevant sections of the Buddhist Temporalities Ordinance.

According to the definition in section 2 of the Buddhist Temporalities Ordinance, which, I shall refer to hereafter as "The Ordinance", a temple means, *inter alia*, a vihare or a devale. Section 3 makes the provisions of the Ordinance applicable to every temple in Ceylon unless, by an Order made by the Minister, such a temple is exempted from the operation of all or any of its provisions. Counsel appearing on both sides before this court were agreed that the devale which, according to the definition, is a temple, has been exempted from the operation of section 4 (1) of the Ordinance. The question has therefore to be considered on that basis.

* For Sinhala translation, see Sinhala section, Vol. 14, part 2, p. 5.

As there was considerable argument in regard to sections 4 and 8 of the Ordinance it is necessary to consider the bearing of these two sections on the present question. Section 4(i) deals with the management of the property belonging to every temple not exempted from the operation of this subsection and vests such management in a person or persons duly appointed trustee under the provisions of the Ordinance, which provisions would appear to be contained in section 8. As the temple in this case is one which is exempted from the operation of this subsection the provision as to vesting of the management has no application. Section 4(2) deals with the management of property belonging to every temple exempted from the operation of section 4 (1) but not exempted from the operation of the entire Ordinance and vests such management in the viharadhipati of such temple. It would thus appear from a reading of sections 3 and 4 together that the Ordinance contemplates three classes of temples, namely, those that fall within the operation of the Ordinance, those that are exempted from the operation of section 4(i) and those that are exempted from the operation of all the provisions of the Ordinance. So far as it is necessary for the present purpose, in the case of temples not exempted from the operation of Section 4(i), the management would be vested in a person or persons appointed trustee in terms of the provisions of section 10, where such temple is a vihare, and in terms of section 8 when it is a devale. In the case of temples exempted from the operation of section 4(i), although the provision regarding their management is contained in section 4 (2), a certain difficulty is created by the wording of the provision which lays down that the management shall vest in the viharadhipati. A viharadhipati can be present only if a temple is a vihare and not a devale. For this reason, although section 4(2) deals with the management of property belonging to a temple which can mean both a vihare and a devale, the vesting of the management in a viharadhipati, bv neccessary implication restricts the operation of this subsection to vihares only and excludes devales from its purview. The Ordinance is therefore silent as regards the vesting of the management of devale property when such devale is exempted from the operation of section 4(i) and it will not be permissible to invoke the provisions of section 8 for the appointment of a trustee to the devale in those circumstances. When, therefore, section 8 provides that the trustee for every other devale shall be a person appointed by the Public Trustee, the words "every other devale" must be interpreted as being applicable only to those devales that are not exempted from the operation of the Ordinance. A similar question arose for consideration in the case of *Peter Singho* vs. *Appuhamy*, 41 N.L.R. 527 in which Wijeyewardene, J. expressed the view that a devale which has not been brought under the operation of section 4(i) of the Buddhist Temporalities Ordinance, falls outside the provisions of the Ordinance. This is a judgment which commends itself to me as one that should be followed. In order to accept Mr. Jonklaas' submission that the provisions of section 8 are wide enough to cover every devale, it is necessary to proceed on the basis that, while the Ordinance itself excludes certain devales—which would be included in the definition of 'temple' — from the operation of the Ordinance, section 8 at the same time governs such devales as well. Such an interpretation would suffer from inconsistency and must therefore fail.

Counsel for the appellant has cited, apart from the case already referred to, a number of older cases in support of his submission that a *de facto* trustee of a devale can maintain an action for declaration of title to land belonging to the devale. In the case of *Siddhartha Unnanse* vs. *Udayara*, 6 C.W.R. 29 it was held by de Sampayo, J. that a *de facto* trustee of a dagoba who had proved his actual possession for many years and was ousted was entitled to maintain a possessory action. In the course of his judgment Sampayo, J. referred to the Privy Council decision in the case of *Abdul Azeez* vs. *Abdul Rahiman*, 14 N.L.R. 317, which confirmed the principle that a person in possession of a land, even though it does not belong to him by any investitive fact, has a right to bring a possessery action. The Privy Council in turn cited with approval the following pronouncement of Bonser, C.J. in the case of *Changarapillai* vs. *Chelliah*, (1905) 5 N.L.R. 270,....."it seems to me that

if the plaintiff, who is called the manager of the temple, has the control of the fabric of the temple and of the property belonging, to it, he has such possession as would entitle him to maintain an action, even though he makes no pretence of claiming the beneficial interest of the temple or its property, but is only a trustee for the congregation who worship there."

While the last two cases cited above dealt with the trusteeship of a mosque and a Hindu Temple respectively it is possible to extract a principle from these three cases, namely, that a person who functions as a trustee of a religious institution such as a devale, temple or mosque, may be treated as a *de facto* trustee for the purpose of instituting proceedings for the protection of any property belonging to such religious institution even though he may not have a legally recognised title thereto. Counsel for the respondent advanced the argument that all these cases were decided prior to the Buddhist Temporalities Ordinance of 1931 and have therefore no application to the instant case. He relied of course for this argument on his earlier submission that section 8 of the Ordinance covered every devale. In view of the opinion I have already expressed in regard to the inapplicability of section 8 to devales exempted from the provisions of the Ordinance, the argument of counsel cannot prevail.

For the above reasons I hold that the plaintiff in this case is entitled to maintain this action, assuming that he is able to establish on the evidence that he is a *de facto* trustee of the devale. I accordingly allow the appeal, set aside the order of the District Judge and send the case back for trial in due course. The appellant is entitled to his costs in this court and in the court below.

Alles, J.

I agree.

Appeal allowed.

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

KURUPPU *vs.* KURUPPU

S.C. No. 116/66 (Inty) — *D.C. Kalutara No.* 2572/T

Argued and decided on: 14th October, 1966.

Settlement in testamentary case—Southern half to be given to a party—Administrator's conveyance—Is it necessary for judge to ascertain how land should be divided?

When a term of the settlement in a testamentary case was that the southern half share of a land should be given to the 3rd respondent and an application was made for the Administrator's conveyance in respect of that share—

Held: That it was not necessary for the learned District Judge to ascertain how the land should be divided into the northern and southern half shares.

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

H. Wanigatunge, with *Cecil de S. Wijeratne*, for the respondent.

Sri Skanda Rajah, J.

This is a testamentary action which was settled sometime in 1938. One term of the settlement was that the southern half share of the land in question was to be given to the 3rd respondent. Later, on 7.10.1965, the 3rd respondent desired to have the Administrator's Conveyance in respect of the southern half share. That application could have been easily allowed by ordering the Administrator to grant the conveyance asked for. It was not necessary for the learned Judge to ascertain how the land should be divided into the southern half share and northern half share.

We, therefore, set aside the order made by the learned Judge and direct the Administrator to convey the southern half share of this land to the 3rd respondent, in terms of the settlement. As to the situation of the southern half share, the matter should be determined in appropriate proceedings. There will be no costs of this appeal.

Alles, J.

I agree.

Set aside.

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

ISO NONA *vs.* HATURUSINGHE

S.C. Appliction No. 98/66 — *Revision in D.C. Gampaha No.* 9721/P

Argued and decided on: 15th June 1966

Appeal — Appellant dead at the time of its disposal — Effect.

Held: That any order made after the death of an appellant is invalid.

Hanan Ismail, for the petitioner.

N. Balakrishnan, for the respondent.

Sri Skanda Rajah, J.

Admittedly the 1st defendant-appellant was dead on the 29th of September, 1965. This fact was not brought to the notice of Court when the appeal was disposed of on 19th November, 1965.

Any order made after the death of an appellant is invalid. We, therefore, set aside the order made by this Court on 19th November, 1965, and direct the District Judge of Gampaha to effect proper substitution and then forward the record to this Court for disposal of the appeal.

Alles, J.

I agree.

Set aside.

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

RAJAPAKSE APPUHAMILAGE JAYARATNE
vs.
SIRIMAVO RATWATTE DIAS BANDARANAIKE & TWO OTHERS

S.C. Application No. 470 *of* 1966

In the matter of an Application for a Rule for Contempt of Court in terms of section 47 *of the Courts Ordinance.*

Argued and decided on: 26th February, 1967
Statement of Reasons on: 28th February, 1967

Contempt of Court — Publication in newspaper of statement calculated to injure the reputation of courts — Need to protect reputation of courts in public interest and interests of good government — Courts Ordinance, section 47.

In the issue of a newspaper published by the 3rd respondent on 16.10.1966 the following news item appeared:—

MRS B: MOVES TO KEEP ME OFF POLITICS

"Mrs. Sirima Bandaranaike at a public meeting held at the Bandarawela esplanade on Saturday (October 15, 1966) said that the Dudley Senanayake Government had pledged to keep her off politics and that was why it had framed frivolous charges against her two brothers, followed by an election petition against her."

At the time of this publication an election petition presented against one of Mrs. B's brothers had been decided against him and an appeal to the Supreme Court from that determination of the Election Judge had been dismissed. Against another of her brothers there was pending at this time a prosecution initiated by the Attorney-General alleging the Commission of the offence of bribery.

The petitioner prayed for the issue of a rule on Mrs. B, (1st respondent) the Editor of the said newspaper (2nd reapondent) and the Publisher, (3rd respondent) to show cause why they should not be punished for contempt of court.

When the matter came up first for hearing *ex parte* to consider whether a rule shall issue, the court while refusing to issue a rule on the 1st respondent as there was no evidence oral or documentary adduced to show that she in truth made the statement attributed to her, ordered a rule to issue against the 2nd and 3rd respondents.

Accordingly the 2nd and 3rd respondent appeared before Their Lordships and presented affidavits. The 2nd respondent in his affidavit stated *inter alia* (*a*) that as Editor he took full responsibility for the publication (*b*) that he approved the publication through inadvertence without realising the possibility of the statement in question being understood by readers as involving a comment on the decision of the election court or of the Supreme Court and that there was a likelihood of it prejudicing the public (mind) in regard to the bribery case.

The 3rd respondent as a working director of the Company accepted full responsibility.

Both respondents pleaded guilty and expressed deep regret and apologised to all three courts concerned. Counsel appearing for them addressed the Court in mitigation of punishment.

Held: (1) That the published statement is capable of the interpretation that the courts are also in some way in collaboration with the Senanayake Government's attempt to keep the Leader of the Opposition out of politics by upholding frivolous charges.

(2) That the public mind must not be permitted to be prejudiced against the courts by an insinuation of bias or impartiality.

(3) That taking into consideration the amplitude of the apology tendered and the circumstances set out in the affidavits a fine of Rs. 1,000/- should be imposed on each of the respondents, in default 2 months' simple imprisonment.

Per **T. S. Fernando, J.** "It is a matter for some surprise that, despite what I believe has been remarked by this Court on earlier occasions, many newspaper offices do not yet appear to have the assistance, in their daily working, of men with knowledge of the law and of legal experience to examine proposed publications so as to avoid the publication of defamatory, contemptuous or other offensive matter."

Case referred to: *Ambard* vs. *Attorney-General for Trinidad and Tobago*, (1936) A.C. 322

K. C. Nadarajah, with *Ananda Paranavithana*, for the petitioner.

C. Ranganathan, Q.C., with *N. E. Weerasooria, Jr.*, for the 2nd and 3rd respondents.

V. T. Thamotheram, Deputy Solicitor-General, with *H. L. de Silva*, Crown Counsel, for the Attorney-General, as *amicus curiae*.

T. S. Fernando, J.

The petitioner on this application presented on November 6, 1966 prayed that this Court do issue a rule in terms of section 47 of the Courts Ordinance on the three respondents calling upon them to show cause why they should not be punished for contempt of court. This application was a sequel to the publication by the 3rd respondent in the issue of a newspaper published by it on October 16, 1966 of the news item reproduced below accompanied by the following headlines:—

MRS. B: MOVES TO KEEP ME OFF POLITICS

"Mrs. Sirima Bandaranaike at a public meeting held at the Bandarawela esplanade on Saturday (October 15, 1966) said that the Dudley Senanayake Government had pledged to keep her off politics and that was why it had framed frivolous charges against her two brothers, followed by an election petition against her."

At the time of this publication (October 16, 1966) an election petition presented against one of Mrs. Bandaranaike's brothers had been decided against him by the Election Court and an appeal to this Court from the determination of the Election Judge had been dismissed. Against another of her brothers there was pending at this time a prosecution initiated by the Attorney-General alleging the commission of the offence of bribery.

The application was not supported by any affidavit to show that the 1st respondent had in truth made a statement of the nature attributed to her in the newspaper. When this application was listed ten days later, i.e. on November 16, 1966, for hearing *ex parte* to consider whether a rule shall issue, the petitioner, though present and represented by counsel, made no attempt to produce any evidence oral or documentary towards establishing the making by the 1st res-

pondent of the statement alleged, and this Court (H. N. G. Fernando, S.P.J. and Alles, J.), stating that there is no legal ground upon which to base a conviction for the alleged offence of contempt of court, made order refusing to issue a rule on the 1st respondent. The Court, however, observing that the question whether the publication in the newspaper itself constituted a contempt of court on the part of the newspaper was one which seemed worthy of argument and decision, ordered a rule to issue against the 2nd and 3rd respondents.

The 2nd and 3rd respondents accordingly appeared before us pursuant to the issue of the rule by this Court. The 2nd respondent is the editor of the newspaper in question and was the editor on the material date as well. The 3rd respondent, the company, appeared before us by one of its working directors.

Both respondents have presented affidavits before us. The 2nd respondent in his affidavit states that on October 15, 1966 the company received a press telegram from its regular correspondent at Bandarawela containing his report of a public meeting held at Bandarawela on the said date in connection with a pending Parliamentary by-election including parts of a speech made by the 1st respondent. This telegram was, after its receipt, edited by a sub-editor and put up to the 2nd respondent for approval for publication, and he did approve. He takes full responsibility for the publication. He goes on to say that he approved publication through inadvertence without realising that there was a possiblity of the said statement being construed by readers of the newspaper as a comment on the decision of the court or the decision of this Court on appeal or that it was likely to prejudice the public (mind) in connection with the pending charge of bribery. He states he intended no disrespect to any one of the three courts concerned, but now realises that there is a possibility of the statement in question being understood by readers of the newspapers as involving a comment on the decision of the election court or of this court and that there is a likelihood of it prejudicing the public (mind) in regard to the bribery case. He expresses his deep regret and apologizes to all three courts concerned.

The 3rd respondent by its working director also presented an affidavit in which the company accepted full responsibility for the publication, deeply regretted it and apologized to all three courts.

Both respondents pleaded guilty to the charge, and counsel appearing for them, addressing us in mitigation of punishment, submitted that, in approving the report for publication, what was dominant in the 2nd respondent's mind must have been that he was approving for publication an allegation made against the Senanayake Government, and in that state of mind the question that the other part of the statement was capable of being construed as a reflection on the Courts escaped his attention. There are recognised ways in which decisions of Courts can be commented on. I need refer here only to the words of Lord Atkin in *Ambard* vs. *Attorney-General for Trinidad and Tobago* — (1936) A.C. 322 at 335 —

> "But whether the authority and position of an individual judge, or the due administration of justice, is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticising, in good faith, in private or public, the public act done in the seat of justice. The path of criticism is a public way; the wrong headed are permitted to err therein; provided that the members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though out-spoken, comments of ordinary men."

But the public mind must not be permitted to be prejudiced against the courts by an insinuation of bias or impartiality, The published statement, we have to add, is capable of the interpretation that the courts are also in some way in collaboration with the Senanayake Government's attempt to keep the Leader of the Opposition out of politics by upholding frivolous charges. The public interest demands that the Courts should not even unwittingly be drawn into any cold war that may be going on among the political parties. No less important, in my opinion, is the need for newspapers to be alert in keeping out of such a war. It is a matter for some surprise that, despite what I believe has been remarked by this Court on earlier occasions, many newspaper offices do not yet appear to have the assistance, in their daily working, of men with knowledge of the law and of legal experience to examine proposed publications so as to avoid the publication of defamatory, contemptuous or other offensive matter.

On the question of punishment, we did inquire from counsel for the 2nd and 3rd respondents what steps had been taken by the company to ascertain the correctness of the report. In answer

to our inquiry, counsel tendered an affidavit from the Bandarawela correspondent in which the latter states he was present at the election meeting and heard the 1st respondent make the statement reproduced above. The 1st respondent is not before us to answer this affidavit, but it is strange that the petitioner who initiated these proceedings did not think it worthwhile to obtain such an affidavit either before he came to this Court or before the refusal of notice on the 1st respondent.

We are satisfied that there was no intention on the part of either the 2nd or the 3rd respondent to cast any reflection on any of the courts, but the publication is admittedly calculated to injure the reputation the courts must enjoy among the public if we are to have good government. Taking into consideration the amplitude of the apology tendered and the circumstances set out in the affidavits, we ordered each of these two respondents to pay a fine of Rs. 1,000/-, in default 2 months simple imprisonment.

Abeyesundere, J.
I agree.

Manicavasagar, J.
I agree.

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

M. V. G. FERNANDO *vs.* MEL MENDIS LIMITED

S.C. 400/1963 (*F*) — *D.C. Hatton* 6635

Argued and decided on: 8th June, 1967
Reasons delivered on: 12th June, 1967

Undue influence — When presumption arises — Special relationship where one party is in fiduciary position and other reposes trust in him necessary — Whether presumption attaches in case of employer and employee.

Held: That the presumption of undue influence does not arise because of the relationship of employer and employee. This is a strictly contractual relationship; the presumption would arise only in the case of certain special relationships where one party occupies a position of a fiduciary nature to the other, and the other party reposes a trust or confidence in him.

H. W. Jayawardene, Q.C., with *T. S. P. Senanayake* and *S.S. Basnayake*, for the defendant-appellant.

C. Ranganathan, Q.C., with *E. Gooneratne*, for the plaintiff-respondent.

H. N. G. Fernando, C.J.

Counsel for the appellant in this case did not request us to review the findings of fact which the learned trial Judge reached — that the defendant had voluntarily admitted his liability to pay to the plaintiff company the amount of about Rs. 26,000 representing the value of kerosene oil found short on a verification of stocks, and had agreed by his letter P1 to pay that amount, and that the defendant executed the conveyance P2 and the promissory note P3 voluntarily, and not in consequence of undue influence or in consideration of any agreement by the Managing Director of the company to desist from instituting criminal proceedings against the defendant.

The argument pressed in appeal was one of law: that because of the relationship of employer and employee subsisting between the company and the defendant, there is a presumption that undue influence was exercised, and that the presumption is either not rebuttable, or else was not rebutted by the evidence in this case. We do not agree that such a presumption is applicable merely because of the existence of the relationship of employer and employee — Chitty on Contracts (21st Ed. 573) and Wille's Principles of South African Law (p. 322 — 5th Ed.) refer to the presumption as being applicable in the case of an attorney and his client, a doctor and patient, a parent and child, a guardian and ward, a spiritual adviser and his disciple, in all these cases, the one party occupies a position of a fiduciary nature to the other, and the other party reposes a trust or confidence in him. The presumption arises because

of this special relationship, and does not attach in the case of the strictly contractual relationship of employer and employee, which is not of a fiduciary character. Even the cases in which the presumption has been held to apply are easily distinguishable from the present case. Here there was an admitted antecedent liability to pay to the plaintiff company a specific sum of money. The liability was discharged by the conveyance P2 and the promissory note P3. Thus the facts establish that the *causa* for the conveyance was the discharge of the defendant's liability (in part) to pay the sum of money to the company. The case then is no different from one in which an employee, having freely admitted his liability to pay a sum of money to his employer, makes a cash payment to discharge the liability. Even though the defendant may have entertained a hope that he might avoid a criminal prosecution, that was only a motive for his executing the conveyance; the *causa* or consideration was the discharge of the admitted liability.

For these reasons, I would affirm the judgment and decree, and dismiss the appeal with costs.

Sirimane, J.

I agree.

Appeal dismissed.

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

JAYAWARDENA *vs.* ARNOLISHAMY & ANOTHER

S.C. 507(*F*) 1965 — *D.C. Avissawella No.* 10954/*L.*

Argued on: 21st November, 1966
Decided on: 21st December, 1966.

Civil Procedure Code, section 406 — *Withdrawal of action without obtaining permission to file fresh action for same subject-matter — Meaning of term "Subject-matter" in the section — Does decree dismissing action on such withdrawal operate as res judicata — Statutory bar in Section* 406 — *Effect of consent decree — Res judicata — Burden of proof.*

The Plaintiff instituted action against the defendant declaration of title to a land called G alleging that they, on 3.3.1963 forcibly entered the said land and erected a house.

The defendants in their amended answer pleaded

(1) that they were entitled to a share of certain lots depicted in the plan made for the purpose of the case and forming a land called J.

(2) that the rest of the lots in the said plan formed the land called G and that they never disputed title to it.

(3) that the plaint and decree in case No. 9808, D.C. Avissawella was *res judicata* between the plaintiff & themselves.

At the trial the question regarding the plea of *res judicata* was raised as a preliminary issue which the learned District Judge decided in favour of the defendants and dismissed the plaintiff's action with costs. The plaintiff appealed.

In support of this plea of *res judicata* the defendants produced only the plaint and the decree in D.C. Avissawella 9808 which showed

(*a*) that the 1st defendant in this action and some other parties had been disputing plaintiff's title to land G. for five years prior to the plaint and put up a boutique despite protests.

(*b*) that that action was withdrawn and dismissed without costs on 30.9.60 without obtaining permission to institute a fresh action for the subject-matter of the action.

Held: (1) That the withdrawal of the said action No 9808 D.C. Avissawella did not preclude the plaintiff from bringing this action because the subject-matter of the present action is not the same as that of action No. 9808 in that—

(a) the trespass complained of in the present case took place over two years after the termination of the proceedings in Case No. 9808;

(b) in the present case differences relate to the identity of the corpus of the plaintiff's land and there is no dispute as to title as in the earlier case,

(2) That as subject matter of the two actions was not the same, the fact that the decision of the questions raised in the earlier action that was withdrawn would have been decisive in respect of some of the issues in the present action was immaterial.

(3) That the term "subject-matter" in section 406 of the Civil Procedure Code does not mean the property in respect of which the action is brought. It includes the facts and circumstances upon which the plaintiff's rights to the relief claimed by him depends.

(4) That where a plaintiff desires to withdraw his action he is entitled to do so and the Court has to enter an order of dismissal. The dismissal of an action upon its withdrawal by the plaintiff gives rise to the statutory bar provided for in section 406(2). It does not provide the basis for a plea of *res judicata* properly so termed, because there is no adjudication.

(5) That a consent decree supports a plea of *res judicata* properly so termed, even though there was no adjudication by Court, because such a decree implies a decision upon the rights in dispute between the parties to the action.

(6) That inasmuch as no copy of the answer filed by the defendants had been produced the party relying on the plea of *res judicata* had not placed before Court sufficient material to support such a plea.

Per **Samerawickrama, J.** "It is incumbent upon a party who makes a plea of *res judicata* to place before Court material necessary to show what the matters were in dispute in the earlier action and that matters in dispute in the action under consideration are the same."

Cases referred to: *Aly Muhammad* s. *Karim Baksh* A.I.R. 1933 Lahore 943
Kanapathipillai vs. *Kandiah*, (1942) 44 N.L.R. 42
A. J. Juda vs. *Ramapada Gupta*, A.I.R. 1959 Calcutta 715
Kandavanam v. *Kandaswamy*, (1955) 57 N.L.R. 241

R. Manikkavasagar, for the plaintiff-appellant.

Ralph de Silva, for the defendants-respondents.

Samerawickrama, J.

The plaintiff-appellant instituted this action against the 1st and 2nd defendants-respondents for declaration of title to a land called Godaporagahawatta. In his plaint he alleged that the defendants, during the night of the 3rd March, 1963, forcibly and unlawfully entered the said land and erected a hut there.

After two surveys of the land had been made, one at the instance of either party, the defendants-respondents filed amended answer in which they stated they were entitled to a share in a land called Jambugahawatta, which was depicted as Lots 1, 2 and 11 in Plan No. 1147/64 filed of record, and that they put up a hut on that land. They also stated that the land called Godaporagahawatta is Lots 3 to 10 in Plan Nos. 968 and 1147/64, and that they never disputed title to any portion of that land. They further pleaded that the plaint and decree in case No. 9808 was *res judicata* between the plaintiff and themselves.

In action No. 9808 of the District Court of Avissawella, the plaintiff-appellant filed action against the present 1st defendant and some other parties claiming a declaration of title to the land called Godaporagahawatte. In his plaint, he alleged that the defendants in that case were disputing his title to the said land for the past five years, and that in spite of the protests of himself and the other co-owners, they had put up a boutique on the said land. The decree in action No. 9808 has been produced marked D2, and it shows that that action was withdrawn and was dismissed on the 30th September, 1960. No permission of Court to institute a fresh action for the subject matter of the action is stated to have been obtained.

At the trial, the following issue was raised and taken up for decision as a preliminary issue:—

> "Is the decree in Case No. 9808 D.C. Avissawella *res judicata* between the plaintiff and the defendants in this case."

The learned Judge made order answering the issue in the affirmative and dismissing the plaintiff's action with costs.

The question is whether the withdrawal of action No. 9808 D.C. Avissawella precluded the plaintiff from instituting the present action. Section 406 of the Civil Procedure Code states as follows:—

(1) If, at any time after the institution of the action, the court is satisfied on the application of the plaintiff —
(*a*) that the action must fail by reason of some formal defect, or
(*b*) that there are sufficient grounds for permitting him to withdraw from the action or to abandon part of his claim with liberty to bring a fresh action for the subject-matter of the action, or in respect of the part so abandoned.
the court may grant such permission on such terms as to costs or otherwise as it thinks fit.

(2) If the plaintiff withdraw from the action, or abandon part of his claim, without such permission, he shall be liable for such costs as the court may award, and shall be precluded from bringing a fresh action for the same matter or in respect of the same part.

The term 'subject matter' in the above provision does not, in my view, mean the property in respect of which an action is brought. In considering an almost identical provision in the Indian Code of Civil Procedure in *Aly Muhammad* vs. *Karim Baksh* — A.I.R. 1933 Lahore Page 943 — Shadi Lal, C.J., who was later a member of the Judicial Committee of the Privy Council, stated, "the phrase 'subject matter' is not defined in the Code but it is clear that it does not mean property, but has reference to the right in property which a person seeks to enforce." In a passage which has been cited with approval by Howard, C.J. in *Kanapathipillai* vs. *Kandiah*, 44 N.L.R. page 42, Chitaley states, "the term 'subject matter' means the plaintiff's cause of action for his suit, and a suit for a different cause of action, is, therefore, not barred under this rule even though the suit may relate to the same property. Conversely, a suit based on the same cause of action as the first one is barred." I do not think that cause of action in this passage has the meaning given to that term in our Code by the definition. It is used there in a wider sense and meant both the right asserted and its denial. I am of the view that the term 'subject matter' includes the facts and circumstances upon which the plaintiff's right to the relief claimed by him depends.

In the present case, the trespass alleged is stated to have taken place on 3rd March, 1963. Action No. 9808 was withdrawn on 30th September, 1960. The trespass complained of in the present action is, therefore, one which took place over two years after the termination of the earlier proceedings. In the present case, the title of the plaintiff to the land called Godaporagahawatta is admitted and not in dispute. In the plaint in action No. 9808 (which is the only pleading in that case produced) it was alleged that the defendants had been denying the title of the plaintiff-respondent to that land for a period of five years before action. In the present case, the differences relate to identity of the corpus of the plaintiff's land without any dispute regarding the title of the plaintiff to his land; in action No. 9808 the dispute as to the title of the plaintiff is alleged. It cannot be said, therefore, that the subject matter of the present action is the same as the subject matter of action No. 9808. Accordingly, the dismissal of that action would not preclude the institution of the present action by reason of the provisions of Section 406(2) of the Civil Procedure Code.

Learned counsel for the defendants-respondents conceded that, in any event, the dismissal of action No. 9808 could not bar the action as against the 2nd defendant-respondent as he was not a party to that case.

Learned counsel for the defendants-respondents however went further and argued that the decree in action No. 9808 was one made of consent and that it would support the plea of *res judicata* properly so termed. The decree states "the plaintiff's application to withdraw the action being allowed, it is ordered and decreed of consent that the plaintiff's action be and the same is hereby dismissed without costs."

The plaintiff who desires to withdraw his action is entitled to do so and the Court has necessarily to enter an order of dismissal. The consent of the defendants, therefore, could not have been to the dismissal of the plaintiff's action but to its dismissal without costs. I am, therefore, of the view that for this purpose the dismissal must be treated as one made in consequence of the withdrawal of the action by the plaintiff.

The dismissal of an action upon its withdrawal by the plaintiff gives rise to the statutory bar provided for in Section 406(2). It does not, however, provide the basis for a plea of *res judicata* properly so termed, because there is no adjudication. Where a partition action was withdrawn and the claims made in that action was set up again in another action brought subsequently, Justice Gratiaen said, "As there had been no formal adjudication in the earlier action regarding these competing claims, the doctrine of *res judicata*, in the strict sense of the term, does not apply". — vide 57 N.L.R. page 241, at page 244. That the decision of the questions raised in the action that was

withdrawn had it proceeded to judgment would have been decisive in respect of some of the issues that arise in the subsequent action is of no moment if the subject matters of the actions are not the same.

In the case of *A. J. Judah* vs. *Ramapada Gupta*, A.I.R. 1959 Calcutta page 715 at page 723, Mallick, J. put the matter thus:

"It would follow from what is stated before that if the cause of action which gave rise to the reliefs claimed in the subsequent suit did not arise when the previous suit was instituted and withdrawn in the sense that one important event absolutely essential to complete the cause of action in the subsequent suit did not take place, then the subject matter of the two suits must be different and 0.23, R. 1(3) has no application. It may be that for successful determination of the suit alleged to be hit by the mischief of 0.23 R. 1(3) questions and issues have to be decided which were substantially at issue in the previously instituted suit, but that in my judgment does not make the subject matter in the two suits to be the same. If the previous suit was decided against the plaintiff then the decisions on those issues either expressly or constructively must have been taken to have been decided against the plaintiff and the subsequent suit would fail because of the principle of *res judicata* embodied in S. 11 of the Code. If however the suit was not decided but merely withdrawn, no question of *res judicata* arises and in law the plaintiff is still entitled to agitate the question in Court. The argument advanced by Mr. Das in substance and in fact is an attempt to extend the principles of *res judicata* to cases in which there has been no adjudication by the Court. In my judgment, the principles of S. 11 and 0.23 R. 1(3) are different and it is not permissible to apply the principles of *res judicata* to cases under 0.23 R. 1(3)."

It is true that a consent decree supports a plea of *res judicata* properly so termed, even though there was no adjudciation by Court. This is because such a decree implies a decision upon the rights in dispute at the action by the parties. From the withdrawal of an action, no such decision as to the rights in dispute in the action can be implied. In fact, as pointed out by My Lord the Chief Justice at the argument, the plaintiff may withdraw his action because the defendant has made full amends in respect of the claim made by him.

The learned Judge stated in his judgment that having withdrawn the earlier action without permission to file a fresh action, the plaintiff in effect stated that he could not maintain his action for a declaration of title against the defendants. Even if the learned Judge is right in saying that from the withdrawal of this action a statement by the plaintiff that he could not maintain the action must be implied, such a statement had reference to the circumstances obtaining at the time he made it. In the present action, the title of the plaintiff to his land was not disputed and the action itself is brought upon on a trespass alleged to have taken place nearly two years after the termination of the earlier proceedings. Accordingly, even if the plaintiff was unable to maintain the earlier action, it does not follow that he is precluded from bringing this present action, based as it is upon different facts and circumstances.

There were references in the proceedings to the fact that answer had been filed in action No. 9808. No copy of the answer has however been produced. It is incumbent upon a party who makes a plea of *res judicata* to place before Court material necessary to show what the matters were in dispute in the earlier action and that matters in dispute in the action under consideration are the same.

Spencer Bower states "It follows that, in strictness, the burden is on the party setting up the estoppel of alleging and establishing this identity of subject matter — that is to say, that his opponent is seeking to put in controversy and re-agitate some question of law, or issue of fact, which is the very same question or issue which has already been finally decided between the same parties by a tribunal of competent jurisdiction. Where there are no pleadings or particulars, the identity must be established by evidence." vide *The Doctrine of Res Judicata* by George Spencer Bower, page 115.

It would appear therefore that the defendants-respondents have failed to place before Court the material necessary to support a plea of *res judicata* even if they were entitled to put forward such a plea upon the order of dismissal of action No. 9808 on an application to withdraw by the plaintiff.

I hold that the preliminary issue should have been answered in favour of the plaintiff-appellant. I accordingly set aside the order of the learned Judge and send the case back for trial in due course of law, upon the other issues that arise. The defendants-respondents will pay to the plaintiff-appellant his costs of appeal as well as the costs of the trial date, 7. 9. 65, on which date argument on the preliminary issue was heard.

H. N. G. Fernando, C.J.

I agree.

Appeal allowed.

ELECTION PETITION APPEAL No. 13 *of* 1966

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

S. W. DAHANAYAKA *vs.* C. N. KANNANGARA*

Election Petition No. 24 *of* 1965 — *Electoral District No.* 66 *DENIYAYA*

Argued on: January 28, 29, 30 and 31, 1967.
Decided on: 28th February, 1967.

Election Petition — Appeal on a question of law only — When is a finding of fact liable to be set aside?

Ceylon (Parliamentary Elections) Order-in-Council 1946 — *Meaning of term "agent."*

Evidence — Is a party bound by adverse evidence given by his own witness who has been generally disbelieved?

Where, in terms of section 82A of the Ceylon (Parliamentary Elections) Order-in-Council 1946, an appeal to the Supreme Court from the determination of an Election Judge was granted only on a question of law —

Held: (1) That a finding of fact reached **either** in the absence of any evidence to justify it, **or** on the ground that there was no evidence to justify a conclusion to the contrary, forgetful of the existence of such evidence, is liable to be set aside on the ground of an error of law.

(2) That the test to be applied in determining whether a pure finding of fact should be set aside is whether on the facts proved, the contrary conclusion is the true and only reasonable one.

Therefore, where the Election Judge had concluded that one P. L. Chandrasena was not proved to have been an agent of the respondent, and there was on record the evidence of a witness, Abeywickrema, that Chandrasena was one of the main workers for the respondent, and the evidence of Fernando, the election agent, that Chandrasena "did canvassing for the respondent," —

Held: (3) That such evidence sufficed to establish Chandrasena as an agent of the respondent in the sense that expression is understood in the law relating to elections.

The question at issue was whether a pamphlet was printed, distributed and expense incurred thereon with the knowledge of the Election Agent of the respondent. Witness Abeywickrama who was called on behalf of the respondent stated that upon receiving information that the particular pamphlet had been printed without authority, he informed the Election Agent who directed that the pamphlet be not distributed, and that accordingly its distribution was suppressed. The Election Judge disbelieved Abeywickrema, and held that the pamphlet had in fact been distributed, but that there was no evidence that the Election Agent had knowledge of it.

In appeal, it was contended by the petitioner - appellant that upon the evidence of Abeywickrema himself, who was a witness produced by the respondent, it was abundantly clear that the Election Agent had knowledge of the existence of the pamphlet.

Held: (4) That where a witness summoned by a party is disbelieved by the trial judge, it would be wholly unreal to utilise *against* such party the evidence so given merely because such evidence has been produced or led on his behalf.

Cases cited: *Edwards* vs. *Bairstow* 1956 A.C. 14; (1955) 3 A.E.R. 48
Griffiths vs. *Harrison (Watford) Limited* 1963 A.C. 1; (1962) 1 A.E.R. 909

Colvin R. de Silva, with *Nihal Jayawickrama* and *V. Nanayakkara*, for the appellant.

G. E. Chitty, Q.C., with *A. M. Coomaraswamy, R. L. Jayasuriya, M. Underwood* and *Sunil de Silva*, for the respondent.

* For Sinhala translation, see Sinhala section, Vol. 14, part, 3, p. 9

T. S. Fernando, J.

The appellant who was one of the unsuccessful candidates at an election held on March 22, 1965 for the purpose of electing a member of the House of Representatives to represent electoral district No. 66 — Deniyaya — presented an election petition against the respondent, the successful candidate, seeking an avoidance of the election on the grounds of the commission by the respondent and/or his agents of the corrupt practices of (1) making false statements of fact in relation to his personal character or conduct and (2) undue influence. The petition contained also a charge that by reason of the existence of other circumstances within the meaning of clause (a) of section 77 of the Parliamentary Elections Order in Council the respondent's election should be declared void. The petition was amended, with leave of Court, after the respondent filed his return of election expenses, by the addition of yet another charge which alleged the commission by the respondent or his election agent of the illegal practice of making a false declaration as to election expenses.

Evidence was confined at the trial towards establishing this additional charge of making a false declaration and the original first charge of making false statements of fact in relation to personal character or conduct. At the end of a lengthy trial, the learned election judge held that the appellant had failed to establish either of these charges and dismissed the petition.

In respect of the charge of making false statements of fact (section 58(1)(d)), argument was confined at the hearing of this appeal to three items in the particulars which had been furnished by the appellant. These related to:—

(1) (item 3) — a statement made by one Pala Pathirana at a public meeting held on March 9, 1965 at Derangala in support of the respondent that the appellant had earned a lot of money by illicit gemming;

(2) (item 5) — a statement alleged to have been made by one Vidana Pathirana at a public meeting held on March 17, 1965 at Minipegoda in support of the respondent that the appellant had brought disrepute to his relations in getting involved in a case by doing illicit gemming;
and

(3) (item 9) — the publication of a leaflet P47.

In regard to the statement alleged to have been made by Pala Pathirana, the trial judge was not disposed to believe the evidence given by the appellant's witnesses David and Ariyadasa. He held, however, that Pala Pathirana himself, who was called as a witness for the respondent admitted that the words spoken by him were substantially the same as those alleged by the appellant's two witnesses above mentioned. He nevertheless held the charges not established because he found that the conduct of the appellant pointed to his involvement in illicit gemming and the statement proved to have been made was therefore not false. I thought there was substance in the argument of learned counsel for the appellant that (a) the trial judge had received and acted on some irrelevant evidence of possession by the appellant of some gems in July 1965, four months after the time of the making of the statement in question and (b) the trial judge's inference that the object of the appellant in obstructing the police was to interfere with their duty of preventing illicit gemming was erroneous. It is right to add, however, that we did not call upon the respondent's counsel to reply to this argument as on the whole of the relevant evidence we were unable to say that the trial judge was not entitled to reach the conclusion he did that the falsity of the statement proved to have been made was not established beyond a reasonable doubt.

In regard to the other statement, that alleged to have been made on March 17, 1965 at Minipegoda by Vidana Pathirana, it was urged before us that the trial judge, who was not disposed to accept or act upon the evidence of the appellant's witnesses Dayananda and Dissanayake, had entirely overlooked an examination of the evidence given before him by Vidana Pathirana himself that he stated at the meeting in question that the appellant had trouble with the police as a result of gemming. While we were not unimpressed by the argument that, even where the appellant's witnesses were disbelieved, it was competent for the appellant to seek to establish his case by pointing to the evidence called for his opponent, we did not invite reply on this point on behalf of the respondent for the reason indicated already, viz. that we were unable to say that the trial judge had erred in reaching the finding of fact that the falsity of the statement was not proved to the required degree of satisfaction.

The learned trial judge was not inclined to believe the evidence of the witnesses called by

the appellant to establish distribution of the leaflet P47. He has, however, held that copies of this leaflet were available in time for distribution and that there was opportunity for distribution. There was, in my opinion, substance in the criticism that it was unreasonable to hold that a leaflet printed, paid for and available for distribution was not in fact distributed, particularly where the evidence of the witness who stated that it was not available in time was disbelieved. While circumstantial evidence might have been sufficient to establish distribution especially as copies of the leaflet were ordered to be printed on two occasions, the question involved is one purely of fact. Moreover, I entertain some doubt as to whether those statements in P47 in respect of which complaint was made at the trial related really to personal character or conduct.

The last of the points raised on behalf of the appellant was the only one upon which we required respondent's counsel to reply. It concerned the trial judge's determination that the petitioner had failed to establish the commission of the illegal practice of knowingly making a false declaration as to election expenses.

The election agent nominated by the respondent in terms of section 59 of the Parliamentary Elections Order-in-Council was the witness Y. M. Fernando. The only item of expenditure we are concerned with on this appeal is a sum of Rs. 20/- paid to the Nilwala Press for the printing of copies of notices P51 and P62 advertising a meeting (described as the "mangala" or inaugural meeting of the respondent's election campaign) at the Morawaka bazaar. It is common ground that this item of expenditure is not shown in the return of expenses. No attempt was made by the respondent to prove that this meeting was not held or that these notices were not distributed. They bear on their face a statement that they are published by one P. L. Chandrasena of Warella on behalf of the Organising Committee of the election campaign of the respondent. The printer's evidence established that the notices were ordered and paid for by a man who gave his name and address as P. L. Chandrasena of Warella. Evidence of a witness called by the respondent showed that there is a man by this name at Warella, a supporter of the respondent. Neither party to this election petition called Chandrasena as a witness. It is not improbable that the appellant did not expect a supporter of the respondent to give evidence that he ordered and paid for these notices. The appellant, however, now tries to make use of some evidence given by a witness named Abeywickrema, an agent of the respondent who had been called to testify at the trial on behalf of the latter. Abeywickrema stated that P. L. Chandrasena saw him and informed him that certain notices advertising a meeting at Morawaka purporting to be issued by him had been printed by a Youth Leaguer of Morawaka, that Chandrasena objected to this action, that he thereupon informed the election agent Fernando of it and that Fernando directed that the notices be not distributed. He went on to say that copies of the notices were then stored in the party office at Morawaka and their distribution was suppressed. These were harmless notices advertising a meeting to support the respondent's candidature and it is difficult to account either for the alleged objection of Chandrasena or for the alleged suppression of distribution. The trial judge understandably disbelieved Abeywickrema and held that the probability was that the notices were in fact distributed. Mr. Chitty contended that the learned judge had erred here in regard to the standard of proof that the petitioner had to attain to establish distribution, but it is clear from other parts of the judgment that the judge was well aware that publication and distribution had to be established beyond reasonable doubt. That the judge was satisfied there was distribution is further borne out by his express finding that this expenditure should have been declared in the return of election expenses, had Chandrasena himself been an agent of the respondent.

The trial judge, after examining the evidence on the point of agency, concluded that Chandrasena was not proved to have been an agent of the respondent. I am satisfied that in reaching this conclusion the learned judge was clearly in error. He appears to have lost sight of an answer given by the election agent Fernando to the following question put by the judge himself:—

> *Q.* "Had he (Chandrasena) any work to do with regard to the election campaign of the respondent?"

The answer was that Chandrasena "did canvassing for the respondent." Taken along with Abeywickrema's evidence (which was led for the respondent) that Chandrasena was one of the main workers for the respondent, Fernando's answer sufficed, in my opinion, to establish Chandra sena as an agent of the respondent in the sense that expression is understood in the law relating to elections. A person who is authorised to canvass

for votes necessarily has implied authority to call up meetings for the purpose of promoting the canvassing of votes.

Just as much as a finding of fact reached in the absence of any evidence to justify it is liable to be set aside on the ground of an error of law, a finding reached on the ground that there was no evidence to justify a conclusion to the contrary, forgetful of the existence of such evidence, is also liable to be set aside on a like ground. In determining whether a pure finding of fact should be set aside, Lord Radcliffe in *Edwards* vs. *Bairstow* (1956 A.C. 14 at 36) favoured the application of the test whether on the facts found the contrary conclusion is the true and only reasonable one. Viscount Simonds who had been associated with Lord Radcliffe in *Edwards* vs. *Bairstow* himself applied this same test seven years later in the case of *Griffiths* vs. *Harrison* (*Watford*) *Ltd.* (1963 A.C. 1 at 11). On the evidence of the respondent's own election agent, a witness whose evidence the trial judge found acceptable, I am of opinion that the true and only reasonable conclusion the trial judge could have reached in this case was that Chandrasena was an agent of the respondent.

Does such a conclusion as that indicated immediately above suffice to establish the commission of the illegal practice alleged? Section 68B of the Order in Council penalises not every declaration as to election expenses that turns out to be false, but only such a declaration as has been made with the knowledge that it is false. On the assumption that the printing and distribution of these notices and payment therefor by Chandrasena, an agent of the respondent, have been established, Mr. De Silva, pointing to the evidence of Fernando that the printing of every pamphlet was done with his authority and paid for by him and that every pamphlet was utilised only after he had authorised its distribution, argued that it was established that the payment for copies P51 and P62 was also done with Fernando's authority. It was contended that in this way Fernando's declaration was knowingly false. It is wrong, however, to attempt to read Fernando's evidence in the way submitted. What Fernando undertook responsibility for were those pamphlets which he said he authorised. There was no evidence given by him that he authorised every pamphlet that has actually been issued in support of the respondent. Indeed, it would be highly unreasonable to infer that he intended to convey any suggestion to that effect because that would have meant surrender to the opposite party on the very issue on which this part of the petition was being fought.

Reliance was next placed on that part of Abeywickrema's evidence that P51 and P62 were suppressed by Fernando as being unauthorised publications when the printing of these notices was brought to his attention. Fernando himself said nothing to this effect and he was not cross-examined. Had Abeywickrema been believed by the judge then it might have been possible to contend that such belief leads to a finding that Fernando had knowledge of the printing done at the instance of an agent of the respondent. But as Abeywickrema has been disbelieved by the judge — and good reasons are indicated in the judgment for so doing — it would be wholly unreal to utilise against the respondent evidence merely because it has been produced or led on his behalf. Even if it can be argued that the respondent relied on this evidence, the judge was not bound to accept it and, indeed, in this instance has expressly disbelieved it. The high probability is that nobody paid any attention to the publication of P51 and P62, and Abeywickrema was put forward to give an entirely untruthful account of their suppression by Fernando in an awkward attempt to cover against the discovery that this expenditure had not been included in the return of expenses. The issue finally resolves itself into one of the knowledge on the part of Fernando, the election agent. On this issue the trial judge has stated in his judgment that the evidence does not point to the return being false to the knowledge of Fernando. The appellant has not succeeded in satisfying us that the finding on this issue is impeachable. I would therefore dismiss this apeal with costs.

Abeyesundere, J.

I agree.

Alles, J.

I agree that the appeal should be dismissed with costs.

Appeal dismissed.

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

V. COOMARASAMY *vs.* M.A. THANGARAJAH & TWO OTHERS

S.C. 90/64 — *D.C. Point Pedro*

Argued and decided on: 28th May, 1967

Deeds — Acknowledgment of receipt of consideration by deceased vendor in deed of transfer— Whether proof of valuable consideration — Evidence Ordinance, section 32(3).

Held: That the acknowledgment of the receipt of a sum of Rs. 200/- by the deceased vendor in the Deed P1 was a statement made by him against his pecuniary interest and was, therefore, relevant under section 32 (3) of the Evidence Ordinance.

Distinguished : *Diyes Singho* v. *Herath,* (1962) 64 N.L.R. 492

Referred to : *Munasinghe* v. *Vidanage,* (1966) 69 N.L.R. 97

H. W. Jayewardene, Q.C., with *V. Arulambalam,* for the plaintiff-appellant.

C. Ranganathan, Q.C., with *S. Sharvananda,* for the 2nd & 3rd defendants-respondents.

Fernando, C.J.

The learned District Judge has held in this case that plaintiff's deeds were duly registered and that the first deed relied on by the defendants was not registered at all. We are not disposed to agree to the argument of counsel for the respondents in appeal that the learned Judge wrongly decided the question of due registration.

Judgment has been denied to the plaintiff on the ground that he failed to prove that there had been valuable consideration for the deed P1 of 1906 executed in favour of his predecessor-in-title. The learned District Judge has relied on the judgment in 64 *N.L.R.* 492 for holding that the plaintiff cannot rely on a statement in the deed P1 as proof that consideration passed on it. That case dealt with a different matter, namely, the question whether the statement in an attestation clause by a Notary can be relied on as proof of the payment of consideration. Counsel for the appellant has, during his present argument, suggested that the judgment in 64 *N.L.R.* 492 may need reconsideration in view of a recent judgment of the Privy Council reported in 69 *N.L.R.* 97.

But for the present purposes it is unnecessary to consider that question, because in the case of P1, which was a transfer by way of sale, the vendor himself has acknowledged in the deed that he had received a sum of Rs. 200/- from the transferee. The vendor is now dead and could not be called as a witness at the trial but his statement that he had received a sum of Rs. 200/- was a statement made by him against his pecuniary interest and is, therefore, relevant under Section 32(3) of the Evidence Ordinance. There are also other circumstances in this case which strongly support the inference that the vendor did receive money for the conveyance.

We set aside the judgment and decree appealed against. Let decree be entered for the plaintiff as prayed for in paragraphs (a) and (b) of the prayer in the plaint and for damages in a sum of Rs. 30/- until date of action and thereafter at the rate of Re. 1/- per month until the plaintiff is restored to possession. The plaintiff is also entitled to costs in both Courts.

Sirimane, J.

I agree.

Appeal allowed.

IN THE COURT OF CRIMINAL APPEAL

Present: **H. N. G. Fernando, C.J.** (*President*), **Abeyesundere, J. and Alles, J.**

THE QUEEN *vs.* S. A. J. PERERA

Appeal No. 31 *of* 1967 *with S.C. No.* 141

Application No. 41 *of* 1967 — *M.C. Polonnaruwa* 15137

Argued and decided on: 17th May, 1967.
Reasons delivered on: 1st June, 1967.

Misdirection — Non-direction amounting to misdirection—Plea of private defence of person — Jury invited to act on conjecture — Facts favourable to defence not fairly and adequately put — Corroborative value of statement by appellant to Police — Non-direction — Versions presented as conflicting when no conflict in fact — Summing-up unfair and unjust.

The prosecution evidence, in an indictment for the murder of one Jayakody against the appellant, established the fact that the appellant dealt one blow on the head of the deceased with the blunt side of an axe. The appellant admitted the assault, but gave in evidence a version of events preceding the assault. This version implied that the axe was not brought by the appellant, but was seized on the spur of the moment, after the deceased pulled out a knife, and that the axe was wielded by the appellant in the exercise of the right of private defence of the person. There was no real conflict between prosecution and the defence versions of the incident.

The two prosecution witnesses denied that they saw a knife in the hands of the deceased. But the defence called one W, who had been a prosecution witness at the non-summary inquiry, who deposed that when the body of the deceased was lifted, he saw a knife which had been lying under the body. It appeared from the summing-up that the Commissioner was aware that W had given similar evidence in the Magistrate's Court.

Held: That the summing-up contained the following misdirections or non-direction amounting to misdirection:

(1) A commendation to the Jury of a prosecution suggestion that W gave false evidence "to help" the appellant, since this suggestion was not put to W, and there was no evidence of any friendship between W and the appellant. It was, therefore, a mere conjecture, and it was unjust and unfair to invite the Jury to act upon it.

(2) The uncontradicted evidence of the appellant regarding the deceased's previous aggression and acrimony towards the appellant supported the defence version that on the morning of the incident also the deceased had been threatening and aggressive, but the summing-up did not contain even a bare statement of the mode in which that evidence might assist the defence. Instead, the evidence was presented to the Jury as the basis for a motive, and only as being hostile to the defence case. It was unfair thus to present it.

(3) The proper significance of the appellant's evidence that on the spur of the moment he had seized an axe found at the scene was not mentioned in the summing-up and this amounted to a failure to sum up adequately evidence on which the defence relied.

(4) The Jury were not directed that the statement made by the appellant soon after the incident to the Police generally corroborated the appellant's evidence and that it contained the substance of the version that he acted in self-defence; and that W's evidence concerning a knife could explain that the appellant's omission to mention the knife in his statement had been inadvertent.

(5) It was a misdirection to tell the Jury that "if what the accused says is the truth, the version the three witnesses speak to..... is not true", and that they must convict if the prosecution evidence was true, when in fact the defence position in substance was that the prosecution evidence was true, but incomplete.

Held further: That the verdict could not stand in view of the said misdirection, and the omission to present fairly to the Jury evidence which tended to favour the case of the defence.

E. R. S. R. Coomaraswamy, with *A. S. Mohamed*, *Gemunu Seneviratne* and *F. C. Perera* (assigned), for the accused-appellant.

J. G. T. Weeraratne, Senior Crown Counsel, for the Attorney-General.

Fernando, C.J.

It was common ground in this case that the Appellant caused the death of one Jayakody by striking him on the head with an axe. The Appellant's defence to the charge of murder, that he acted in the exercise of the right of private defence, was obviously rejected by the jury when they returned a verdict of murder.

The prosecution witnesses deposed to the incident. One of them stated that on his return after a morning's work on a bicycle he stopped near a boutique with the idea of reading the morning newspaper and sat for sometime on the luggage-carrier of the bicycle. He saw that Jayakody was seated on a bench in the verandah of the boutique reading a newspaper. He also saw the Appellant come out of the boutique with an axe in his hand, and the Appellant assaulted Jayakody once with the axe. The Appellant thereafter went inside the boutique and made his exit from the rear of the boutique. The second witness states that he was reading a newspaper under a tree near the boutique when he heard the sound of a thud. He then looked towards the boutique and saw Jayakody fall to the ground with his head bleeding; he also saw the Appellant going inside the boutique with an axe in his hand.

The Appellant admitted this assault on Jayakody. But he gave in evidence a version of events preceding the assault. He himself had come to the boutique and had a cup of tea; he thereafter sat down on a chair in front of Jayakody, who having read a newspaper, folded it and placed it on the bench. He then spoke to Jayakody in a low tone about certain things which Jayakody had previously done to him, and finally asked whether Jayakody intended to send him back to his village. Jayakody then replied "I do not propose to send you to your village; I will send you to the moon". Jayakody then pulled out a knife. The Appellant then, in fear for his life, rushed into the boutique and seized an axe. At this stage Jayakody was near the door-way of the boutique with knife in hand, and the Appellant struck him with the axe.

In cross-examination of the two prosecution witnesses, assigned Counsel suggested to them that there had been before the assault a loud and angry exchange of words between the Appellant and Jayakody. This the witness denied. It is unfortunate that Counsel had apparently misunderstood his instructions, for the Appellant's evidence was that the conversation had been in a low tone. That being so, there was no real conflict between the prosecution and defence versions as to this matter: in the case of the second witness in particular, who was reading a newspaper before he heard a thud, his evidence in no way conflicts with the appellant's version of the events which preceded the assault with an axe.

The two prosecution witnesses denied that they saw a knife in the hands of Jayakody. But the defence called one Weerasekera who had been a prosecution witness at the non-summary inquiry. This witness stated that when Jayakody's body was lifted from the floor of the verandah, he saw a knife which had been lying under the body. The learned Commissioner was apparently aware that Weerasekera had given similar evidence about the knife in his deposition. Nevertheless he commended to the Jury a prosecution suggestion that Weerasekera gave false evidence "to help" the Appellant. Now this suggestion was not put to Weerasekera by Crown Counsel, nor was there any evidence whatsoever of any friendship between the witness and the Appellant. Hence the idea that Weerasekera was trying to help the Appellant was a mere conjecture, and it was unjust and unfair to invite the Jury to act upon it.

The Appellant gave uncontradicted evidence that Jayakody had previously acted in a most aggressive manner towards the Appellant. The Appellant had made several complaints to the police against Jayakody:— that Jayakody had brought a gun, threatened to kill him, and uprooted fence sticks in his garden; that Jayakody had taken away his bull and branded it; that Jayakody had cut the barbed wire on his fence. The learned Commissioner referred to these matters, but only as a preface to the following observations:—

> "Eventually he (Appellant) realises that he could not get the police to act in these matters, and, the suggestion for the prosecution is, that on this day after the incident of a couple of days earlier when he met this man for the first time he decided to punish him in this fashion that is the suggestion for the Crown; that is the motive that the Crown says that impelled the man to act in this fashion."

This evidence of Jayakody's previous aggression and acrimony towards the Appellant supported

the defence version that on this morning also Jayakody had been threatening and aggressive. The summing-up does not contain even a bare statement of the mode in which this evidence might assist the defence. Instead, the evidence was presented to the Jury only as being hostile to the defence case and, it was unfair thus to present it.

An important point in the Appellant's evidence was that on the spur of the moment he seized an axe which he found inside the boutique. This fact, if true; negatived the Commissioner's theory that the Appellant had "decided to punish Jayakody", but its proper significance was not mentioned in the summing-up. Here again the Commissinner failed to sum-up adequately evidence on which the defence relied. In appeal, the Crown has conceded that the axe had in fact been in the boutique.

The evidence established that the Appellant went of his own accord to the Police Station after the incident, and his statement was recorded quite soon thereafter. He had in the statement alleged that Jayakody had made the same remark "I will send you to the moon." Thereafter (according to the statement) Jayakody had tried to take something from his waist and the Appellant thought that Jayakody was trying to stab him, and out of fear the Appellant then went into the boutique and brought the axe with which he hit Jayakody. The learned Commissioner quite properly told the jury that this statement had not referred to Jayakody having a knife in his hand and thus contradicted the Appellant's evidence on the point. But the jury were not directed that the statement generally corroborated the Appellant's evidence, and that it contained the substance of the version that the Appellant acted in self-defence. Nor were they directed that Weerasekera's evidence concerning a knife could suffice to explain that the Appellant's omission to mention the knife in his statement had been inadvertent.

The jury were, on the whole case, directed that "if what the accused says is the truth, the version the three witnesses speak to .....is not true." The prosecution witnesses did not claim to have seen or heard everything; their evidence did not render improbable the defence version of a conversation in low tones before the assault. It was only the first witness who actually saw the assault by the Appellant, and this witness did not claim to have been continuously watching the verandah in which Jayakody had been seated; the truth of his evidence was not contested by the defence, which only relied on an incident a few moments earlier which may not have been noticed by the witness. In these circumstances, it was a misdirection to instruct the Jury that they must convict if the prosecution evidence was true. In fact, the defence position in substance was that the prosecution evidence was true, but incomplete.

In view of this mi direction, and the omission of the learned Commissioner to present fairly to the Jury evidence which tended to favour the case for the defence, we set aside the verdict and sentence and acquitted the Appellant. We did not consider this a fit case to exercise out discretion to order a new trial.

Accused acquitted.

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

M. SEVVANTHINATHAN *vs.* V. NAGALINGAM & THREE OTHERS

S.C. Application No. 338 *of* 1959 — *M.C. Mallakam No.* 4107

Argued on: 23rd and 24th May, 1960
Decided on: 28th September, 1960

Prevention of Social Disabilities Act, No. 21 *of* 1957 — *Sections* 2 *and* 3 — *Effect.*

Charges of defiling and trespassing Hindu Temple — Sections 290 *and* 292 *Penal Code.*

Revision, application in — Order of acquittal — When will Court grant such application.

Two accused were charged under sections 290 and 292 of the Penal Code alleging that they defiled a Saivite temple and committed trespass in the temple by entering a certain inner portions of the premise with the knowlwdge that the feelings of the Vellala and other high caste Saivites were likely to be wounded.

After trial the learned Magistrate while recording his findings (a) that the accused entered the inner courtyard of the temple held sacred by the Saivites by climbing the parapet wall and (b) thatafter entering the flagstaff portion went out of the court-yard, acquitted both accused helding that the evidence led by the prosecution was not sufficient to say beyond doubt that there was defilement of the temple by the act of the accused in entering it or that such act was intended to insult the Savite religion or to wound the feelings of the Saivites.

After an unsuccessful attempt to obtain the sanction of the Attorney-General, the complainant presented an application to revise the order of acquittal praying for a re-trial before another Magistrate.

Held: (1) That the defilement of the temple by the accused entering the inner courtyard thereof is a question of mixed fact and law and as the Magistrate had answered it against the petitioner, no case has been made out to justify the conclusion that the Magistrate's order has resulted in a miscarriage or justice. Therefore the application must be refused.

Per **T. S. Fernando, J.** —(a) "I am inclined to agree also with the argument of Mr. Ranganathan that sections 2 and 3 of the Prevention of Social Disabilities Act, No. 21 of 1957 do not have the effect of conferring on the followers of any religion a right of entering, being present in, or worshipping at any place of worship which they did not have before the Act came into force; in other words, the Act penalised only the prevention or obstruction of the exercise of a right which was an existing right at the time the Act became law."

(b) "Whether a place is holy or not, and whether a place that is holy has been defiled are also matters of belief."

C. Ranganathan, with *S. Sharvananda*, *R. R. Nalliah*, *V. K. Palasuntheram*, *K. Palakidnar* and *Miss S. Wickremasinghe*, for the petitioner.

N. Satyendra, for the accused-respondents.

T. S. Fernando, J.

The complainant-petitioner instituted a private prosecution in the Magistrate's Court against the accused-respondents alleging that they had committed offences punishable under section 290 and 292 of the Penal Code. The charges as framed in the Magistrate's Court alleged (1) that the accused defiled the Saivite temple at Chankanai East with the knowledge that all the Vellala and other high caste Saivites are likely to consider such defilement as an insult to the Saiva religion and (2) that the accused committed trespass in the said Saivite temple by entering the flagstaff mandapam therein with the knowledge that the feelings of the Vellala and other high caste Saivites are likely to be wounded, offences punishable under the said sections 290 and 292 respectively.

After a lengthy trial in the course of which a scholar said to be an expert in the exposition of the Agamas or the gospel was called for the prosecution, the learned Magistrate acquitted all the accused. An appeal from this acquittal was not competent except with sanction obtained from the Attorney-General. Such sanction was sought unsuccessfully by the petitioner who thereupon presented this application in revision to this Court claiming a retrial before another Magistrate. It is now settled that before this Court can grant a prayer like that of the petitioner on this application in revision, the petitioner must make out a case showing something in the nature of a positive miscarriage of justice in the Magistrate's Court. — *The King* vs. *Noordeen* (13 N.L.R. at page 118).

The learned Magistrate has recorded certain findings in his judgment which are reproduced below:— (1) that the accused entered the temple in entering the inner courtyard by climbing over the parapet wall on the southern side, and that they entered the flagstaff portion and then went out of the inner courtyard through the kopuram entrance when they were chased by the complainant; (2) that the temple has been built in conformity with the Saivite Agamas and is a place of worship for Saivites and is held sacred by them; (3) that the evidence led by the prosecution is not sufficient to say beyond doubt that there was defilement of the temple by the act of the accused in entering it; (4) that the accused were denied their right to worship at the temple; and (5) that it cannot be said that the act of the accused was intended to insult the Saivite religion or wound the feelings of Saivites.

There is force in the argument of learned counsel for the petitioner that the Magistrate has misdirected himself in regard to one of the elements in the charges requiring proof on the part of the prosecution in that the charges only alleged knowledge on the part of the accused that Vellalas and other high caste Saivites are likely to consider the defilement as an insult to their religion or that the feelings of such people are likely to be wounded

whereas the finding of the Magistrate relates not to the proof of knowledge which was alleged but to the proof of intention which was not alleged in the charges. Also, there is point in the argument that in denying any right in the accused to worship by entering the inner courtyard there was no denial of a right to worship at the temple because the only right which the accused had was alleged to be the right to worship in the outer courtyard. I am inclined to agree also with the argument of Mr. Ranganathan that sections 2 and 3 of the Prevention of Social Disabilities Act, No. 21 of 1957 do not have the effect of conferring on the followers of any religion a right of entering, being present in, or worshipping at any place of worship which they did not have before the Act came into force; in other words, the Act penalised only the prevention or obstruction of the exercise of a right which was an existing right at the time the Act became law.

My agreement with the arguments of petitioner's counsel on the two points referred to above and the findings of fact reached by the Magistrate and described above as findings (1) and (2) do not avail the petitioner in his present application unless I can say with confidence that by entering the inner courtyard of this temple the accused defiled the temple. This is a question of mixed fact and law, and the learned Magistrate has answered this question against the petitioner. It is no doubt true, as petitioner's counsel contended, that the important question arising upon this application is what do people believe in as their religion. Whether a place is holy or not, and whether a place that is holy has been defiled are also matters of belief. Having listened to the exhaustive arguments of counsel for both parties before me and having examined with care the evidence adduced by the petitioner and the expert before the learned Magistrate, I find myself unable to say with any confidence that the latter's findings that the prosecution failed to establish a defilement of the temple is unsupportable. In this state of affairs it follows that I cannot say that the Magistrate's order has resulted in a miscarriage of justice and this application must be dismissed.

Applicetion refused.

Present: **Sirimane, J.**

PIYADASA *vs.* EKMAN SILVA

S.C. 136 *of* 1962 — *C.R. Matara* 7029

Argued on: 28th April, 1964
Decided on: 6th May, 1964

Deeds — Description in deed inapplicable to land claimed — Application of maxim " falsa demonstratio non nocet" — Does title pass on such deed.

Prescription — When can vendee claim benefit of vendor's possession.

The plaintiff sued the defendants for a declaration of title to a land called lot D of a certain land. The plaintiff had purchased this land on deed P 3. The defendants claimed title to the same land on another deed (3D2), in favour of the 3rd defendant.

However, the defendants' deeds purported to convey not Lot D but Lot C. Some of the boundaries and the extent of land was also not the same as those of Lot D. The learned trial Judge applied the maxim "*falsa demonstratio non nocet*" and held in favour of the defendants. The plaintiff appealed.

Held: (1) That the maxim "*falsa demonstratio non nocet*" applies only when the words of the instrument are adequate and sufficient of themselves to describe the property. A subsequent erroneous addition will not then vitiate it.

(2) That the maxim was inapplicable on the facts of the present case. Legal title to Lot D therefore lay in the plaintiff.

(3) That in regard to the question of prescription —

(*a*) there was no convincing evidence of possession led an behalf of the defendants;

(*b*) the defendants could not claim the benefit of their vendor's possession as their deed 3D2 did not convey title to Lot D to the 3rd defendant. The conveyance to the defendants must have been of the identical portion of land now in dispute if they were to be permitted to avail themselves of their vendee's possession.

Followed: *Fernando* vs. *Christiana* (1912) 15 N.L.R. 321.

A. F. Wijemanne, for the plaintiff-appellant.

No appearance, for the defendant-respondents.

Sirimane, J.

The plaintiff-appellant filed this action against the three defendant-respondents for a declaration of title to an allotment of land called lot D of the contiguous lands called 'Paulawatta', 'Paulawatte-pittaniya' and 'Dolewatte' alias 'Ihalawatta' as depicted in Plan P2.

It is common ground that one Podihamy was allotted this lot by a Final Decree (P1) entered in D.C. Matara 778 on 23.6.1926. Podihamy on Deed 12238 of 24.2.1958 (P3) sold this lot to the plaintiff-appellant.

The case for the defendant-respondents is that Podihamy on 12.12.1939, on Deed 3897 (3D1) conveyed this lot to one S. R. Yapa, who on Deed 3945 of 22.1.1959 (3D2) conveyed it to the third defendant-respondent. The first defendant-respondent is the father of the other defendant-respondents. But 3D1 in favour of Yapa purports to convey not lot D, but lot C of 'Ihalawatta'. Lot D is, in fact, bounded on the north by 'Konkanatte-watta', east by lot C, west by lot E, and on the south by a cart-road (vide Plan P2).

The northern boundary in 3D1 is as above. The eastern and western boundaries are described with reference to the names of the people living on the land on those sides and may or may not apply to lots C and E. The southern boundary of the land dealt with in 3D1 is a river. The Plan (P2) shows a river on the eastern side of the entire land.

The extent of lot D is 7.95 perches and the extent of the land dealt with in 3D1 is 12 perches. So that the description of the lot, the boundaries, or at least some of them and the extent in 3D1, do not apply to lot D, and I find it impossible to hold that 3D1 conveyed any legal title to lot D.

The learned Commissioner was of the view that the maxim *falsa demonstratio non nocet* would apply in this case. I do not think so. As pointed out by Pereira, J. in *Fernando* vs. *Christiana*, 15 N.L.R. 321,

"this maxim means that as soon as there is an adequate and sufficient definition with convenient certainty of what is intended to pass by a particular instrument, a subsequent erroneous addition will not vitiate it. It applies only when the words of an instrument, exclusive of the *falsa demonstratio*, are sufficient of themselves to describe the property intended to be dealt with."

So that legal title to lot D is in the plaintiff-appellant and a heavy burden is cast on the defendant-respondents to prove that they have acquired a prescriptive title to that lot.

I agree with the submission made by the learned Counsel for the appellant that there is no convincing evidence of possession led in this case. Lot D has no permanent plantation on it and it appears to be a strip of bare land, with only two or three arecanut trees on it. Apart from the conflicting evidence of the parties to the case there was the evidence of D. T. R. Yapa, the father of the vendee on 3D1 called by the defendant-respondents who made the bare statement that he 'possessed' lot D on behalf of his son and that he cut down a 'Kottamba' and a 'Ketakela' tree on this land. He did not say how he 'possessed' this land when he did so, or when and in what circumstances he cut down the two trees referred to. He added that Podihamy never resided on lot D and was contradicted on this point by the second defendant-respondent who admitted that she did.

The Headman of the area, called by the defendant respondents, did not know who possessed this lot. But even if one assumes that Yapa did in fact enter into possession of lot D on 3D1 in 1939, would his possession accrue to the benefit of his vendee, the third defendant? It undoubtedly would, if Yapa conveyed the lot to which he had acquired title, i.e., lot D. But the deed in favour of the third defendant-respondent (3D2) does not convey lot D but lot C following the boundaries and description in the earlier deed 3D1. So that even if Yapa had acquired a prescriptive title to lot D he failed to convey that title to the third defendant-respondent on 3D2.

On the question whether in such circumstances a vendee can claim the benefit of his vendor's possession, Pereira, J. made the following observation in the case cited above, at page 322:

> "Can he avail himself of the possession of his vendor? He may do so provided the conveyance to him by his vendor is a conveyance of the identical defined portion of land now in dispute:"

I am in respectful agreement with that view. 3D2 did not convey lot D to the third defendant-respondent and in order to gain a prescriptive title the defendant-respondents would have to possess lot D for ten years from the date of that deed — 22.1.59. This action was filed in May 1959.

I set aside the judgment and decree entered in this case and enter judgment declaring the plaintiff-appellant entitled to lot D as depicted in the Plan (P2). No damages have been proved, but the defendant-respondents prevented the plaintiff-appellant from taking possession of this lot. I would award the plaintiff-appellant nominal damages at the rate of Rs. 5/- per year from the date of this action until he is restored to possession. I notice that there is no prayer in the plaint for ejectment, and, perhaps, there may be further litigation, unless the defendant-respondents voluntarily give up possession.

The plaintiff-appellant is entitled to costs here and in the Court below.

Appeal allowed.

Present: **Siva Supramaniam, J.**

A. SALMAN SILVA & ANOTHER *vs.* N. L. AMARADASA, Police Inspecter, Piliyandala

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S.C. 701—702/1965 — *M.C. Colombo South No.* 60815/*A*

Argued on: 22nd October, 1966
Decided on: 14th November, 1966

Criminal Trespass — Requirement that property should be in 'occupation' of complainant — Penal Code, sections 427, 433 — *Criminal Procedure Code, sections* 171, 425.

The accused was charged with (1) committing criminal trespass "by entering the Deltara Government School playground, property in the custody of K. D. L. Perera" with intent to commit mischief; (2) commiting mischief by damaging a barbed wire fance.

The evidence disclosed that K. D. L. Perera was the Head Master of the school and was not in occupation of the land. The learned Magistrate convicted the accused on a finding that "as Headmaster, he is presumed to be in occupation of this property."

Held: (1) That there was no such presumption known to the law and that the first charge did not disclose an offence punishable under section 433 of the Penal Code.

(2) That where an accused is tried and convicted in a Magistrate's Court for an offence, and the place where the offence is alleged to have been committed falls outside the local limits of the jurisdiction of the court, and the objection to jurisdiction is raised before the Magistrate, not at the commencement of the trial but for the first time on the date fixed for the passing of sentence after the trial had been concluded and the accused found guilty, it was an irregularity curable under section 423 of the Criminal Procedure Code, if in fact it occasioned no failure of justice.

C. D. S. Siriwardena, with *Miss S. Lenaduwa*, for the appellants.

F. Conrad Perera, Crown Counsel, for the respondent.

Siva Supramaniam, J.

The two appellants were convicted by the Magistrate, Colombo South, with having committed the offences of criminal trespass and mischief, punishable respectively under Sections 433 and 409 of the Penal Code, and each of them was sentenced to serve a term of two months' rigorous imprisonment. Although the Magistrate held that both charges were established on the evidence he failed to impose a sentence on each count separately. It is not clear from his Judgment in respect of which count he imposed the sentence of two months' R.I.

The amended charges on which the appellants were convicted read as follows:—

"(1) .....you did commit criminal trespass by entering the Deltara Govt. School playground, property in the custody of K. D. L. L. Perera of Thumbowila with intent to commit an offence, to wit: mischief and thereby committed an offence punishable under S. 433 of the Penal Code.

(2) .....you did commit mischief by damaging the barbed wire fence and caused wrongful loss or damage to the extent of Rs. 25/- to the said K. D. L. Perera of Thumbowila and thereby committed an offence punishable under Section 409 of the Penal Code."

The evidence led at the trial which was accepted by the Magistrate disclosed that on the day in question the two appellants entered a land which was used as a playground by the pupils attending the Deltara Government School of which K. D. L. Perera was the Headmaster and blocked the two entrances to the land and in addition caused damage to a barbed wire fence near a well inside the land.

Learned Counsel for the appellants submitted that the conviction on charge No. 1 should be quashed as that charge does not disclose any offence punishable under s. 433 of the Penal Code. The offence of criminal trespass is defined by s. 427 of the Penal Code as follows (omitting the parts that are not relevant to the facts of the instant case):—

"Whoever enters into or upon property in the occupation of another with intent to commit an offence..... is said to commit criminal trespass."

It is an essential ingredient of the charge that the property entered into or upon should be in the *occupation* of the complainant. In the case of *The King* vs. *Selvanayagam* (51 N.L.R. 470 at page 474) the Privy Council stated:

"It is to be noted that the section deals with occupation, which is a matter of fact, and not with possession, which may be actual or constructive and may involve matters of law. The first paragraph of the section comes into operation when a trespasser enters land in the occupation of another with the intent specified.....there must be an occupier whose occupation is interfered with....."

In the instant case, although the charge originally framed against the appellants set out that they committed criminal trespass "by entering into the land in the occupation of M. K. K. A. Austin Silva it was later amended to read "by entering the Deltara Govt. School playground, property in the custody of K. D. L. Perera." The substitution of the word "custody" in the amended charge for 'occupation' in the original charge appears to have been deliberately made since K. D. L. Perera, the Headmaster, was in fact not in physical occupation of the land.

Learned Crown Counsel submitted that the word "custody" in the amended charge was an error for "occupation" and the conviction should not be interfered wtih in view of the provisions of sections 171 and 425 of the Criminal Procedure Code. It is clear, however, from what I have already stated that it was not an error but a deliberate amendment meant to be in accord with the facts. Sections 171 and 425 of the Criminal Procedure Code have no application to such a case. The evidence led did not show that K. D. L. Perera was in occupation of the land. But the learned Magistrate based the conviction on his finding that "as Headmaster, he is presumed to be in occupation of this property." There is no such presumption known to the law. It is obvious that the Magistrate failed to appreciate the distinction between "custody" or "possession" and "occupation".

I agree with learned counsel for the appellants that the amended charge No. (1) does not disclose an offence punishable under s. 433 of the Penal Code. The appellants are therefore entitled to a verdict of acquittal on that charge.

As regards the second charge, counsel for the appellants submitted that the first complaint D1 made by witness Austin Silva at the Police Station referred only to the blocking of the gateways leading to the land and not to any damage caused to the fence and that the Magistrate should therefore have rejected the evidence relating to the cutting down of the fence. This omission has, however, been taken into consideration by the Magistrate, before he arrived at his conclusion on the evidence that the appellants did cause damage to the fence to the value of Rs. 25/- A reversal of this finding will be justified only if the Magistrate had demonstrably misjudged the evidence. I am of the opinion that there is sufficient evidence to support the finding of the Magistrate on the second charge.

It was also submitted on behalf of the appellants that Deltara where the offences are alleged to have been committed is situated outside the local limits of the jurisdiction of the Colombo South Magistrate's Court and the convictions should be quashed on the ground that the Magistrate had no jurisdiction to hear this case. It is not disputed that that part of Deltara where the land in question is

situated falls within the local limits of the jurisdiction of the Magistrate's Court of Panadura. This point in regard to jurisdiction was not raised before the Magistrate at the commencement of the trial. It was raised for the first time on the date fixed for the passing of the sentence after the trial had been concluded and the appellants had been found guilty of the charges.

Section 423 of the Criminal Procedure Code is intended to meet a situation such as the one that has arisen in this case. It provides that "no judgment of any criminal court shall be set aside merely on the ground that the inquiry, trial, or other proceedings in the course of which it was passed took place in a wrong local area unless it appears that such error occasioned a failure of justice." In the instant case, I am satisfied that there has been no failure of justice by reason of the fact that the case was tried in the Magistrate's Court of Colombo South instead of in the Magistrate's Court of Panadura. The objection to the conviction on the ground of absence of jurisdiction therefore fails.

Counsel for the appellants submitted finally that the sentence passed by the Magistrate is excessive. He stated that the 1st appellant claimed to be the lawful owner of the land in question and has, subsequent to the date of the conviction instituted an action in the District Court of Panadura for a declaration of title in regard to it. He also stated that the school authorities have now taken possession of the land and he gave the assurance on behalf of the appellants that they will not interfere with that possession unless the 1st appellant succeeds in obtaining a declaration of title in his favour. Having regard to all the circumstances, I am of the opinion that the ends of Justice will be met by the appellants being dealt with under S. 325(1)(b) of the Criminal Procedure Code.

I set aside the conviction of the appellants on both charges and the sentences passed on them and direct that a verdict of acquittal be entered in respect of charge No. 1. In respect of charge No. 2, I direct that each of the appellants be discharged conditionally on his entering into a recognizance in a sum of Rs. 500/- with one surety to be of good behaviour and to appear for conviction and sentence when called on during a period of two years.

Acquitted on charge 1.
Discharged conditionally on charge 2.

Present: **Siva Supramaniam, J.**

S. WIMALASENA *et al vs.* INSPECTOR OF POLICE, HAMBANTOTA

S.C. 1440 — 1442/1966 — *M.C. Hambantota* 52779

Argued on: 6th May, 1967
Decided on: 26th July, 1967

Criminal Procedure Code, Section 181 — *Penal Code, Sections* 32, 369, 394 — *Evidence Ordinance, Section* 114 (*a*) — *Misjoinder of accused and charges — Referable to time of accusation — Test of misjoinder — Common intention — Mere presence of accused — When reasonable explanation called for from accused — Convictions for both theft and receiving stolen property with knowledge no legal — Insufficient evidence of housebreaking.*

Held: (1) That a question of misjoinder of accused and charges should be considered as at the time of accusation and not on the evidence as found at the conclusion of the trial.

(5) That in order that section 181 of the Criminal Procedure Code might be applicable, the facts must be such as would equally support any one of the several charges.

(3) That the mere presence of the 2nd and 3rd accused in the company of the 1st accused who was in possession of the stolen article was not sufficient to establish common intention.

(4) That on the evidence led it was not possible to draw a presumption against the 2nd or the 3rd accused under section 114(a) of the Evidence Ordinance, and it is only if the prosecution succeeded in establishing conclusively that those accused were in possession of the stolen article that the question of a reasonable explanation by the accused would have arisen for consideration.

(5) That where a Court draws a presumption under section 114(a) of the Evidence Ordinance and finds the accused guilty of theft under section 369 of the Penal Code, he cannot also be convicted, by drawing the alternative presumption, of receiving stolen property, knowing it to be stolen under section 394 of the Code.

Followed: *The Queen* vs. *Vellasamy* (1960) 63 N.L.R. 262
Distinguished: *The Queen* vs. *Wijepala* (1962) 68 N.L.R. 344.
Referred to *The King* vs. *Piyasena* (1942) 44 N.L.R. 58.

E. R. S. R. Coomaraswamy, with *W. M. S. Boralessa*, for the 1st and 2nd accused-appellants.

J. W. Subasinghe, for the 3rd accused-appellant.

Sunil de Silva, Crown Counsel, for the Attorney-General.

Siva Supramaniam, J.

The three appellants were charged on four counts as follows:—

"(1) That, at Sooriya Wewa, between 22nd and 23rd May 1966 they did commit house-breaking by entering into the Radio room of the River Valleys Development Board in order to commit theft and thereby committed an offence punishable under Section 443 of the Penal Code.

(2) That at the same time and place aforesaid and in the course of the same transaction they did commit theft of a spare motor wheel bearing No. Y.S.H. 1895 valued at Rs. 800/- of lorry No. 24 Sri 1392 and thereby committed an offence punishable under Section 369 of the Penal Code.

(3) That they did on 23rd May 1966 at Kmbukwewa dishonestly receive or retain the wheel referred to in Court (2) knowing or having reason to believe the same to be stolen property and thereby committed an offence under Section 394 of the Penal Code.

(4) In the alternative to count (3), they did on 23rd May 1966 at Kumbukwewa voluntarily assist in dispoising the wheel referred to in count (2) knowing or having reason to believe the same to be stolen property and thereby committed an offence punishable under Section 396 of the Penal Code.

The facts of the case, as found by the learned Magistrate, may be summarized as follows:— Abrahim, the driver of lorry No. 24 Sri 1392, owned by the River Valleys Development Board, had left the spare wheel of the said lorry in the Radio room of the Board sometime prior to 22nd May 1966. One Gunapala who worked in the Radio room had been on duty from 6 a.m. to 12 noon on 22nd May 1966. At 12 noon when he closed the doors and windows of the room before going off-duty he saw the said wheel in the room. He handed over the keys of the room to another officer who was on duty from 1 p.m. At 6 p.m. that officer while going off-duty handed back the keys to Gunapala. On the morning of the 23rd May 1966, the room was opened again by Gunapala at 6 a.m. His attention was then drawn by one Gunadasa who also worked in the same room to the fact that one of the windows was open. At the same time he noticed that the wheel was missing from the room. Abraham, from whom inquiry was made, stated that he had not removed it and a complaint was made to the Police regarding the loss.

At 10 p.m. on the same day, viz. 23rd May 1966 the 1st accused went to the house of one Albert, a motor van driver, who lived about six miles away from the Radio room from which the wheel had been stolen, and offered it for sale to Albert. The 1st accused was accompanied by the 2nd and 3rd accused. Albert informed them that he could not examine the tyre then as it was dark and requested them to leave it behind and to call the next morning when he would make an offer after examining it. They left the tyre with

Albert and received from him Rs. 10/- for their expenses but they did not call the next day as promised.

On 25th May 1966 Police Constable Perera who had been detailed to inquire into the complaint of theft, acting on certain information, went to the house of Albert at midnight and recovered the wheel. On a statement made by Albert, the three accused were arrested. Albert's evidence was corroborated by another witness Premadasa.

The 1st and 3rd accused did not give evidence. The 2nd accused gave evidence and denied any knowledge of the transaction and stated that he had been falsely implicated. His evidence was, however, rejected by the learned Magistrate.

All three accused were convicted of the charges contained in counts (1) (2) and (3) and each of them was sentenced to a term of six months Rigorous Imprisonment on each count, the sentences to run concurrently, All of them have appealed.

The appeal has been pressed on two grounds:—

(1) That there was a misjoinder of accused and charges and the convictions should be quashed on that ground.

(2) that, in any event, the evidence did not warrant the conviction of the 2nd and 3rd accused.

The case for the prosecution was that all the accused acted in concert and consequently there was no misjoinder of the accused. The question of misjoinder should be considered as at the time of accusation and not on the evidence as found at the conclusion of the trial .

As regards the contention that there was a misjoinder of charges it was urged that a charge of voluntarily assisting in disposing of stolen property cannot be joined as an alternative to a charge of dishonest retention of stolen property and also that these alternative charges cannot be combined with charges of house-breaking and theft.

Counsel for the appellant relied strongly on the judgment of this Court in *The Queen* vs. *Wijepala* (68 N.L.R. 344). In that case an accused was charged in the same indictment with the commission of the offence of theft of certain articles and, in the alternative, of retention and disposal of stolen property. The facts of that case showed that the accused was found more than one year after the date of the alleged theft in possession of a gold chain which was one of the stolen article and was concerned in a transaction involving a cheque leaf which had been torn from a cheque book which was another of the stolen articles. The possession was so long after the theft that no presumption could have been drawn against the accused under Section 114(a) of the Evidence Ordinance. In order to establish the charge of theft the prosecution relied on certain evidence that about three months before the discovery of the loss of the articles the accused had been seen attempting to open an almirah in which the stolen articles had been kept. The evidence, however, showed that the almirah had not in fact been opened by the accused on that occasion. There was no connection at all between the evidence relating to the theft and the evidence relating to finding the accused in possession of the gold chain or the transaction involving the cheque leaf. They were three independent "transactions." It was held that the charges could not be joined under Section 180(1) of the Criminal Procedure Code as the alleged offence were not committed in the course of the same transaction and that Section 181 was not applicable as the evidence relevant to the two alternative counts was quite distinct from that which related to the charge of theft.

In the instant case, however, the facts are quite different. The alleged theft took place on the 22nd May 1966 and the 1st accused was proved to have been in possession of the stolen article and to have attempted to dispose of it on the following day. It was submitted by Crown Counsel that the joinder of the charges was lawful under Section 181 of the Criminal Procedure Code.

That section provides as follows:—

"If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with all or any one or more of such offences and any number of such charges may be tried at one trial.....

Illustration. A is accused of an act which may amount to theft or receiving stolen property or criminal breach of trust or cheating. He may be charged with theft, receiving stolen property, criminal breach of trust, and cheating, or he may be charged with having committed one of the following offences, to wit, theft, receiving stolen property, criminal breach of trust, and cheating."

In the case of *The King* vs. *Piyasena* (44 N.L.R. 58) Soertsz J. said: "This section postulates a case in which doubt arises from the nature of the fact of series of facts and not from a failure to appreciate the value of unambiguous facts or from inaccurate view of the position in law arising from those facts." On the facts established in the case under consideration by him, the learned Judge held that Section 181 had no application.

Sohoni (commentaries on the Code of Criminal Procedure of India 14th edition) while commenting on the section of the Indian Code corresponding to Section of our Code states at page 494: "The doubts for which the section seeks to provide are doubts as to what inferences will be drawn from the evidence if believed. The doubt which of several offences the facts proved will constitute must arise from the very nature of the acts of which it is intended to offer evidence."

In the instant case the prosecution relief on the following facts:—

(*a*) That there was a theft of the wheel in question between 12 noon on 22nd May 1966 and 6 a.m. on 23rd May 1966 from the Radio room.

(*b*) That the 1st accused accompanied by the 2nd and 3rd accused took the said wheel to Abraham at 10 p.m. on the 23rd May.

(*c*) That the 1st accused offered to sell the said wheel to Abraham .

(*d*) That the accused left the wheel in the custody of Abraham and,

(*e*) The Police recovered the wheel from Abraham .

The position of the prosecution was that while it was permissable for the Court to draw certain presumptions under Section 114(a) of the Evidence Ordinance the facts themselves were of such a nature that it was doubtful which of the several offences set out in counts 1-4 those facts constituted. From the fact of recent possession after the theft, in the absence of a reasonable explanation, the Court was entitled to presume that the accused were the thieves or that they received or retained the wheel in question knowing or having reason to believe that it was a stolen article. The fact that the wheel had been left by the accused in the custody of Abraham and was found by the Police with Abraham could have led to the inference that the accused had voluntarily assisted in the disposal of the stolen article.

While the illustration under Section 181 shows that the different offences contemplated in the section are Cognate offences, the illustration itself is not exhaustive of the cognate offences with which as accused person could be charged. An offence under Section 396 of the Penal Code is one which is cognate to an offence under Section 394 of the Code.

In *The Queen* vs. *Vellasamy* (63 N.L.R. 265 at page 271) Basnayake, C.J. said that in order that Section 181 of the Criminal Procedure Code may be applicable, "the facts must be such as would equally support any one of the several charges." The facts of the instant case answer this test. The joinder of the charges was therefore legal.

It was submitted on behalf of the 2nd and 3rd appellants that the evidence is not sufficient to

establish that they were in possession of the stolen wheel. The learned Magistrate has set out his reasons for convicting the 2nd and 3rd appellants on counts 1, 2 and 3 as follows:—

"The 2nd and 3rd accused were seen in the company of the 1st accused who was in possession of P1 on the night of 23.5.66. The 2nd and 3rd accused had not given any explanation as to their presence. In the absence of any such explanation one cannot escape from the conclusion that they were jointly engaged with the 1st accused in the commission of these offences."

The prosecution apparently relied on Section 32 of the Criminal Procedure Code to bring home the offence sagainst the 2nd and 3rd accused. It has been repeatedly held by this Court that the more presence of an accused is not sufficient to establish common intention. On the evidence led it was not possible to draw a presumption against the 2nd or 3rd accused under Section 114(a) of the Evidence Ordinance. It is only if the prosecution succeeded in establishing conclusively that the 2nd and 3rd accused were in possession of the stolen article that the question of a reasonable explanation by the accused would have arisen for consideration. The 2nd and 3rd accused are accordingly entitled to an acquittal.

The facts proved against the 1st accused were not seriously disputed in appeal. The question however arises as to whether on the evidence the accused could have been convicted on all the counts 1-3 and sentenced in respect of each of them. In view of the fact that the 1st accused was in possession of the stolen article soon after the theft and he failed to give a reasonable explanation for such possession it was open to the Court under Section 114(a) of the Evidence Ordinance to presume that the 1st accused was either the thief or had received the wheel knowing it to be stolen; If the presumption is drawn that the accused is the thief and is found guilty and convicted under Section 369 of the Penal Code, the occasion to draw the alternative presumption that he received the wheel knowing it to be stolen will not arise and he should not therefore be convicted in addition under Section 394 of the Code. Gour (Penal Law of India 7th edition) in commenting on the corresponding section of the Indian Code states; at page 1913:— "Where the Court on evidence in the case comes to the conclusion that the accused is a direct participator in the theft, there is no question of his receiving stolen property. The two offences are distinct and a person proved to have committed theft cannot be convicted for receiving the stolen property." At page 2164 he states:— "But there is nothing against his being tried for the two offences. his conviction must be only for one offence, the accused being then acquitted of the other, unless the Court elects to convict him in the alternative."

In view of the conviction of the 1st accused under Section 369 of the Code, his conviction under Section 394 must be set aside.

Learned Counsel for the appellants also submitted that the evidence does not warrant the conviction of the 1st accused on the charge of house-breaking under count (1). I agree with that submission. Although the evidence of Gunapala disclosed that he found one window open when he entered the Radio room on the morning of 23rd May, there was no other circumstances which led to a necessary inference tht the person or persons who stole the wheel and entered the room or taken the wheel through that window. The officer who was on duty from 1 p.m. on the 22nd May was not called as a witness and one cannot exclude the possibility that the wheel was stolen while the office was open during that period. The Police Officer stated that when he examined the window there was no lock on it. There was no evidence that that window had a lock at the time the room was closed on the evening of the 22nd May or that it was, in fact, locked.

The conviction of the 1st appellant on count (1) cannot therefore stand.

In the result I set aside the convictions and sentences passed on the 2nd and 3rd appellants on all counts and acquit them. I also set aside the convictions and sentences passed on counts

1 and 3 on the 1st appellant. I affirm the conviction of the 1st appellant on count 2. Since the 1st appellant has been acquitted on the charge of house-breaking I substitute for the sentence of six months rigorous imprisonment passed on count 2 on the 1st appellant a sentence of 4 months rigorous imprisonment.

2nd and 3rd accused acquitted.
1st accused acquitted on counts 1 and 3, and sentence reduced on count 2.

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

CHAIRMAN, MADAMPE TOWN COUNCIL
vs.
THE AUDITOR-GENERAL & ANOTHER*

S.C. Application No. 482/1965

(In the matter of an application for a Writ of Certiorari and/or Writ of Prohibition under section 42 of the Courts Ordinance)

Argued on: 6th December, 1966
Decided on: 14th December, 1966

Writ of Certiorari and/or Prohibition—Delay in applying therefor—Effect—Auditor-General certifying surcharge against Chairman of Town Council — Appeal to Minister — Surcharge affirmed in appeal — Application for Writ of Certiorari to quash order of surcharge and Minister's order— Refusal to quash order of surcharge but Minister's order quashed and sent back for re-hearing as appeal had been dealt with without notice to petitioner — Minister's second order affirming surcharge not challenged—Application by Local Government Commissioner to recover amount of surcharge through Magistrate's Court—Town Councils Ordinance (Cap. 256), *sections* 181(1), 182(1), 182(2) *and* 182(5).

The Auditor-General (1st respondent), acting under section 181(1) of the Town Councils' Ordinance surcharged the petitioner, the Chairman of a Town Council in a sum of Rs. 28,962/48 on 7.8.59. The Commissioner of Local Government (2nd respondent) applied to the Magistrate's Court under section 182(5) to recover the said amount. Thereupon this application for a Writ of Certiorari and/or Writ of Prohibition made under section 42 of the Courts Ordinance after a lapse of more than six years.

Admittedly the petitioner had in 1959 appealed to the Minister ,being one of the remedies open to him under section 182. After the latter's order affirming the appeal, an application for a Writ of Certiorari to quash the certificate of surcharge and the said order of the Minister was made. The Supreme Court refused the first and allowed the second payer giving the petitioner an opportunity of having his appeal properly heard as the Minister had dealt with the appeal without notice to him.

Held: (1) That the application should be refused as it had been made after the lapse of more than six years after the date of the certificate of surcharge.

(2) That a Writ of Certiorari or Prohibition could not be granted against the 2nd respondent for taking a step provided by law to recover the amount certified by the Auditor as due.

(3) That the Court should not issue this Writ as the petitioner had exhausted the remedies available to him in law when the Minister rejected his appeal after hearing him and which had not been challenged.

Case referred to: *Sahib vs. The State of Madras,* 1952 A.I.R. Madras 605.

A. C. Nadarajah, with *Victor Munasinghe,* for the petitioner.

Mervyn Fernando, Crown Counsel, for the respondent.

Sirimane, J.

The petitioner was the Chairman of the Madampe Town Council. The Auditor General, who is the 1st respondent to this petition. acting under section 181(1) of the Town Councils Ordinance, Cap. 256, surcharged him in a sum of Rs. 28,962.48 on 7.8.59. The certificate is annexture "C" to

* For Sinhala translation, see Sinhala section, Vol. 14, part 4, p. 16

this application made on 14.2.65. The petitioner prays for a Writ of Certiorari to quash this certificate.

The 2nd respondent is the Commissioner of Local Government, who filed an application in the Magistrate's Court as provided for by section 182(5) of Cap. 256 to recover the amount surcharged from the plaintiff, and a Writ is sought against him also.

The learned Crown Counsel raised three matters by way of preliminary objections to the hearing of this application, viz. —

(a) that there has been undue delay in making the application.

(b) that the petitioner has already exhausted the remedies available to him, and

(c) that in any event no Writ, as applied for, would lie against the 2nd respondent.

To deal with the third point first, under section 182(5) of Cap. 256 it is the duty of the Commissioner of Local Government, when the sum certified by the Auditor as due remains unpaid, to make an application for its recovery to a Magistrate. I do not see how a Writ of Certiorari or a Writ of Prohibition can be applied for against the 2nd defendant for taking this step, and at the argument all that the learned Counsel for the petitioner stated in regard to this matter was, that the 2nd respondent was merely "Added as a party", so that he would be bound if the petitioner's main application to quash the order of surcharge succeeded. The 2nd respondent would have been bound by such an order whether he was made a party or not, and the present application against him must fail.

I think the application should also be refused on the ground of delay. It will be seen that the application has been made after a lapse of more than six years from the date of the certificate of surcharge. This Court has repeatedly held, that it would not exercise its discretionary powers where there has been a delay even of some months.

A brief examination of the history of the case further shows that there were alternative remedies open to the petitioner which he has now exhausted.

Under section 182(1) of Cap. 256 a person aggrieved by a surcharge may appeal to the Supreme Court. Under section 182(3) of the same chapter, in lieu of such an appeal the person aggrieved may appeal to the Minister of Local Government.

The choice of one of these two remedies was open to the petitioner in 1959. He chose the latter but was unsuccessful. He then made an application very similar to the present one to this Court. He applied for a Writ of Certiorari to quash the certificates of surcharge and the order of the Minister affirming it in appeal.

The application to quash the order of surcharge was refused. It was found, however, that the Minister had dealt with the appeal without notice to the petitioner and without giving him an opportunity of being heard.

This Court held, therefore, that the Minister's order offended against the principles of natural justice, and that order was quashed and the petitioner given an opportunity of having his appeal properly heard. Tambiah, J. in the course of his judgement said "I do not propose to quash the order of the Auditor General, the 1st respondent, as the petitioner has chosen to appeal from the Auditor General's order to the Minister. A Writ of Certiorari does not lie in cases where there is another effective remedy open to the petitioner." I am in respectful agreement with that view.

The petitioner participated at the re-hearing of the appeal, but was unsuccessful once again. I am unable to agree with the submission of Mr. Nadarajah that the second order of the Minister was made without jurisdiction and that it is a nullity. On the contrary that order, in my view, constitutes the valid and effective decision on the petitioner's appeal.

Rajamannar, C.J., said in *Sattar Sahib* vs. *The State of Madras* (1952 A.I.R. Madras, 605) "We have no doubt whatever in the matter that when an order of the inferior tribunal on an application properly made to them is quashed by this Court by a Writ of Certiorari, on any ground which does not deal with the merits of the case, it is not only permissible, but it is also incumbent on the inferior tribunal to take up the application and re-hear the same."

It is noteworthy that there is no application now to quash that order, which too had been made (according to Counsel) about a year before the present application.

The petitioner exhausted the remedies available to him in law when the Minister rejected his appeal after hearing him.

In my opinion the Court should not exercise its discretionary powers by issuing a Writ such as the one applied for here in favour of a person who in the exercise of an alternative remedy has had an order made against him which he has not challenged.

The application is dismissed with costs.

Samerawickrama, J.
I agree.

Application dismissed.

Present: **Tennekoon, J.**

JAYAKODY *vs.* WIJEWARDENE

S.C. No. 432/67 — *M.C. Colombo South No.* 31238/*A*

Argued and decided on: 9th July, 1967

Surety — Penalty under the bond — When is a Magistrate empowered to impose default sentence on surety — Criminal Procedure Code section 411.

Held: That a Magistrate has no power to impose a default sentence under section 411 of the Criminal Procedure Code, without proceeding to recover the penalty from a surety by issuing a warrant for the attachment and sale of the movable or immovable property belonging to the surety.

Accused-appellant in person.

Ranjith Gunatilleke, Crown Counsel, for the Attorney-General.

Tennekoon, J.

This is an appeal against an order made by the Magistrate in the exercise of powers under Section 411 of the Criminal Procedure Code. That Section provides that if sufficient cause is not shown by the surety why he should not be called upon to pay the penalty of this bond, the Court may proceed to recover the same by issuing a warrant for the attachment and sale of the movable or immovable property belonging to the surety. Sub-Section 4 of Section 411 goes on to say that if such penalty be not paid and cannot be recovered by such attachment and sale, the person so bound shall be liable by order of the Court which issued the warrant to simple imprisonment for a term which may extend to six months.

In this case the learned Magistrate having noticed the surety to show cause in terms of Sub-Section 1 of Section 411 proceeds to say, "Mr. Samarakkody for the surety states that he has no cause to show ..... The surety has been given ample time to produce the accused for execution of sentence but has failed to do so..... I order him to forfeit his bond of Rs. 1,000/- in default 3 months simple imprisonment."

It is obvious that the Magistrate has no power to impose a default sentence under Section 411. All he can do is, in the first instance, to proceed to try to recover the penalty due on the bond by issuing a warrant for attachment and sale of movable or immovable property of the surety. It is only if such execution proves futile that the Magistrate has power to impose a term of imprisonment. Accordingly the order made by the learned Magistrate is varied to read as follows: "The bond is forfeited and the surety is ordered to pay the penalty of Rs. 1,000/-". The Magistrate should now proceed to issue warrant under Sub-section 2 of Section 411. His power to order a term of imprisonment arises only if the amount of the penalty is not paid or recovered under the warrant.

Subject to this variation the appeal is dismissed.

Order varied.

THE RIGHT TO PRIVACY

A CONFERENCE OF JURISTS from the Nordic countries which was held in Stockholm, Sweden, in May 1967, examined in depth a subject which so far has remained in most countries vague and undefined, and consequently vulnerable to serious abuse, namely, the right enshrined in Article 12 of the Universal Declaration of Human Rights — The Right to Privacy.

THE CONFERENCE, which was held under the auspices of the International Commission of Jurists, attempted to define the various rights inherent in the personality of the individual,to delimit the areas which lie exclusively within the sphere of the private life of the citizen, and to ascertain the general principles which should apply in order that these rights may be respected, protected and exercised within the framework of the exigencies of life in a modern state.

WE SET OUT below the conclusions of the Nordic Conference on The Right to Privacy:

Preamble

WHEREAS Article 12 of the Universal Declaration of Human Rights and Article 17 of the United Nations Covenant on Civil and Political Rights of December 1966 have provided that "no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation" and that "everyone has the right to the protection of the law against such interference or attacks"

AND WHEREAS Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms has provided that "everyone has the right to respect for his private and family life, his home and his correspondence"

AND RECALLING that the International Commission of Jurists has at its first international Congress held at Athens in 1955 stressed that the Rule of Law requires that the private lives of individuals be inviolable

AND CONSIDERING that the increasing complexity of modern society makes it desirable to protect the Right to Privacy with greater particularity than hitherto,

THEREFORE the International Commission of Jurists decided to request this Nordic Conference of Jurists to examine the scope at the present day of the Right to Privacy and the particular problems relating thereto and to advise on the safeguards and remedies that should be made available to protect this Right,

AND NOW THEREFORE this Nordic Conference of Jurists from Denmark, Finland, Iceland, Norway and Sweden, attended by legal experts from Austria, Brazil, Ceylon, Ecuador, France, Great Britain, India, Ireland, Japan, Netherlands and the United States and distinguished observers from the Council of Europe, the International Press Institute, the English Law Commission, the Press Council of Great Britain, the World Federation of United Nations Associations and the World Peace Through Law Center, having considered the issues involved in the Right to Privacy, adopts the Conclusions hereinafter set forth.

Conclusions

PART I

NATURE OF THE RIGHT TO PRIVACY

1. The Right to Privacy, being of paramount importance to human happiness, should be recognised as a fundamental right of mankind. It protects the individual against public authorities, the public in general and other individuals.

2. The Right to Privacy is the right to be let alone to live one's own life with the minimum degree of interference. In expanded form, this means:

The right of the individual to lead his own life protected against: (*a*) interference with his private, family and home life; (*b*) interference with his physical or mental integrity or his moral or intellectual freedom; (*c*) attacks on his honour and reputation; (*d*) being placed in a false light; (*e*) the disclosure of irrelevant embarassing facts relating to his private life; (*f*) the use of his name, identity or likeness; (*g*) spying, prying, watching and besetting; (*h*) interference with his correspondence; (*i*) misuse of his private communications, written or oral; (*j*) disclosure of information given or received by him in circumstances of professional confidence. (The limitations of this right are set forth in Part II.)

3. For practical purposes, the above definition is intended to cover (among other matters) the following:

(i) search of the person;
(ii) entry on and search of premises or other property;
(iii) medical examinations, psychological and physical tests;
(iv) untrue or irrelevant embarrassing statements about a person;
(v) interception of correspondence;
(vi) wire or telephone tapping;
(vii) use of electronic surveillance or other "bugging" devices;
(viii) recording, photographing or filming;
(ix) importuning by the press or by agents of other mass media;
(x) public disclosure of private facts;
(xi) disclosure of information given to, or received from, professional advisers or to public authorities bound to observe secrecy;
(xii) harrassing a person (e.g. watching and besetting him or subjecting him to nuisance calls on the telephone).

PART II

LIMITATIONS

4. In modern society, the Right to Privacy, as any other human right, can never be without limitation except in the sense that nothing can justify measures which are inconsistent with the physical, mental, intellectual or moral dignity of the human person. The limitations which are necessary to balance the interests of the individual with those of other individuals, groups and the State will vary according to the context in which it is sought to give effect to the Right to Privacy.

5. The public interest frequently requires the granting to public authorities of greater powers to interfere in the individual's private sphere than would be acceptable in the case of interference by private individuals or groups. Such powers should never be used except for the purpose for which they were granted.

6. The circumstances in which a public authority may be granted such powers have been laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms as those in which interference in the private sphere is necessary in a democratic society:

> "In the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

7. It is essential that the cases in which interference is permitted be defined with precision. Legislation should ensure that powers which may involve invasion of privacy should only be exercised by a specifically appointed person or agency upon the order of a judicial authority or some other public authority ultimately responsible to the Legislature. Such order should determine the period and place of the exercise of the powers concerned.

8. In relation to interference in the above-mentioned circumstances, the following considerations apply;

(*a*) **National Security, Public Safety and Emergency Situations** — State powers to interfere with the Right to Privacy must vary according to the situation facing a country and may not be exercised except in accordance with its international obligations:

(i) **In peace-time** national security may require invasions of privacy for very special and limited purposes. In order to ensure that such invasions are made only in cases of genuine threats to national security, and that powers granted by law in the interests of national security are not misused for politcal purposes, it is desirable that some form of independent supervision or control be instituted.

(ii) **In time of war or other public emergency** threatening the life of the nation, any additional powers to interfere with the Right to Privacy of the individual in the interests of public safety should be restricted to those strictly required by the exigencies of the situation and should be limited in time to the period of war or public emergency. For this purpose, they should be subject to periodic review and renewal by Parliament.

(iii) **In cases of natural disaster** public safety may necessitate invasions of privacy to enable measures to be taken to deal with such disasters or other calamities endangering the life of the people. The measures taken should be strictly proportionate to the threat involved.

(*b*) **The economic well-being of a country** is not a concept which is capable of being precisely and narrowly defined. Therefore, it should not be relied upon except when absolutely necessary.

(*c*) **The prevention of disorder or crime** may justify measures taken in the sphere of criminal law:

(i) for the investigation of criminal offences and the detection of offenders;

(ii) for the prosecution and punishment of offenders;

(iii) to prevent the commission of a criminal offence or the outbreak of disorder which there are compelling grounds to believe is imminent.

This presupposes that the crime in question is not one which forbids the exercise of any of the fundamental rights and freedoms. It further presupposes that legal provisions define in detail the powers of the police and criminal investigation authorities, set out the offences in relation to which they can be used and lay down precise limits to their use. These limits should, in particular, ensure that measures involving an invasion of privacy are in all cases reasonably necessary having regard to the gravity of the offence involved and that there should be a reasonable proportion between the measures taken and the magnitude of the offence. In addition, there must be reasonable grounds for suspecting that the person concerned is guilty of or is about to commit a criminal offence.

(*d*) **The protection of health** may justify reasonable measures taken in order to combat or to prevent the outbreak of an epidemic, or the spread of communicable diseases. Measures taken for **the protection of morals** (otherwise than within the ordinary framework of criminal law) should be limited to those necessary for the protection of children and young persons.

9. **The Administration of Civil Justice**

The extent to which the Right to Privacy requires to be limited for the purposes of the administration of civil justice must be clearly defined in the laws relating to procedure and evidence in civil cases.

10. **Freedom of Expression, Information and Debate**

The exercise of these freedoms is obviously in the public interest and it is inevitable that in

some cases there should be a conflict between the interest of society in their exercise and the interest of the individual to live his private life unmolested. The line of demarcation between these interests is very difficult to draw. Certainly it cannot be drawn in the simple terms of the axiom that where public life begins private life must end. The private life of public figures is entitled to immunity save where it can be shown to impinge upon a course of public events. Even less acceptable is the axiom that "being in the news" of itself justifies intrusion on private life. It would be undesirable and indeed impossible to provide for all cases by legislation; but it may be insufficient to rely exclusively upon the self-discipline of the press and other mass media or upon rules of conduct laid down by the professional organisations concerned.

The subject-matter is so full of problems and the checks and balances must be so many and so delicate that a combination of all these methods, the formulation of rules of conduct, the establishment of professional disciplinary tribunals and appropriate legislation may be required for dealing satisfactorily with this aspect of the Right to Privacy.

It should be emphasized however that, because freedom of expression is one of the great freedoms on which so many others depend, it ought not to be curbed by special legislation designed to protect privacy against invasion by the press or other mass media, unless the self-discipline of the press and other mass media and the rules of conduct laid down by professional organisations have been shown to fail. This does not imply that the press or other mass media are exempt from general legislation protecting the Right to Privacy including legal provisions which apply to improper methods of obtaining information.

PART III

PROTECTION

11. Protection under existing rules

There are in most countries legal rules in other fields which provide civil remedies or criminal sanctions against certain forms of invasion of privacy. Some of these remedies or sanctions have not the protection of privacy as their primary object and it may therefore be necessary to strengthen or modify the provisions in question in order to secure the more effective protection of privacy aspects involved. An institution which can give valuable assistance in the protection of privacy against invasion by public authorities is the Ombudsman.

12. The following invasions would seem to fall within the category referred to in the preceding paragraph. Where provisions of the nature described do not already exist, their introduction is considered necessary as part of the adequate protection of the Right to Privacy:

(*a*) **Entry on and search of premises and other property** — Criminal provisions in this field may not provide an adequate protection of individual interests. Similarly, civil remedies designed primarily to protect ownership or possession may not extend protection to individuals who have the mere use of premises or other property without possession.

(*b*) **Search of the Person** — Where existing laws provide for the search of the person, they should ensure that the search is limited to the object for which it is authorised and conducted with due respect for the individual searched.

(*c*) **Compulsory medical examinations and other tests** — The circumstances and cases in which medical examinations or other tests can be ordered and carried out should be clearly defined.

(*d*) **Interception of correspondence and other communications** — Most countries have legislative provisions prohibiting the opening of correspondence and protecting the secrecy of telegrams. In some cases these provisions apply only to employees of the postal and telecommunications services and there would seem to be a need for more general provisions — criminal and civil — protecting correspondence and other communications from interference by other third parties.

(*e*) **Disclosure of information given to public authorities or professional advisers** — Such disclosures are normally covered by legal or disciplinary provisions against the disclosure of confidential information given to public authorities. In the case of communications to professional advisers, their unauthorised disclosure should be made the subject of sanctions, which may be criminal, civil or disciplinary, or a combination of these, according to the circumstances of the case.

(*f*) **Defamation** — The law of defamation in most legal systems protects the individual against attacks on his honour and reputation. In some systems truth is an absolute defence; in others it is not. In the former types of system there is need for legal protection in relation to the publication of true but irrelevant embarrasing facts relating to the individual's private sphere.

13. **Protection under special Rules relating to Privacy**

There are forms of invasion of privacy, other than those mentioned in the preceding paragraph, infringing rights which cannot be adequately protected by straining the existing legal rules devised mainly to meet other problems in other fields. These naturally fall within a Law of Privacy and should be protected by such a Law. The following invasions are within this category:

(*a*) **Intrusion upon a person's solitude, seclusion or privacy** — An unreasonable intrusion upon a person's solitude, seclusion or privacy, which the intruder can foresee will cause serious annoyance, whether by the intruder watching and besetting him, following him, prying on him or continually telephoning him or writing to him or by any other means, should be actionable at civil law; and the victim should be entitled to an order restraining the intruder. In aggravated cases, criminal sanctions may also be necessary.

(*b*) **Recording, photographing and filming** — The surreptitious recording, photographing or filming of a person in private surroundings or in embarrasing or intimate circumstances should be actionable at law. In aggravated cases, criminal sanctions may also be necessary.

(*c*) **Telephone-tapping and concealed microphones** — (i) The intentional listening into private telephone conversations between other persons without consent should be actionable at law.

(ii) The use of electronic equipment or other devices — such as concealed microphones—to overhear telephone or other conversations should be actionable both in civil and criminal law.

(*d*) **The use of material obtained by unlawful intrusion** — The use, by publication or otherwise, of information, photographs of recordings obtained by unlawful intrusion (paras. (a), (b) and (c) above) should be actionable in itself. The victim should be entitled to an order restraining the use of such information, photograph or recording, for the seizure thereof and for damages.

(*e*) **The use of material not obtained by unlawful intrusion** — (i) The exploitation of the name, identity or likeness of a person without his consent is an interference with his right to privacy and should be actionable.

(ii) The publication of words or views falsely ascribed to a person, or the publication of his words, views, name or likeness in a context which places him in a "false light" should be actionable, and entitle the person concerned to the publication of a correction.

(iii) The unauthorised disclosure of intimate or embarrassing facts concerning the private life of a person, published where the public interest does not require it, should in principle be actionable.

14. **Need for Specific Legal Rules**

Finally, this Conference recommends that all countries take appropriate measures to protect by legislation or other means the Right to Privacy in all its different aspects and to prescribe the civil remedies and criminal sanctions required for its protection.

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

WIJESUNDERA *vs.* KUNJIMOOSA & CO., AND ANOTHER

S.C. 481(*F*)/64 — *D.C. Kandy, M.S.* 7101

Argued on: 28th April, 1967
Decided on: 9th June, 1967

Cheques — Bills of Exchange Ordinance (Cap. 82), sections 49(12) *and* 50(2)(*c*)(*v*) — *Notice of dishonour—Need to give forthwith—When notice of dishonour dispensed with—Countermand of payment.*

The plaintiff Company obtained judgment against the 1st and 2nd defendants on two cheques marked 'A' and 'B'. Only the 1st defendant appealed.

Cheque A was for a sum of Rs. 1000/- drawn by the 1st defendant in favour of the 2nd defendant. Cheque B was also for Rs. 1000/- drawn by an unknown person and endorsed by the 1st defendant to the 2nd defendant who obtained cash for both cheques from the plaintiff company.

Cheque A was dishonoured on 3.4.62 because payment was stopped by the drawer. B was dishonoured on 11.5.62, with the endorsement "effects not cleared." A notice of dishonour in respect of both cheques was sent to the 1st defendant on 11.6.62.

Held: (1) That a notice of dishonour in terms of Section 49(12) of the Bills of Exchange Ordinance is a condition precedent to a right of action against an indorser or drawer.

(2) That the said notice sent nearly a month after the date of dishonour is not a notice as required by that section.

(3) That under Section 50(c)(v) of the Bills of Exchange Ordinance, notice of dishonour is dispensed with where the drawer countermands payment, therefore the 1st defendant was liable on cheque A.

(4) That as the 2nd defendant did not appeal, judgment against him would stand.

A. C. Gooneratne, Q.C., with *R. Gooneratne*, for the 1st defendant-appellant.

C. Ranganathan, Q.C., with *V. E. Selvarajah*, for the plaintiff-respondent.

Sirimane, J.

This was an action filed by the plaintiff company against the two defendants for the recovery of a sum of Rs. 2,000/- which they alleged was due to them on two cheques marked "A" and "B".

Cheque "A" was for a sum of Rs. 1,000/- drawn by the 1st defendant in favour of the 2nd defendant. Cheque "B" was also for a similar sum drawn by an unknown person but endorsed by the 1st defendant to the 2nd defendant. The 2nd defendant had obtained cash on both these cheques from the plaintiff company. When presented for payment both cheques were dishonoured.

The learned District Judge has entered judgment against the two defendants and the 1st defendant appealed.

The only point urged in appeal was that there was no notice of dishonour given to the 1st defendant within a reasonable time as required by the Bills of Exchange Ordinance (Cap. 82.).

Section 49(12) of that Ordinance provides that:

"The notice may be given as soon as the bill is dishonoured, and must be given within a reasonable time thereafter.

In the absence of special circumstances notice is not deemed to have been given within a reasonable time, unless —

(*a*) where the person giving and the person to receive notice reside in the same place, the notice is given or sent off in time to reach the latter on the day after the dishonour of the bill;

(*b*) where the person giving and the person to receive notice reside in different places, the notice is sent off on the day after the dishonour of the bill,

* For Sinhala translation, see Sinhala section, Vol. 14, part 5, p. 19

if there be a post at a convenient hour on that day, and if there be no such post on that day then by the next post thereafter."

The cheque "A" was dishonoured on 3.4.62 and cheque "B" on 11.5.62. Notice of dishonour is a condition precedent to a right of action against an indorser or a drawer.

Such a notice was sent to the 1st defendant in respect of both cheques nearly a month later, viz. on 11.6.62 by letter P3. There was no notice, therefore, as required by the section quoted above nor were there any special circumstances to excuse suh a notice.

In respect of cheque "A", however, payment was stopped by the drawer (1st defendant).

Under section 50(2)(c)(v) of the Bills of Exchange Ordinance, notice of dishonour is dispensed with when the drawer countermands payment.

The argument in regard to lack of due notice of dishonour, therefore, does not apply to cheque "A", but it is entitled to succeed in regard to cheque "B". That cheque was not drawn by the 1st defendant and was dishonoured because "effects were not cleared" to quote the endorsement made on it by the bank.

The learned District Judge in answering the issue relating to due notice of dishonour had overlooked this fact, and wrongly decided that the 1st defendant was not entitled to notice in respect of cheques on the ground that he had countermanded payment

The 2nd defendant has not appealed against the judgment. In fact, at the trial he had given evidence which favoured the plaintiffs' case and stated in the course of that evidence: "When the two cheques were dishonoured, the plaintiffs came and saw me and they asked me to give them the money due on the cheques."

The judgment against him must therefore stand.

We vary the judgment and decree in respect of the 1st defendant only by entering judgment against him for a sum of Rs. 1,000/- with legal interest thereon from date of action, and costs in the lower court.

As both parties have partially succeded here, there will be no costs of appeal.

H. N. G. Fernando, C.J.

I agree.

Judgment varied.

Privy Council Appeal No. 38 *of* 1966

Present: **Lord Morris of Borth-y-Gest, Lord Hodson, Lord Pearce, Sir Douglas Menzies, Sir Alfred North**

KARIAPPER *vs.* WIJESINHA & ANOTHER

From
THE SUPREME COURT OF CEYLON

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

DELIVERED ON: 24th JULY, 1967

Ceylon (Parliamentary Elections) Order in Council — Election as Member of House of Representatives — Whether seat is vacated by the operation of the Imposition of Civic Disabilities (Special Provisions) Act No. 14 *of* 1965 *— Competence of Parliament to pass the Act imposing disabilities and disqualifications on named individuals — Implied powers of Parliament — Ceylon (Constitution) Order in Council, sections* 29(1) *and* (4) *— Appropriateness of Writ of Mandamus on Clerk to the House of Representatives for payment of salary to a member of the House.*

The appellant, was elected to the House of Representatives on 22nd March, 1965 and was normally entitled to hold office for 5 years unless the Parliament was sooner dissolved. In 1959 the appellant, along with five others, had been found guilty by a Commission of Inquiry of certain allegations of bribery made against them. On 16th November 1965, the Parliament passed the Imposition of Civic Disabilities (Special Provisions) Act imposing certain civic disabilities on these six persons in consequence of which, so for as the appellant was concerned, his seat as a Member of the House of Representatives

was deemed to have become vacant. In pursuance of these provisions the Clerk to the House of Representatives and the Assistant Clerk refused to recognise the appellant as a member of Parliament and to pay him his remuneration and allowances as a member.

It was contended on behalf of the appellant that the Act was invalid as it was inconsistent with the Ceylon (Constitution) Order in Council 1946, and secondly, that although it purported to have been enacted as an amendment of the Constitution in the manner provided by section 29 (4) thereof, it was not an effective amendment for the following reasons:—

(1) That the Act was not law. Instead of being the exercise of legislative power, it was the usurpation of judicial power.

(2) That even if the Act were an exercise of legislative power it cannot be regarded as an amendment of the Constitution because it does not, upon its face, have that character.

(3) That if, upon its proper construction, the Act were both an assumption by the Parliament of judicial power and the exercise of that power, the Act attempted too much, for judicial power would need to be acquired by Parliament under an amendment of the Constitution before it could be exercised by Parliament. This would require two Acts of Parliament.

Held: (1) That although the Act was inconsistent with the constitution it was a proper amendment of the constitution enacted in the manner provided by section 29(1) and (4) thereof.

(2) That when the proviso to section 29(4) proceeded to set out the manner of presentation of a constitutional amendment it did not intend to prescribe a particular form to be present on the face of it.

(3) That in the exercise of Parliament's powers to protect itself, the passing of a law imposing disabilities on a particular member of Parliament for conduct unfitting him to remain as such is not in essence a law punishing him for his conduct, but should be treated as an incident of the legislative function and that the Act was, therefore, not a usurpation of judicial power.

(4) That a mandate in the nature of a Writ of Mandamus did not lie against the respondents as they were servants of the Crown and only owed duties to the House itself or to the Crown as the employer of the respondents but not to the appellant.

Referred to: *Liyanage* vs. *The Queen* (1967) A.C. 259.
Shell Company of Australia Limited vs. *Federal Commission of Taxation* (1931) A.C. 275; 144 L.T. 421; 47 T.L.R. 115.
Huddart, Parker & Co. vs. *Moorehead* (1909) 8 C.L.R. 330,
Cummings vs. *The State of Missouri* IV Wall. 277.
United States vs. *Lovett* 328 U.S. 303
The Queen vs. *Richards e.p. Fitzpatrick and Browne* 92 C.L.R. 157
The Queen vs. *White and Others e.p. Eyrnes* 109 C.L.R. 665.
McCawley vs. *The King* (1920) A.C. 691; 123 L.T. 177; 36 T.L.R. 387.
Bribery Commissioner vs. *Ranasinghe* (1965) A.C. 172; LXVI C.L.W. 1; 66 N.L.R. 73

E. F. N. Gratiaen, Q.C., with *L. Blom Cooper, M. I. Hamavi Haniffa* and *Mark Fernando*, for the appellant.

Ralph Milner, Q.C., with *R. K. Handoo* and *H. L. de Silva*, for the respondents.

Sir Douglas Menzies

This is an appeal from a judgment and decree of the Supreme Court of Ceylon (Sansoni, C.J. and G. P. A. Silva, J.) refusing the appellant's application for a mandate in the nature of a writ of mandamus requiring the respondents who are the Clerk to the House of Representatives, Ceylon, and the Assistant Clerk to the House respectively to recognise the appellant as a member of Parliament and to pay him his remuneration and allowances as a member.

The appellant was elected to the House of Representatives, on 22nd March 1965 and was sworn as a member thereof on 5th April following. His term of office was for five years. He continued as a member of the House until 15th November 1965 and the principal question with which the Board is concerned is whether his seat was vacated by the coming into operation on 16th November 1965 of the Imposition of Civic Disabilities (Special Provisions) Act hereinafter called "the Act". It was, if the Act was within the competence of the Parliament of Ceylon, for, in the circumstances, the effect of section 7 was to vacate the appellant's seat.

The unusual procedure which the appellant adopted to obtain a decision upon the validity of the Act — which, not surprisingly, has turned out to be a source of difficulty — was followed because, strangely enough, it seemed the only way to bring the question of the validity of the Act directly before the Supreme Court. Other proceedings seeking a declaration and an injunction in connection with related matters were, so their Lordships have been informed, commenced in the District Court and those proceedings there lie dormant. With them, the Board is not concerned although their Lordships do appreciate that their conclusions here will, as Counsel for the appellant frankly stated have a vital bearing on the proceedings in the District Court.

The Act as its preamble indicates followed, but at a distance of five years, the reports in made 1959 by a Commission of Inquiry constituted under section 2 of the Commissions of Inquiry Act. This Commission, upon inquiry, found that allgations of bribery against certain persons, members of the Senate, House of Representatives or State Council of Ceylon, had been proved. The appellant was one of those persons. The preamble to the Act recorded "And whereas it has become necessary to impose civic disabilities on the said persons consequent on the findings of the said Commission". The Act consequently imposed disabilities upon any person "to whom the Act applies" and "a person to whom this Act applies" was defined to mean "each person specified in the Schedule to this Act in regard to whom the relevant Commission in its Reports found that any allegation or allegations of bribery had been proved". The Schedule named six persons including the appellant. The disabilities imposed by the Act extended to disqualification for seven years from registration as an elector and from voting at elections; disqualification for seven years from being a candidate for election to the House of Representatives or to any local authority; disqualification for seven years from being elected or appointed as Senator or member of the House of Representatives or a member of any local authority or sitting and voting as such; and disqualification for all time from being employed as a public servant. Section 7 of the Act is the one with which the Board is immediately concerned. It is in these terms:

> "Where, on the day immediately prior to the relevant date, a person to whom this Act applies was a Senator, or a member of the House of Representatives or of any local authority, his seat as a Senator or such member, as the case may be, shall be deemed, for all purposes, to have become vacant on that date."

If this section is valid the appellant's application, wherein he asserted his continued membership of the House of Representatives, was rightly refused by the Supreme Court.

The attack upon the validity of the Act asserted two propositions with regard to it. Frst, that it was inconsistent with the Ceylon (Constitution) Order in Council 1946, *i.e.*, the Constitution of Ceylon, and, secondly, that although it purported to have been enacted as an amendment of the Constitution in the manner provided by section 29(4) thereof, it was not an effective amendment. Three reasons were advanced for this second proposition:

(1) That the Act was not a law. Instead of being the exercise of legislative power it was the usurpation of judicial powers.

(2) That even if the Act were an exercise of legislative power it cannot be regarded as an amendment of the Constitution because it does not, upon its face, have that character.

(3) That if, upon its proper construction, the Act were both an assumption by the Parliament of judicial power and the exercise of that power, the Act attempted too much for judicial power would need to be acquired by Parliament under an amendment of the Constitution before it could be exercised by Parliament. This would require two Acts of Parliament.

On two important matters there was no controversy before the Board.

The appellant's first proposition, that there was inconsistency between the provisions of the Act and the Constitution of Ceylon, was not disputed. By section 24 of the Constitution provision is made for the vacation of the seat of a member of Parliament in specified circumstances which have no relevace to the appellant. These include section 24(1)(*d*) viz. "if he (*i.e.*, a member of Parliament) becomes subject to any of the disqualifications mentioned in section 13 of this Order". Section 13(3)(*k*) is as follows:

> "if during the preceding seven years he has been adjudged by a competent court or by a Commission appointed with the approval of the Senate or the House of Representatives or by a Committee thereof to have accepted a bribe or gratification offered with a view to influence ing his judgment as a Senator or as a Member of Parliament."

The appellant was not adjudged to have accepted a bribe, etc., by a court or by such a Commission. There is therefore no doubt that, if the Act is valid, the appellant's seat was vacated upon a ground not to be found in the Constitution as it stood before the Act came into force.

The second matter not in controversy before the Board was that the Constitution of Ceylon embodies the doctrine of the separation of legislative, executive and judicial power, at least to the extent that it commits judicial power to the Courts to the exclusion of the Parliament. This was decided by the Privy Council in *Liyanage* vs. *The Queen* (1967) A.C. 259. Their Lordships after referring to a number of the provisions of the Constitution of Ceylon said at pages 287 and 288:

> "These provisions manifest an intention to secure in the judiciary a freedom from political, legislative and executive control. They are wholly appropriate in a Constitution which intends that judicial power shall be vested only in the judicature. They would be inappropriate in a Constitution by which it was intended that judicial power should be shared by the executive or the legislature. The Constitution's silence as to the vesting of judicial power is consistent with its remaining, where it had lain for more than a century. in the hands of the judicature. It is not consistent with any intention that henceforth it should pass to or be shared by, the executive or the legislature."

Later at page 289, after referring to the contention of the Solicitor-General that the Supreme Court was wrong in finding in the Constitution of Ceylon a separation of powers rather than merely a separation of function, their Lordships said:

> ".....that decision was correct and there exists a separate power in the judicature which under the Constitution as it stands cannot be usurped or infringed by the executive or the legislature."

The Board is now in a position to consider the first question for its determination, viz, whether the Act is what it purports to be, a law made by Parliament; or, is rather, an exercise of judicial power.

Counsel for both the appellant and the respondents were content to accept, so far as it goes, the description of "judicial power" adopted by the Judicial Committee in *Shell Company of Australia Limited* vs. *Federal Commission of Taxation* (1931) A.C. 275 at pages 295 and 296 in a passage referring to the Constitution of the Commonwealth of Australia:

> "What is 'judicial power'? Their Lordships are of opinion that one of the best definitions is that given by Griffith C.J. in *Huddart, Parker & Co.* vs. *Moorehead* 8 C.I.R. 330, 357, where he says 'I am of opinion that the words "judicial" as used in section 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action."

This description was adopted, however, in a case where the question at issue was whether or not a Taxation Board of Review was exercising judicial power in the sense of ascertaining and applying an established standard of liability and it is not so pertinent in a case such as this where the problem is rather to ascertain the true character of an enactment which is in form legislation altering legal rights by its own force. This observation does however point to what appears to their Lordships as the appellant's fundamental difficulty, *i.e.*, that what is claimed to be a judicial determination is in form legislation altering the law as it stood. Counsel for the appellant have naturally fastened upon certain observations in which bills of attainder and bills of pains and penalties have been referred to as 'an exercise of the judicial power of Parliament in a legislative form", *e.g.*, Halsbury's Laws of England, 3rd Ed., Vol. 28, page 398, and have sought to establish that the character of the Act is that of a bill of attainder or a bill of pains and penalties. Reference was also made to observations in *Liyanage* vs. *The Queen* (supra) at page 291 to describe the Acts there successfully impugned viz.:

> "One might fairly apply to these Acts the words of Chase J., in the Supreme Court of the United States in *Calder* vs. *Bull:*
>
> 'These acts were legislative judgments; and an exercise of judicial power.'
>
> Blackstone in his Commentaries said:
>
> 'Therefore a particular act of the legislature to confiscate the goods of Titius, or to attaint him of high treason, does not enter into the idea of a municipal law; for the operation of this act is spent upon Titius only and has no relation to the community in general; it is rather a sentence than a law.'
>
> If such Acts as these were valid the judicial power could be wholly absorbed by the legislature and taken out of the judges."

Moreover by reference to decisions of the Supreme Court of the United States of America it was sought to support the conclusion that the Act

would, in the United States of America, fall within the category of an act of attainder.

It is unwise in the sphere of constitutional law to go beyond what is necessary for the determination of the case in hand and because the Board is of the opinion that the character of the Act is not that on an act of attainder or a bill of pains and penalties it is not necessary here to attribute a particular character to what has, as as has already been seen, been described an "exercise of the judicial power of Parliament in a legislative form". The Act is not an act of attainder or a bill of pains and penalties because it does not condemn the appellant for any action, *i.e.*, it contains no declaration of guilt, and because the disabilities which it imposes have not the character of punishment for guilt.

At this point it is convenient to say a little more about the United States cases upon which Mr. Gratiaen so greatly relied. They were all cases involving the construction and application of Article 1, Section 9, clause 3 or Article 1, Section 10 of the Constitution of the United States of America which together prohibit Congress or a State from passing a bill of attainder or *ex post facto* law. As early in the constitutional history of the United States as 1866 it was decided that "a bill of attainder is a legislative act which inflicts punishment without a judicial trial. If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties." *Cummings* v. *The State of Missouri* IV Wall. 277 at page 323. In the same case the Court described such laws as follows:

> "In these cases the legislative body, in addition to its legitimate functions, exercise the powers and office of judge; it assumes, in the language of the text-books judicial magistracy; it pronounces upon the guilt of the party, without any of the forms of safeguards of trial; it determines the sufficiency of the proofs produced, whether conformable to the rules of evidence or otherwise; and it fixes the degree of punishment in accordance with its own notions of the enormity of the offence."

Mr. Gratiaen seizing upon the description of the enactment of the bill of attainder as an assumption of judicial magistracy went so far as to submit that Article 1, Section 9, clause 3 of the Constitution of the United States of America was plainly superfluous because the separation of powers, so clearly embodied in that Constitution, carried with it as a necessary consequence the limitation that Congress could not pass a law truly described as an exercise of judicial magistracy. He went on to contend that what was to be found by express prohibition in the Constitution of the United States was, upon the authority of the American decisions, to be found by implication in the Constitution of Ceylon. Their Lordships, however, would express no opinion upon the hypothetical question of the American law, *i.e.*, whether or not the Congress of the United States could, in the absence of Article 1, Section 9, clause 3 of the Constitution, pass an Act of attainder, and the Board is not prepared to base any reasoning in relation to the powers of the Parliament of Ceylon upon the assumption that Congress could not do so.

In considering the argument that the Act is in truth a bill of attainder or a bill of pains and penalties their Lordships have, of course, been greatly assisted by the judgments of the justices of the Supreme Court to which their attention has been drawn and they have found particularly valuable guidance in the judgment of Frankfurter J. in the *United States* v. *Lovett* 328 U.S. 303 notwithstanding that in the result that learned judge was one of the minority. Frankfurter, J. said "All bills of attainder specify the offense for which the attainted person was deemed guilty and for which punishment was imposed". In rejecting the contention that the Act thereunder consideration was a bill of attainder His Honour said "no offense is specified and no declaration of guilt is made..... Not only does section 304 lack the essential declaration of guilt. It likewise lacks the imposition of punishment in the sense appropriate for bills of attainder ..... Punishment presupposes an offense, not necessarily an act previously declared criminal, but an act for which retribution is exacted. The fact that harm is inflicted by governmental authority does not make it punishment. Figuratively speaking all discomforting action may be deemed punishment because it deprives of what otherwise would be enjoyed. But there may be reasons other than punitive for such deprivation. A man may be forbidden to practice medicine because he has been convicted of a felony..... or becuase he is no longer qualified..... 'The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact.' " *Cummings* v. *State of Missouri*, 4 Wall. 277 ,320, 18 L. Ed. 356 pages 322, 323 and 324.

The two elements found by Frankfurter, J. to be absent from the law under consideration in *United States* vs. *Lovett* (supra) the Board find to be absent from the Act. First, it contains no declaration of guilt of bribery or of any other act. As has already been observed it applies to "each person specified in the Schedule of this Act in regard to whom the relevant Commission in its Reports found that any allegation or allegations of bribery had been proved." It is the Commission's finding that attracts the operation of the Act not any conduct of a person against whom the finding was made. Parliament did not make any finding of its own against the appellant or any other of the seven persons named in the Schedule. The question of the guilt or innocence of the persons named in the Schedule does not arise for the purpose of the Act and the Act has no bearing upon the determination of such a question should it ever arise in any circumstances. Secondly, the disabilities imposed by the Act are not, in all the circumstances, punishment. It is, of course, important that the disabilities are not linked with conduct for which they might be regarded as punishment but more importantly the principal purpose which they serve is clearly enough not to punish but to keep public life clean for the public good. Their Lordships have already summarised the disabilities imposed by the Act and what has just been said applies to all disabilities so imposed. The particular task of the Board is, however, to decide whether the law vacating the appellant's seat is a valid law and in their Lordships' opinion it would be wrong to describe that law as one for the punishment of the member whose seat is vacated. Reference has already been made to earlier legislation vacating the seats of persons convicted of bribery by a Court or found by certain Commissions to have been guilty of bribery. The Act is a law of the same character as this legislation notwithstanding that it operates in respect of particular persons against whom findings of bribery have been made. Unforeseen cases may always arise calling for the special exercise of Parliament's power to protect itself. Thus if a member of Parliament were to act in a way not previously proscribed but obviously unfitting him to remain in Parliament a new law vacating his seat would not, in essence, be a law punishing him for his conduct. The case now under consideration is, of course, substantially different from the case of *The Queen* vs. *Richards e.p. Fitzpatrick and Browne* 92 C.L..R 157 but it may be observed that in a judgment, approved by the Judicial Committee, Dixon C.J. speaking for the High Court of Australia did emphasise the tendency to treat the powers and privileges attached to the House of Commons for its own protection as incidents of the legislative function. His Honour said:

> "It should be added to that very simple statement that throughout the course of English history there has been a tendency to regard those powers as not strictly judicial but as belonging to the legislature, rather as something essential or, at any rate, proper for its protection. This is not the occasion to discuss the historical grounds upon which these powers and privileges attached to the House of Commons. It is sufficient to say that they were regarded by many authorities as proper incidents of the legislative function, notwithstanding the fact that considered more theoretically — perhaps one might even say, scientifically — they belong to the judicial sphere."

It was no doubt the recognition of this tendency that influenced G. P. A. Silva, J. to say:

> "a Court will be slow to invalidate any law passed by the Parliament imposing certain disabilities or disqualifications on Members of Parliament in view of the power the Parliament has to control its own proceedings and impose its own discipline."

Speaking generally, however, their Lordships would observe that it is not readily to be assumed that disciplinary action, however much it may hurt the individual concerned, is personal and retributive rather than corporate and self-respecting. The distinction between discipline and punishment is one which the High Court of Australia has drawn recently in *The Queen* vs. *White and Others e.p. Byrnes* 109 C.L.R. 665. The question was whether the chief officer of a Commonwealth Department who in the exercise of powers conferred by section 55 of the Public Service Act found an officer of his department guilty of an "offence" in refusing to have obeyed a lawful order and imposed a fine therefore exercised "judicial power". Section 55 made wilful disobedience to a lawful order an "offence" for which punishment was provided. The Court having observed the difficulty discovered in the case was apparent rather than real and arose from the choice of language that had been made said at page 670:

> "Section 55, in creating so-called "offences" and providing for their "punishment", does no more than define what is misconduct on the part of a public servant warranting disciplinary action on behalf of the Commonwelath and the disciplinary penalties that may be imposed or recommended for such misconduct; it does not create offences punishable as crimes."

For the foregoing reasons their Lordships therefore reject the argument that the Act is

legislation of the same character as an act of attainder or a bill of pains and penalties.

Their Lordships however going beyond this merely negative conclusion, are of opinion that the Act is an exercise of legislative power and not the usurpation of judicial power. The Act is an Act of Parliament purporting to change the law and providing in terms that in the event of inconsistency with existing law the Act shall prevail. Section 10. In determining whether the Act should be regarded as a usurpation of judicial power weight must be given to the consideration that it is in form legislation and that it is enacted:

> ".....by the Queen's Most Excellent Majesty by and with the advice and consent of the Senate and the House of Representatives of Ceylon in this present Parliament assembled, and by the authority of the same....."

The Act is subject to the ordinary incidents of legislation, viz., it can be repealed or amended. Furthermore, for the reasons already stated the Act does not declare guilt or impose punishment. Moreover, although the Act has a strictly limited operation in that it applies only to "each person specified in the Schedule..... in regard to whom the revelant Commission in its Reports found that any allegation or allegations of bribery had been proved", its terms show that reference to the Reports — which do not form part of the Act — will or may be necessary in its application. It does not speak like a court order. Finally, although the operation of the Act is made to depend upon past events that operation is prospective for the disabilities are imposed from the date of its commencement for the periods defined.

Having come to the conclusion that the Act is legislative in character it now becomes necessary to consider the contention that being inconsistent with the provisions of the Constitution it is invalid because it was not enacted in accordance with the requirements of section 29(4) of the Constitution. Section 29(1) and (4) of the Constitution are as follows:

> "(1) Subject to the provisions of this Order, Parliament shall have power to make laws for the peace, order and good government of the Island."

> "(4) In the exercise of its powers under this section, Parliament may amend or repeal any of the provisions of this Order, or of any other Order of Her Majesty in Council in its application to the Island:

> 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 on it a certificate under the hand of the Speaker that the number of votes cast in favour thereof in the House of Represent tatives amounted to not less than two-thirds of the whole number of Members of the House (including those not present)."

Here it may be observed that subsections (2) and (3) forbidding laws interfering with religious freedom and rendering void any laws in contravention of this prohibition do not require consideration.

The bill for the Act when presented for the Royal Assent did have endorsed upon it the certificate of the Speaker required by the proviso to section 29(4) and that certificate was in accordance with the actual voting in the House. The critical question is, therefore, whether something more was required to bring the Act within the power of Parliament conferred by section 29(1) and (4). Counsel for the appellant argued that there was and that the Act, being inconsistent with the Constitution as it stood, was invalid for the reason that it was not in form an express amendment of the Constitution.

As long ago as 1920 the Judicial Committee in *McCawley* vs. *The King* (1920) A.C. 691 decided that an uncontrolled constitution could like any other Act of Parliament be altered simply by the enactment of inconsistent legislation. Their Lordships' statement of the proposition which was rejected was as follows:

> "The constitution of Queensland is a controlled constitution. It cannot, therefore, be altered merely by enacting legislation inconsistent with its articles. It can only be altered by an Act which in plain and unmistakable language refers to it asserts the intention of the Legislature to alter it; and consequently gives effect to that intention by its operative provisions."

The reason for the rejection of this proposition was thus stated:

> "The Legislature of Queensland is the master of its own household, except in so far as its powers have in special cases been restricted. No such restriction has been established, and none in fact exists, in such a case as is raised in the issues now under appeal."

The power of the Parliament of Ceylon to amend or repeal the provisions of the Constitution is restricted in the manner provided by section 29. There is, therefore, a most material distinction between the Constitution of Ceylon and that of Queensland which is made apparent by the following citations from the judgment of Lord Birkenhead L.C. His Lordships said:

"The first point which requires consideration depends upon the distinction between constitutions the terms of which may be modified or repealed with no other formality than is necessary in the case of other legislation, and constitutions which can only be altered with some special formality, and in some cases by a specially convened assembly.

Many different terms have been employed in the text-books to distinguish these two contrasted forms of constitution. Their special qualities may perhaps be exhibited as clearly by calling the one a controlled and the other an uncontrolled constitution as by any other nomenclature."

Nevertheless, notwithstanding the distinction that renders the decision in *McCawley's* Case inapplicable here their Lordships to rely upon a passage from the judgment of the Lord Chancellor. It is as follows:

".....Narrow constructions were placed by colonial judges upon the instruments creating constitutions in colonial Legislatures. Causes of friction multiplied, and soon a conflict emerged, analogous to that which is the subject of discussion to-day, between those who insisted that the constitutions conceded to the colonies could be modified as easily as any other Act of Parliament, and those who affirmed that the statute defining such constitutions was 'fundamental' or 'organic' and that therefore the constitution was controlled. These controversies became extremely grave, and were reflected in an opinion, cited in the course of the argument and given in 1864 by the law officers of the day, Sir Roundell Palmer and Sir Robert Collier. These distinguished lawyers were of opinion, and the Board concurs in their view, that when legislation within the British Empire which is inconsistent with constitutional instruments of the kind under consideration comes for examination before the Courts, it is unnecessary to consider whether those who were responsible for the later Act intended to repeal or modify the earlier Act. If they passed legislation which was inconsistent with the earlier Act, it must be presumed that they were aware of, and authorized such inconcistency."

Although this passage has no bearing upon the ultimate question here, *i.e.*, whether the manner and form required by section 29 for a constitutional amendment were actually observed, it has an important bearing upon the question to which a good deal of argument was addressed, namely, whether an inconsistent law should be regarded as an amendment of a controlled constitution in the absence of an expressed intention to amend. The expression of opinion of the law officers concurred with by the Board is that, as a general rule, an inconsistent law amends. This is, of course, but an instance of the fundamental principle that it is from its operation that the intention of a statute is to be gathered. As the law officers said in the opinion already referred to:

" 'If the colonial Registration Act was *ultra vires* of the Legislature of South Australia, it can only be so on the ground that it altered the electoral law contained in the Constitutional Act, No. 2 of 1855. Assuming this to have been its effect, we cannot accede to the argument, which seems to have found acceptance with two South Australian Judges, that it was not passed "with the object" of altering the Constitution of the Legislature. It must be presumed that a legislative body intends that which is the necessary effect of its enactments; the *object*, the *purpose* and the *intention* of the enactment, is the same; it need not be expressed in any recital or preamble; and it is not (as we conceive) competent for any Court judicially to ascribe any part of the legal operation of a Statute to inadvertence."

In the *Bribery Commissioner* vs. *Ranasinghe* (1965) A.C. 172 the Judicial Committee had occasion to consider *McCawley's* case with reference to the Constitution of Ceylon and explained the essential difference between *McCawley's* case and the case then under consideration. Lord Pearce giving the judgment of the Board said:

"It is possible now to state summarily what is the essential difference between the *McCawley* case and this case. There the legislature, having full power to make laws by a majority, except upon one subject that was not in question, passed a law which conflicted with one of the existing terms of its Constitution Act. It was held that this was valid legislation, since it must be treated as *pro tanto* an alteration of the Constitution, which was neither fundamental in the sense of being beyond change nor so constructed as to require any special legislative process to pass upon the topic dealt with. In the present case, on the other hand, the legislature has purported to pass a law which, being in conflict with section 55 of the Order in Council, must be treated, if it is to be valid, as an implied alteration of the Constitutional provisions about the appointement of judicial officers. Since such alterations, even if express, can only be made by laws which comply with the special legislative procedure laid down in section 29(4), the Ceylon legislature has not got the general power to legislate so as to amend its Constitution by ordinary majority resolutions, such as the Queensland legislature was found to have under section 2 of its constitution Act, but is rather in the position, for effecting such amendments, that that legislature was held to be in by virtue of its section 9, namely, compelled to operate a special procedure in order to achieve the desired result."

Accordingly, therefore, upon general principles and with the guidance of earlier authority their Lordships have come to the conclusion that the Act, inconsistent as it is with the Constitution of Ceylon, is to be regarded as amending that Constitution unless there is to be found in the constitutional restrictions imposed on the power of amendment some provision which denies it constitutional effect. This brings the Board to the actual terms of section 29(1) and (4).

Section 29(1) confers full legislative power upon Parliament subject only "to the provisions of this Order", *i.e.*, the Constitution. Subsection (4) indicates that the power conferred by sub-

section (1) extends to amending or repealing "any of the provisions of this Order"' The exercise of this power is however restricted by the proviso. As has already been explained, their Lordships do read the words "amend or repeal" in the earlier part of section 29(4) as covering an amendment or repeal by inconsistent enactment. Indeed were these words "amend or repeal" not to be regarded as covering an alteration by implication it might be that a law effecting such an alteration could be enacted under section 29(1) without any restriction arising from subsection (4). Their Lordships however do not so read the statutory provisions and had no doubt that the Parliament of Ceylon has not uncontrolled power to pass laws inconsistent with the Constitution. Apart from the proviso to subsection (4) therefore the Board has found no reason for not construing the words "amend or repeal"' in the earlier part of section 29(4) as extending to amendment or repeal by inconsistent law. Attention was, however, directed to the words in the proviso "Bill for the amendment or repeal' and it was argued that only a bill which provided expressly for the amendment or repeal of some provision of the Order would fall within these words. Their Lordships would find it difficult to restrict the plain words of the earlier part of the subsection by reference to an ambiguity in the proviso, if one were to be found, but they find no ambiguity and they reject the limitation which it has been sought to introduce into the proviso. A bill which, if it becomes an act, does amend or repeal some provision of the Order is a bill "for the amendment or repeal of a provision of the Order." It would have been inexact to refer in the proviso to a bill to amend or repeal a provision of the Order, but a bill which when passed becomes an amending Act falls exactly within the description under consideration. The bill which became the Act was a bill for the amendment of section 24 of the Constitution simply because its terms were inconsistent with that section. It is the operation that the bill will have upon becoming law which gives it its constitutional character not any particular label which may be given to it. A bill described as one for the amendment of the Constitution which contained no operative provision to amend the Constitution would not require the prescribed formalities to become a valid law whereas a bill which upon its passing into law would, if valid, alter the Constitution would not be valid without compliance with those formalities. In his judgment in the Supreme Court Sansoni, C.J. quoted aptly from the judgment of Isaacs and Richards, JJ. in *McCawley's* case — the minority judgment in the High Court approved by the Privy Council — as follows: "The effect of the repealing Act must therefore depend on what it does, and not on the label it affixes to itself." See 26 C.L.R. at page 63. Their Lordships also agree with Silva, J. when he said "I do not think that when the proviso to section 29(4) proceeded to set out the manner of presentation of a constitutional amendment it also intended to prescribe a particualr form to be present on the face of it".

In the course of argument a good deal was made of the doubts and complexities that must follow if the Constitution can be amended by laws which do not, as it were, show their colours, and the point was forcibly emphasized by reference to the very law under consideration. The Board is thoroughly aware of the difficulties that are likely to result from altering the Constitution except by laws which plainly and expressly amend it with particularity. Considerations of this sort, powerful as they ought to be with draftsman, cannot in a court of law weigh against the considerations which have brought the Board to its conclusions that a bill, which upon its passage into law would amend the Constitution, is a bill for its amendment. In association with the consideration to which reference has just been made attention was drawn to section 10 of the Act. This section is far from clear and their Lordships have not felt able to base any affirmative reasoning upon it. All that can be gathered from it is that Parliament was aware that the Act might be regarded as amending the Constitution in some particulars. The introduction of such a provision does little to obviate the complexities to which legislation such as the Act must inevitably give rise in the future if and when it becomes necessary to set out the Constitution as amended.

Finally upon the merits of the case their Lordships would observe that in view of their conclusion that the Act is a law and not an exercise of judicial power it has not been necessary to consider the question, which was fully argued on both sides, whether Parliament can by a law passed in accordance with the proviso to section 29(4) both assume judicial power and exercise it in the one law.

Their Lordships have thought it proper to deal with the appeal upon its merits before considering whether the procedure actually adopted to bring the question of the validity of the Act before the supreme Court, *i.e.*, an application for

a mandate in the nature of a writ of *mandamus* to the Clerk and the Assistant Clerk of the House of Representatives, was appropriate. In the Board's opinion it was not. In the end it was practically conceded by Mr. Gratiaen that it had not been shown that the respondent or either of them were under a duty to the appellant to pay him his parliamentary salary and allowances even if he continued to be a member of Parliament. Furthermore in their Lordships' opinion it was not shown that the respondents or either of them owed any duty to the appellant to "recognise" him as a member of Parliament even if a sufficiently precise meaning to found *mandamus* could be accorded to the vague word "recognise". The duties upon which reliance was placed arose under the Standing Orders of the House of Representatives and although they were no doubt duties in respect of members of the House they were duties owed to the House itself or to the Crown as the employer of the respondents. On the question of the competence of the proceedings in the Supreme Court their Lordships have therefore come to the same conclusion as did Sansoni, C.J.

Their Lordships will therefore humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the costs of the appeal.

Appeal dismissed.

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

THE ATTORNEY-GENERAL *vs.* RATWATTE & ANOTHER

S.C. No. 2 *of* 1967 — *D.C. Colombo No.* B/13

Argued & Decided on: 4th July, 1967
Reasons delivered on: 10th July, 1967

Bribery — Abetment of bribery — Appeal against acquittal — When such appeal will be allowed — Offences of abetment — How affected by acquittal of person alleged to be abetted — False pretences — Cheating — No instigation — Criminal Procedure Code, sections 210, 336 — *Bribery Act(Cap.* 26), *sections* 19, 20.

The two appellants were indicted on seven counts, three of which alleged the commission by the 1st accused of offences under sections 19 and 20 of the Bribery Act (Cap. 26). Three counts alleged the commission by the 2nd accused of the offences of abetment of the three offences alleged to have been committed by the 1st accused. The remaining count (count 3) alleged the abetment by the 2nd accused of the offence of offering by one Papuraj of a bribe to the 1st accused.

At the close of the case for the prosecution, the trial Judge, after hearing the address of Counsel on one point, remarked that he did not think this was a case for him to call upon the accused for their defence, acquitted both accused, and later set out his reasons.

The Crown appealed against the acquittals of both accused.

At the argument in appeal, Counsel who appeared for the Crown, did not seek to press the appeal against the acquittal of the 1st accused on the facts.

Held (1) That an appeal from an acquittal on a question of fact should only be allowed to succeed in very exceptional cases and where it is perfectly clear to the appellate tribunal that the finding of the inferior court is erroneous. The appeal could be justified only if the misdirection is obvious and has in effect resulted in a miscarriage of justice.

Followed: *The King* vs. *Mack and Carron*, (1930) 11 C.L. Rec. 1.

Per **T. S. Fernando, J.** — "The Court, in the same case, quoting Shaw J, in *The King* vs. *Kumarasamay*, stated that 'the provision contained in section 336 of the Criminal Procedure Code authorising an appeal at the instance of or with the sanction of the Attorney-General in the case of an acquittal, even on a question of fact, is one unknown to the English Criminal Law and is somewhat opposed to one of its elementary principles, namely, that no man should be twice placed in jeopardy for the same offence. It is a necessary provision here where we sometimes have gentlemen acting as Magistrates and even as District Judges who have not only had no legal training, but have sometimes had even very little experience of local conditions'. This last observation of Shaw, J. no longer holds good here because the judiciary of this Country has, at least for the last 25 years, been manned exclusively by members of the legal profession."

(2) That when the 1st accused was eliminated from a participation in the transaction alleged, all that would have been established was that the 2nd accused by false pretences obtained money from P. (the chief witness for the prosecution), thereby committing the offence of cheating, which was a very different charge to that alleged in the third count, which charge also failed.

(3) As the Judge's finding involved the inference that the 2nd accused never intended that the money should pass beyond him, he could not be said to have instigated the offer of a gratification which he never intended to give.

E. F. N. Gratiaen, Q.C., with *V. S. A. Pullenayagam, A. C. de Zoysa* and *R. Abeysuriya, Crown Counsel*, for the appellant.

G. E. Chitty, Q.C., with *E. R. S. R. Coomaraswamy, T. W. Rajaratnam* and *Nihal Jayawickrama*, for the 1st accused-respondent.

J. V. C. Nathaniel, with *J. Weerasekera*, for the 2nd accused-respondent.

T. S. Fernando, J.

The two respondents to this appeal stood their trial as the 1st and 2nd accused respectively in the District Court of Colombo on an amended indictment under the hand of the Attorney-General consisting of seven counts, three of which alleged the commission by the 1st accused of offences under sections 19 and 20 of the Bribery Act (Cap. 26). Of the other four counts in the indictment, three alleged the commission by the 2nd accused of the offences of abetment of the three offences alleged to have been committed by the 1st accused; the remaining count (count 3) alleged the abetment by the 2nd accused of the offence of offering by one Papuraj of a bribe to the 1st accused.

All seven charges in the indictment were founded upon an allegation that the 1st accused accepted a bribe (in two instalments) of a sum of Rs. 5,000/- as an inducement for obtaining a grant of citizenship in terms of the Citizenship Act for one Cader Sultan, a Malaysian citizen who had entered Ceylon on a visit visa valid for three months that had expired on 30th September 1961. Sultan's application for Ceylon citizenship had been refused and he was under notice to leave this Country. In this situation Sultan sought the assistance of one Papuraj in another effort to obtain citizenship. Papuraj made contact with the 2nd accused who told him that the 1st accused would be in a position to obtain a grant of citizenship for Sultan. The 1st accused was at the relevant time the Private Secretary to the Prime Minister who was also the Minister for Defence and External Affairs, the Minister who had to decide questions relating to grants of citizenship. The 2nd accused informed Papuraj that he had spoken to the 1st accused and that the latter had agreed to obtain a grant of citizenship for Sultan if he was paid a sum of Rs. 5,000/-.

The Crown led the evidence of Papuraj and of another man of the name of Kalam, a brother-in-law of Sultan, that the 2nd accused at about 2.30 p.m. on 16th March 1964 handed over to the 1st accused in the open verandah of the latter's house in Colombo a sum of Rs. 1,000/-, and that on the night of the 18th March 1964 the 2nd accused handed over a further sum of Rs. 4,000/- to the 1st accused in the verandah of the latter's father's house at Balangoda.

The only other evidence touching the 1st accused relied on by the Crown was that a petition P10 bearing the date 6th April 1964 and addressed by the wife of Sultan to the Prime Minister praying for grant of citizenship handed over at the office of the Prime Minister on 5th June 1964 bore the following endorsement by the 1st accused, also made on the same day:—

"Asst. Secretary/M/D. & E.A.
Forwarded."

The Ministry referred to in the above endorsement was the Ministry of Defence and External Affairs and was the appropriate Ministry to deal with the petition in the ordinary way, notwithstanding that it had been addressed to the Prime Minister. Sultan did not obtain citizenship even after the presentation of this petition. He was eventually arrested on 4th May 1965 preparatory to deportation to Malaysia. An application by way of *habeas corpus* made to the Supreme Court was dismissed on 27th May 1965. The complaint to the Bribery Commissioner from which this prosecution originated was made on 30th June 1965 by Papuraj on the eve of Sultan's deportation.

At the close of the case for the Crown on 16th December 1966, the trial judge, addressing the Attorney-General, said "The question that is agitating the Court at this point of time is how do you relate the 1st accused with the givers of the bribe? The Attorney-General then addressed the judge, obviously with a view to assisting him on the point raised. At the conclusion of that address, the trial judge, remarking that he did not think this was a case for him to call upon the accused for their defence, made order acquitting

both accused persons, and on a later date (16.1.67) set out his reasons for that order.

It is clear from the following extract from the statement of reasons that the trial judge did not believe the evidence of Papuraj and Kalam.

"But in my view no reasonable court can accept the oral testimony of Papuraj that this gratification was given to the 1st accused. Here is a person holding a responsible post under Government and one day in the afternoon on the 16th March 1964 an unknown car drove up to the compound. The car contained some people unknown to him, one of the persons, possibly known to him — there is no proof even of that fact — walks up to him who has by now come up to the parties and hands him quite openly Rs. 1,000/- which he accepts without any hestitation and he puts it into his shirt pocket. Similarly, on the night of the 18th March 1964 an unknown car drives up to his house — in this case the ancestral walauwa of the 1st accused — that the same person who on the previous occasion is said to have given him Rs. 1,000/- walks up to him and the 1st accused who has now come to the entrance of his house accepts this Rs. 4,000/- and puts it in his shirt pocket to be seen by the unknown persons in the car. On both occasions the 1st accused does not appear to have been in any way hesitant about accepting the money. He does not appear to have been anxious to conceal the acceptance from any person who may have seen it. He does not take the precaution even of accepting the money without being seen by the unknown persons. It cannot be said that he is unaware of the seriousness of the offence he is committing. He does not seem to care as to whether he is led into a trap or not. I do not think any ordinary person would accept a bribe in such a manner, least of all a person in the position of the 1st accused who holds such a responsible post under Government."

The appeal against the acquittal of the 1st accused was essentially one on facts rather than on law. In respect of appeals from acquittals made in District Courts, it is useful to remind ourselves of the observations of this Court made no long ago as 1930, over a third of a century back, in the case of *The King* vs. *Mack and Carron* (11 Law Rec. 1) that an appeal from an acquittal on a question of fact should only be allowed to succeed in very exceptional cases and where it is perfectly clear to the appellate tribunal that the finding of the inferior court is erroneous. The Solicitor-General had conceded in that case he had a very heavy burden to discharge, and that an appeal could only be justified if there had been a palpable misdirection by the District Judge when considering the facts of the case which could be demonstrated to be wrong on the very face of the record; or, in other words, that his appeal could be justified only if the misdirection was obvious and had in effect resulted in a miscarriage of justice.

The Court, in the same case, quoting Shaw, J. in *The King* vs. *Kumarasamy*, stated that "the provision contained in section 336 of the Criminal Procedure Code authorising an appeal at the instance of or with the sanction of the Attorney-General in the case of an acquittal, even on a question of fact, is one unknown to the English Criminal Law and is somewhat opposed to one of its elementary principles, namely, that no man should be twice placed in jeopardy for the same offence. It is a necessary provision here where we sometimes have gentlemen acting as Magistrates and even as District Judges who have not only had no legal training, but have sometimes had even very little experience of local conditions". This last observation of Shaw J. no longer holds good here because the judiciary of this Country has, at least for the last 25 years, been manned exclusively by members of the legal profession.

It is right to add that Mr. Gratiaen, who argued the Crown's case before us, very properly did not seek to press the appeal against the acquittat of the 1st accused on the facts. Instead he broughl to our attention the requirement of section 210 of the Criminal Procedure Code that an acquittal by a District Judge at the close of the prosecution case without calling for a defence can be justified only where the judge wholly discredits the evidence on the part of the prosecution. He sought to interpret the trial judge's statement of reasons in this case as falling short of one which shows that the prosecution evidence had been wholly discredited. There can, of course, be no set or invariable mode of expressing a judge's view that evidence is not credit-worthy at all. Judges will employ varying language to express their opinions to this effect. To maintain an argument that the judge is not wholly discrediting the evidence where the judge says, as here, that no reasonable court can accept the testimony on the point in question, it is necessary to go on to say also that the judge is putting himself outside

the pale of reasonable men! In the context in which the statement occurs (vide reproduction above), it amounts, in my opinion, to a total discrediting of the evidence on the one important point in the case which touches the 1st accused. In a case which aroused so much interest as this it is, in my opinion, not possible to maintain the contention that this trial judge has inadvertently or otherwise overlooked the conditions precedent to the making of the order specified in the very section under which the order was made. For this reason we dismissed the appeal against the acquittal of the 1st accused.

The appeal against the acquittal of the 2nd accused was pressed before us on a different ground. That acquittal resulted from the trial judge's opinion expressed in the statement of reasons that "once the charges against the 1st accused fail, the charges against the 2nd accused must necessarily fail". While it is true that often when the substantive or principal offence alleged is held not proved it follows that abetment of the offence also fails of proof, there are circumstances where abetment can be established notwithstanding that proof of the substantive or principal offence is lacking. Not infrequently there is too little appreciation of the meaning and scope of the sections that comprise Chapter V of our Penal Code dealing with Abetment. It was argued before us that the statement of reasons is suggestive of a belief reached by the trial judge that the 2nd accused received the money from Papuraj, although the 2nd accused may not have given that money to the 1st accused. Hence there was not here a total discrediting of the evidence of Papuraj, and that therefore there was here an implied requirement of section 210 that the 2nd accused should be called upon for his defence.

In regard to this aspect of the argument, while it may be legitimate for a judge or jury in certain circumstances to disbelieve a witness on one part of his evidence and yet accept his testimony on other parts, we must not lose sight of the fact that in this case Papuraj (and Kalam) were wholly discredited in regard to their unequivocal evidence that money passed from the 2nd accused to the 1st accused in their very presence. But even if the trial judge had accepted that part of the evidence of Papuraj which was confined to the passing of money from him to the 2nd accused, it had to be concluded that the trial judge's acquittal of the 2nd accused on charges 2, 5 and 7 of the amended indictment was correct. These three were charges of abetment of the three offences alleged to have been committed by the 1st accused in soliciting or accepting a bribe. If no bribe was proved to have been solicited or accepted by the 1st accused, then of course the three corresponding charges of abetment also had to fail. It was contended, however, that the position in respect of the one remaining charge, viz. charge 3, was different. This charge alleged that the 2nd accused abetted the offer of a gratification of a sum of Rs. 5,000/- to the 1st accused by Papuraj as an inducement for the 1st accused to procure a grant of Ceylon citizenship for Cader Sultan. The argument advanced was that the moment the 2nd accused instigated Papuraj to offer money to the 1st accused the 2nd accused's offence of abetment alleged in the 3rd charge was complete. If the 1st accused has now to be eliminated from a participation in this transaction, then all that would have been established is that the 2nd accused by false pretences obtained money from Papuraj, thereby committing the offence of cheating, a very different offence to that alleged. Moreover, as the judge's finding now involves the inference that the 2nd accused never intended that the money should pass beyond him he could not be said to have instigated the offer of a gratification which he never intended to give. In these circumstances we did not think there was any purpose to be served by sending the case back for a continuation of the trial as against the 2nd accused alone on charge 3. That charge had itself failed, and we therefore dismissed the appeal also against the acquittal of the 2nd accused.

Fernando, C.J.

I agree.

Appeal dismissed.

Present: **Siva Supramaniam, J.**

J. E. M. SENEVIRATNE *vs.* A. H. M. JAHAN, S.I. POLICE

S.C. 203/1967 — *M.C. Narahenpita Case No.* 31302

Argued on: 11th May, 1967
Decided on: 3rd August, 1967

Motor Traffic—Driving Motor car on highway while under influence of alcohol—Medical expert's evidence — Grounds for opinion — Insufficient — Proof necessary in such cases — Incapacity to have proper control of vehicle — Evidence insufficient — Motor Traffic Act (Cap. 203) *Section* 151(1).

Held: (1) That in a charge of driving a motor-car on a highway while under the influence of alcohol, the mere facts that an accused was strongly smelling of alcohol and that his pupils were semi-dilated and sluggish might indicate that he had consumed alcohol but would not prove the charge. The evidence should justify the inference that the accused was under the influence of drink to such an extent as to be incapable of having proper control of the vehicle.

Followed: *Don Carthelis* vs. *Ibrahim*, (1955) 56 N.L.R. 561.

(2) That where the evidence did not indicate that as a result of the alcohol he had consumed, the accused's powers of co-ordination had been impaired or that his capacity to drive had been prejudicially affected and there was no evidence that either immediately before or after the accident the accused drove his car in such a manner as to show want of control over it, but the evidence showed that the accused drove the car quite competently from the scene of the accident to the Police Station, the accused could not be found guilty of the offence.

E. R. S. R. Coomaraswamy, with *S. Sahabandu*, for the accused-appellant.

Sunil de Silva, Crown Counsel, for the Attorney-General.

Siva Supramaniam, J.

The appellant was convicted in this case on a charge of having driven a motor car on a highway while he was under the influence of alcohol in breach of Section 151(1) of the Motor Traffic Act and sentenced to pay a fine of Rs. 250/-, in default to undergo six weeks simple imprisonment. He has appealed from the conviction and sentence. There was a second count that he had failed to take such action as was necessary to avoid an accident in breach of Section 149(1) of the Motor Traffic Act but he was acquitted of that charge.

The facts of the case may be briefly stated as follows:—

On 23rd October 1964 at about 2 p.m. the appellant who was driving his car No. 3 Sri 4141 along Skinner's Road South in Colombo, while overtaking taxicab No. 3 Sri 2728, collided with it on the right side causing a scrape mark on the right rear mudguard and a dent on the hub cap of the right rear wheel of the said taxicab. It was conceded that the damage was very slight. The taxi driver made a complaint at the Kotahena Police Station. The appellant too drove in his car to the same Police Station and arrived there before the taxi driver's statement was recorded. P.C. Dhanapala to whom the complaint was made formed the impression that the appellant was after liquor and took him to the Assistant Judicial Medical Officer, who, after examination reported that the appellant was under the influence of alcohol. The charge contained in count (1) was based on the Medical Officer's report.

The taxi driver in his evidence stated that the appellant was "after drinks" and P.C. Dhanapala stated that the appellant "was unsteady." The learned Magistrate relied principally on the evidence of the Medical Officer in convicting the appellant on Count (1).

The Medical Officer stated in the course of his evidence-in-chief that he examined the appellant at 3.45 p.m. and found him to be under the influence of alcohol and, in the condition, he was not in a fit condition to drive a motor vehicle. Under

cross-examination he stated that he noted on the Police ticket the results of his examination on which he based his opinion. He did not produce the document in evidence although, he admitted, he had it with him in Court. But he read out what he had entered on that ticket. According to that entry, the results of his examination were as follows:—

"(1) Strongly smelling of alcohol.
(2) Tends to be talkative.
(3) Pupils semi dilated and sluggish.
(4) Performed tests but resents examination.
(5) Does not comprehend the place, and
(6) Tends to march."

He stated that his opinion was "based on the sum total of all tests". In the course of his further evidence under cross-examination, the witness stated that he also tested the appellant for "rhombagism" and the result was positive. No explanation however was given by him for his failure to include the result of this test in the contemporaneous note made by him on the Police ticket. He also stated that the appellant's "clothes were in disarray" and "his face was flushed" but these too were not noted by him on the ticket. He admitted, however, that the appellant's memory for recent events was good, that he was coherent and had no difficulty in recalling what had happened. When asked for the time, the appellant looked at his watch and gave him the time. But he made no record whether the time given was correct or not.

The witness examined the appellant on 22.10.64 but gave his evidence in Court on 15.1.67 It would therefore be safer to rely on the results of the tests as recorded by him in his contemporaneous note than on his recollection of the details more than two years later.

In regard to the six items mentioned in the note, he explained that item (5) — "does not comprehend the place" — meant that the appellant "was not at first aware for what purpose he was brought there". If the Police had not told the appellant where and for what purpose he was being taken, he would not have been aware why he had been taken to that place. That can hardly be regarded as a point against the appellant. In regard to items (4) and (6) "Resents examination" and "Tends to march", — the witness admitted that when he asked the appellant to walk, he marched "because he resented my attitude". He did not say that he found the appellant's gait unsteady. The appellant may well have marched in order to impress on the doctor that not only could he walk steadily but could even do something more difficult, namely, march steadily, showing proper co-ordination of his limbs. The note under item (4) shows that the appellant performed all the tests, that is, carried out all the tests successfully.

The only circumstances against the appellant were that he was strongly smelling of alcohol and that his pupils were semi-dilated and sluggish. These would undoubtedly indicate that the appellant had consumed alcohol. The question however is whether a person who drives a car on the highway after having consumed alcohol commits a breach of Section 151(1) of the Motor Traffic Act.

In the case of *Don Carthelis* vs. *Ibrahim* (56 N.L.R. 561) Gratiaen J. after examining this section of the Act, as well as the correspondeing legislation in England, reached the conclusion that a person cannot be convicted under this section unless the evidence justifies the inference that the accusd person was under the influence of drink to such an extent as to be incapable of having proper control of the vehicle. With respect, I am in agreement with that view. The evidence in this case does not indicate that as a result of the alcohol he had consumed, the appellant's powers of co-ordination had been impaired or that his capacity to drive a car had been prejudicially affected. The fact that the appellant's car had grazed the taxicab while overtaking it cannot lead to a necessary inference that the appellant was incapable of having proper control of his vehicle. There is no evidence that either immediately before or after the accident the appellant drove his car in such a manner as to show want of control over it. On the other hand according to the evidence the appellant drove the car quite competently from the scene of the accident to the Police Station.

The learned Magistrate misdirected himself by relying on the Medical Officer's opinion without closely examining the effect of the evidence given by him under cross-examination.

On the evidence led, the prosecution failed to extablish beyond reasonable doubt the charge under count (1).

I set aside the conviction of the appellant on Count (1) and acquit him.

Accused acquitted.

"THE EFFECTIVE REALIZATION AND PROTECTION OF CIVIL AND POLITICAL RIGHTS"

U.N. SEMINAR HELD AT KINGSTON, JAMAICA FROM 25TH APRIL — 8TH MAY, 1967

THE SEMINAR was convened pursuant to U.N. General Assembly Resolution 1926 (*x*) *part of the U.N. Human Rights Advisory Services. It was the first U.N. Seminar on the topic of Civil and Political Rights. The Seminar was confined to the Western Hemisphere and consisted of participants from Argentina, Barbados, Bolivia, Brazil, Canada, Chile, Costa Rica, Dominican Republic, Ecuador, France, Guatemala, Guyana, Honduras, Jamaica, Mexico, Netherlands, Nicaragua, Panama, Trinidad and Tobago, United Kingdom, United States of America and Venezuela* (22 *Governments*), *assisted by experts from France, Japan, Roumania and Sweden. Observers represented the Governments of Columbia and Peru. The International Commission of Jurists was represented by Mr. Sean MacBride, S.C., Secretary-General, and Observers from* 28 *non-governmental organisations participated.*

* * * * *

BECAUSE OF their importance in the field of Civil and Political Rights, the Conclusions of the Seminar are set forth in full hereunder.

Conclusions

PART I

ESSENTIAL REQUIREMENTS

In general, the essentials for the effective Realization and Protection of Civil and Political Rights at the national level are:

1. **Guarantee of Rights**

A formulation, preferably in the organic law, but at all events in the jurisprudence of the country, of the civil and political rights of the individuals.

2. **Courts**

A Court system which

(*a*) ensures the independence and impartiality of the Judiciary;

(*b*) acknowledges the right of the Courts of Justice to pronounce on the legality of governmental action and to grant redress for violations of the civil and political rights of the individual;

(*c*) guarantees to aggrieved individuals a practicably exercisable right of access to the Courts of Justice to secure redress for violations of their civil and political rights.

3. **Supplementary Machinery**

Machinery, supplementary to the Courts of Justice, designed swiftly to investigate and effectively to pronounce upon administrative action violative of the civil and political rights of the individual and to which the individual may have inexpensive recourse.

4. **Emergency Situations**

A system of control of the assumption and exercise of extraordinary powers by the Executive branch of Government designed:

(*a*) to restrict the circumstances of national emergency in which the Executive branch of Government may be vested with such powers;

(*b*) to limit the degree to which such powers may be exercised in derogation from the civil and political rights of the individual;

(*c*) to give the Courts of Justice a supervisory jurisdiction over the observance of these restrictions and limitations including the power to grant effective remedies in cases of their contravention.

5. **Public Opinion**

A citizenship consicious of its civil and political rights, resolute in its support of the institutions

and arrangements designed to safeguard them and vigilant against the erosion of the rights of free expression and of assembly and petition and of civil and political rights in general.

6. Elections

A system of periodic and genuine elections by universal equal suffrages through which the will of the people may form the basis of the authority of government.

PART II

DESIRABLE MEASURES

In order to ensure the proper and effective application of the general essentials hereinbefore set forth, the following measures are desirable:

1. Review of Laws

That Governments and Legislature should systematically undertake a review of their legislation, laws and procedures to ensure that they conform with the provisions of the Universal Declaration.

2. Policy Guide Lines

That in regard to the day to day policy of public authorities, the following guide lines should inspire them:

(*a*) A desire to strengthen the protection of civil and political rights;

(*b*) Where complaints against public authorities arise, their consideration by the public authorities should be sympathetic and objective rather than critical and subjective;

(*c*) Where decisions or indications are given by the Courts either in regard to the need for legislation or for other measures to better secure civil or political rights, those decisions or indications should be given due weight;

(*d*) The need to ensure the easy and ready availability of legal remedies to protect civil and political rights by means of free legal aid or other equivalent methods.

3. Quasi Judicial Acts

In regard to quasi judicial or administrative acts affecting or likely to affect the political or civil rights of the individual, the motivation for such acts should be fully stated and the following rules should obtain:

(*a*) Executive or administrative orders not involving an individual adjudication.

Such orders or regulations may not initially amount to an adjudication affecting any particular individual but by reason of their broad scope they may ultimately affect the rights and interests of individuals. In these cases the public authority should consult organisations or groups interested in the contemplated measures and give a reasonable opportunity to interested individuals to present their views.

(*b*) Executive or administrative orders accounting to an individual adjudication.

In these cases the following requirements should be observed.

(i) There should be adeqaute notice to the interested parties of the contemplated measures and the reasons therefor. (See above.)

(ii) An adequate opportunity should be provided to the interested parties to prepare their case, including right of access to all relevant data.

(iii) The interested parties should be given the right to be heard, to present evidence and to meet opposing arguments and evidence.

(iv) The interested parties should be given the right to be represented by counsel or other qualified representative.

(v) Notice of the decisions reached and of the reasons therefor should be communicated within a reasonable delay to the interested parties.

4. Independence of Judiciary

To ensure the proper working of the Courts, it is essential that there should be an adequate number of Judges and that their appointment and working conditions should be such as to ensure their independence.

PART III

SPECIALISED INSTITUTIONS

The Seminar examined the various specialised institutions existing in some areas of the world

to ensure the more effective protection of civil and political rights, such as in France (le Conseil d'Etat), in Sweden (the Ombudsman), in Japan (Civil Liberties Bureau and Commission), in Roumania (The Procurator General) and in Puerto Rico (Commission on Human Rights).

Ombudsman Recommendations

While appreciating the value of each of these institutions in their national context, it was considered that any additional institutions envisaged should be capable of being grafted upon the political and legal system which already exist in the area. In the case of countries other than the Latin American countries, the consensus was in favour of the institution of the Ombudsman system such as it prevails in Sweden, Denmark, Norway, New Zealand, Guyana and the United Kingdom, suitably adapted to the needs of the country. It was the general view that this system would be of considerable assistance to ensure both more efficient administration and more effective protection of civil and political rights. Such a system would be a valuable complimentary adjunct to the existing administration and judicial machinery in most countries in the area.

The Latin American countries represented at the Seminar shared the view that the Ombudsman represents an effective instrument for the defense of human rights. This institution, which was a long and fruitful tradition in European countries, would be new in their countries. Consequently, it would be necessary to prepare the ground beforehand and to ask the assistance of the U.N. so that there might be a methodical approach to publicizing the institution throughout Latin America. This could lead to the progressive implementation of the system in a manner consistent with the conditions prevailing in each country.

PART IV

INTERNATIONAL MEASURES

U.N. High Commissioner for Human Rights

The Seminar noted with satisfaction the initiative taken by Costa Rica, now endorsed by the United Nations Commission on Human Rights, for the establishments of a United Nations High Commissioner for Human Rights as a valuable adjunct to any system for the better realization of the principles enunciated in the Universal Declaration of Human Rights.

Reinforcement at National Level of U.N. Measures

The participants were agreed that the International measures instituted by the United Nations for the protection of Human Rights and fundamental freedoms should be reinforced by national institutions for the protection of those rights, such institutions being composed of persons of high integrity and impartiality.

PART V

WAR AND PUBLIC EMERGENCIES

The participants were also agreed on the following:

(*a*) (i) That it should be made constitutionally impossible, however grave an emergency might be, to suspend such fundamental rights as the right to life, freedom from slavery, freedom from inhuman or degrading treatment; or the basic principles of equality before the law and no penalty without fair prior trial. The suspension of constitutional guarantees in times of emergency should be strictly controlled by law in all its phases. The circumstances in which an emergency may be declared, the measures to be adopted and powers exercised by competent authorities to deal with the emergency, should all be set out in legislation and all Governments should consider reviewing and refining their legislation on emergencies in times of peace and tranquility.

(ii) That wherever the executive power is legally authorised to declare a state of emergency, the declaration should be compulsorily referred to the Legislature for confirmation within the shortest possible time. The Legislature should retain control over the duration of emergency period, which should only be extended from time to time when the Legislature is satisfied that extension is needed.

(iii) That it should be recognised that emergencies differ in the nature and gravity of the threat which is posed to national

existence and in the absence or presence of internal political tension or foreign interference. The powers conferred on competent authorities and the extent of the authorised abrogation or curtailment of rights and freedoms should be limited strictly to the needs of the particular circumstances.

(iv) That an obligation should be imposed upon the executive power to submit its programme and procedures to legislative review from time to time during the emergency. Moreover, the courts should not be deprived of the right to examine the legality of any action taken by the executive during the emergency.

(v) That all persons who have illegally assumed executive power and abrogated civil and political rights by illegal declarations of emergency should be liable to trial and punishment through the procedures of the court.

(*b*) That it is necessary to adopt means which will help to expedite judicial proceedings, since delayed justice is truly a denial of justice.

(*c*) That steps must be taken to ensure that administrative officials are not entrusted with judicial functions.

(*d*) That the system of trial by jury should be reviewed in order to be made more efficient.

PART VI

RATIFICATION OF U.N. CONVENTIONS

The Seminar noted with satisfaction the significant steps taken at the international level, at the twentieth and twenty-first session of the General Assembly of the United Nations, by the adoption of the International Convention on the Limitation of All Forms of Racial Discrimination and of the International Covenant on Human Rights, in particular the Covenant on Civil and Political Rights. The Seminar expressed the hope that this advance would be matched at the national level by the ratification of the Convention and the Covenants on the part of all countries of the Hemisphere.

Privy Council Appeal No. 14 *of* 1966

Lord Morris of Borth-y-Gest, Lord Wilberforce, Lord Pearson, Sir Jocelyn Simon and Sir Alfred North

PHILIP SEEVALI WIJEWARDENE *vs.* GEORGE BENJAMIN SIRISENA GOMES & OTHERS

From
THE SUPREME COURT OF CEYLON

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

DELIVERED THE 5TH JULY, 1967

Trust — Shares, issued but not allotted, the subject-matter of a voluntary settlement, which shares "the settlor is about to be caused to be allotted into the names of the trustees" for the benefit of his son—Absence of agreement to transfer shares to trustees—Can these words alone create an effective trust?—Evidence—Identity of field passing under last will—Admissibility of extrinsic evidence to establish identity— Trusts Ordinance (Cap. 87) *section* 6.

Damages — Amount of damages to be awarded for wrongful disposal of a picture by the executors under a last will Distribution of Estate — Proper date for distribution — Dependent on construction of last will.

The late D. R. Wijewardene died on the 13th June, 1950, and his last will was proved on 21st March, 1951. The executors (the respondents to this appeal) applied for a judicial settlement of their accounts, and in those proceedings the appellant (the eldest son of the deceased) raised certain objections. Four objections were raised in the appeal before their Lordships.

(1) The deceased had executed a voluntary settlement for the benefit of his youngest son on the 28th February 1950, which was to include 1,000 shares in the Associated Newspapers of Ceylon Ltd. which had been issued but not yet allotted. By his last will the testator made certain dispositions of shares, but excluded from them any shares which were the subject of the voluntary settlement. At the time of his death the 1,000 shares had not been allotted to the name of the trustees of the settlement. The question was whether these shares passed under the will, or whether the trustees were entitled to call for an allotment to them. The argument before their Lordships was that the testator had agreed with the trustees to allot to them the shares, and that as soon as the shares were capable of being allotted under the law of Ceylon the trustees were entitled to call for the shares even though the agreement was not supported by consideration.

Held: That there was no evidence of such a promise to the trustees, and that therefore the argument failed, accordingly the shares (which now had increased to 2,000 by reason of a bonus issue) should devolve in terms of the last will.

(2) The appellant contended that Field No. 1 of the Galpokuna Estate devolves on him under the will. Under clause 15(1) a half-a-share "of the Galpokuna Division of my Galpokuna Group" was devised to the appellant; the other half share was devised under clause 15(3) to the testators daughter Ranee. By clause 15(2) the testator devised "all that divided portion known as the Udabaddawa Division of the group aforesaid" to his daughter Nalini. The question was under which of these devises the field in question passed.

Held: (a) That extrinsic evidence was admissible to resolve this question.

(*b*) That the learned District Judge, after carefully considering the evidence led, had decided that the field had passed under clause 15(3), and these findings had been concurred in by the Supreme Court.

(*c*) That their Lordships substantially concurred with these findings, and in any event would be slow to depart from them, unless there had been some substantial misdirection or error in law. There was no such misdirection or error in law.

(3) The appellent claimed as his a painting which the executors had handed over to a third person .The District Judge had found that this should have been given to the Appellant, and the only question before their Lordships was the value to be placed on the painting.

Held: That the different values placed on the painting by both the District Court and the Supreme Court were based on unsatisfactory evidence, and that the issue should be remitted for a fresh valuation.

(4) The appellant contended that the date for distribution of the testator's estate should be 31st March 1954, while the respondent's claim was that the date should be the 31st December, 1957.

Held: That upon a construction of clauses 15 and 16 of the Will, the distribution of the estate had to be after the estate had been finally assessed for estate duty purposes. Since the final assessment figures had been communicated to the respondents in August 1957, the date for distribution could be taken to be 31st December, 1957.

Per curiam: "According to their Lordships practice, recently restated in *Vander Poorten* vs. *Vander Poorten* (1963) 1 W.L.R. 945 appeals concerned with the taking of an account will not be entertained where questions of fact rather than principles of law are involved."

Cases referred to: *Vander Poorten* vs. *Vander Poorten* (1963) 1 W.L.R. 945; 65 N L.R. 385.
Milroy vs. *Lord* (1862) 4 De G F & J. 264.
Saibo vs. *Commissioner of Stamps* (1938) 40 N.L.R. 374.

E. F. N. Gratiaen Q.C. with *M. P. Soloman*, *L. Kadirgamar*, and *Mark Fernando* for the Appellant.

S. Nadesan Q.C. with *R. K. Handoo* and *N. Chinivasagam* for the respondents.

Lord Wilberforce—

This is an appeal from the judgment and decree of the Supreme Court of Ceylon dated 24th May 1963 dismissing an appeal from the judgment of the District Court Colombo dated 30th May 1960. The proceedings relate to the estate of Tudugallege Don Richard Wijewardene who died on 13th June 1950 and whose will, dated 26th May 1950, was proved on 21st March 1951. The proving Executors made an application under section 729 of the Civil Procedure Code for the judicial settlement of the accounts of their administration up to 31st December 1957. The present appellant, who is the eldest son of the Testator and a legatee under his will, raised certain objections to these accounts. He succeeded with regard to one only in the District Court and appealed unsuccessfully to the Supreme Court of Ceylon as regards the remaining objections. As regards that objection on which he had succeeded, the executors lodged a cross-appeal and succeeded in the Supreme Court in reducing the amount awarded to the appellant. The appellant now appeals to their Lordships against the rejection of his objections and against the reduction in the amount awarded to him in respect of the matter on which he was successful.

The appeal, as presented to their Lordships, related to six matters; but as regards two of these namely (*a*) certain fees payable to the firm of Proctors acting for the executors and (*b*) the cost of a passage from Canberra for a person named in the Will as executor, Counsel for the appellant properly and inevitably conceded that these were not matters which could be raised on an appeal to this Board. According to their Lordships' practice, recently restated in *Vander Poorten* vs. *Vander Poorten* ((1963) 1 W.L.R. 945) appeals concerned with the taking of an account will not be entertained where questions of fact rather than principles of law are involved.

There remain four other questions relating to individual and unconnected matters and their Lordships will deal separately with them.

1. The appellant claims to be entitled to a quarter share of a holding of 1,000 ordinary shares in the Associated Newspapers of Ceylon Ltd. The validity of this claim depends in the first instance 'upon whether the 1,000 shares in question devolved under the will of the Testator or formed part of the Trust Fund under a Voluntary Settlement made by the Testator on 28th February 1950. The Testator, who was the principal

shareholder and managing director of the company, was the registered owner in 1950 of 8,026 shares of Rs. 100/- each out of a total ordinary share capital of 11,500 shares. A meeting of the directors was held on 9th February 1950 at which it was resolved to issue 2,000 ordinary shares at par, such shares to be offered to members in proportion to their existing holdings. On 16th February 1950 a circular letter was sent out to the members, including the Testator, containing an offer from the company to each member in accordance with the resolution. The number of shares of the new issue to which the Testator was entitled under this offer was 1,396. There was attached to the circular letter a form of request for allotment to be completed and returned to the company together with a payment of Rs. 50/- a share before 15th March 1950. The remaining Rs. 50/- were to be paid on allotment on or before 15th September 1950. On 28th February 1950, that is to say after receipt of the offer but before he had taken any action upon it, the Testator executed a Voluntary Settlement for the benefit, in the main, of his youngest son. The Settlement was, according to a schedule, to include 6,000 ordinary shares in the company which the Testator was the registered owner and 1,000 further ordinary shares which "had been issued but not yet allotted and which the Settlor is about to cause to be allotted into the names of the Trustees". On the same day the Testator executed a transfer to the Trustees of the Settlement of 6,000 shares of which he was the registered owner. On or about 7th March 1950 the Testator applied to the company for an allotment of 1,396 ordinary shares and sent to the company a cheque for Rs. 69,800/- being the amount payable on application. The company, on 7th March 1950, acknowledged the receipt of this application. A meeting of the directors of the company was held on 6th April 1950 at which the applications for allotment of the new shares were recorded and agreed to. On 26th May 1950 the Testator executed his last will in which he made certain dispositions of shares in the company but he expressly excluded from those dispositions any shares which had formed the subject of the Voluntary Settlement. He died on 13th June 1950 before any allotment of the shares of the new issue had been made. In due course the 1,396 shares to which the Testator was entitled were allotted to the executors on payment by them of the final amount due.

In these circumstances the question arose whether the Settlement Trustees were entitled to call upon the executors to transfer to them 1,000 of the allotted shares. In fact the executors transferred to the Trustees, by agreement with three of the Testator's children, or at least without objection by them, 750 of these shares; but, on objection being made by the appellant, they retained 250. The appellant contends that the 1,000 shares in question do not belong to the Settlement Trustees but ought to devolve under the will.

Under the Trusts Ordinance of Ceylon (Cap. 87) Section 6, for an effective trust to be created there must (unless the Settlor is himself to be the Trustee) be either a testamentary disposition or a transfer of the trust property to the Trustee.

The learned District Judge held that a valid trust had been constituted because the Voluntary Settlement of 28th February 1950 was effective as a transfer to the Trustees of the rights of the Settlor in the 1,000 shares and constituted a valid declaration of trust in respect of those shares. The contention that the Settlement amounted itself to a transfer appears to their Lordships to involve considerable difficulties both on the form of the Settlement and having regard to the facts relating to the shares. Moreover, such a contention was expressly disclaimed in argument before the District Court; nor does it appear to have been contended before the Supreme Court. Furthermore, if and so far as it is suggested that the Settlor had declared himself a Trustee of the shares, or of the rights in them, this was inconsistent with the form of the Settlement, and with the well-known principle that where a trust is intended to be effected by means of a transfer of property to trustees, and no such transfer takes place, effect cannot be given to the trust as a declaration by the Settlor that he himself holds the property as Trustee (see *Milroy* vs. *Lord* (1862 4 De G F & J, 264 per Turner L. J. at p. 274). These particular contentions were in fact not supported in argument by learned Counsel appearing for the surviving Settlement Trustee. Nor did Counsel endeavour to justify an alternative line of argument relied on by the learned District Judge which was to the effect that the (admittedly effective) gift of the 6,000 shares in the company carried with it, as the fruit of that holding, the rights to the new shares issued in 1950. On this

point too the facts were against him since the Testator himself had separated the rights from the main holding, transferring the one but not the other.

In place of these arguments, on which the judgment of the District Court was based, the respondents contended that the Testator should be regarded as having formally agreed with the Trustees to have allotted, or to transfer, to them the 1,000 new shares. Such an agreement, under the law applicable in Ceylon, would, it was argued, be legally enforceable, without the necessity of consideration such as English law would require. Consequently, so soon as the new shares came to be allotted, the Trustees of the Voluntary Settlement were in a position to enforce the promise made by the Testator.

Their Lordships express no opinion whether, if the necessary basis of fact were shown to exist, an effective trust could be constituted in this manner under the law of Ceylon, for they are satisfied that the respondents have failed to show that any such promise was made. That, at the time of making the Settlement, it was the policy and intention of the Settlor to vest in the Trustees both 6,000 of the existing shares and 1,000 of the new shares to be allotted, there can be no doubt, but more than a mere manifestation of intention is required in order to constitute a promise enforecable in law. No evidence was given that any such promise was made to, or relied on by, the Trustees, and the respondents were, consequently, driven to rely upon the terms of the Settlement itself. But these, though again they are evidence of the Settlor's intentions, and also indicate upon what trusts the shares are to be held once vested in the Trustees, cannot be construed as amounting either expressly or by implication to a promise. The words most relied on, which appear both in recital (*c*) and in the Schedule paragraph (2) are that the Settlor "is about to cause to be allotted into the names of the Trustees", but these are words which declare an intent and fall far short of amounting to a promise. In the absence therefore of the requisite factual substratum their Lordships must hold that this argument fails. It follows that the appellant succeeds, on this objection, in showing that the 1,000 shares the subject of the new issue in 1950, do not pass to the Trustees of the Voluntary Settlement.

There remain certain points of detail. First it appears that since the death of the Testator there has been a bonus issue, on a one-for-one basis, of fully paid shares in the company, so that the 1,000 shares the subject of this issue are now represented by 2,000 shares. It was not disputed that the whole of this aggregate holding devolves together. Secondly their Lordships were informed that, of the 750 shares transferred to the Settlement Trustees, a number said to represent one-eighth part had been transferred to the appellant. The appellant must of course bring any of these shares into account in any distribution of the 1,000 (2,000) shares under the will. Thirdly, although it is now clear that the 1,000 (2,000) shares should pass under the will, it was contended by the respondents that the question remains whether they devolve under clause 15(1) or under clause 15(7). Under the former clause the appellant would be entitled to one-quarter (250/500): under the latter to one-fifth (200/400). In view of the fact that the Testator's youngest son, who would be interested to argue for the second alternative, was not represented on the appeal, in order to avoid further litigation, Counsel for the appellant was instructed to agree to limit his claim to 200/400 out of the 1,000/2,000 shares in the company.

The appeal therefore succeeds on this issue and the accounts must be adjusted to give effect to the points above stated.

2. The appellant claims that a piece of land known as Field No. 1 of the Galpokuna Estate devolves to him under the terms of the will. Under clause 15(1), a half share "of the Galpokuna Division of my Galpokuna Group" was devised to the appellant; the other half share of this division was devised under clause 15(3) to the Testator's daughter Ranee, the fifth respondent. By clause 15(2) of the will the Testator devised "all that divided portion known as the Udabaddawa Division of the group aforesaid" to his daughter Nalini, the fourth respondent. The issue is under which of these devises Field No. 1 passes. The question is one of identification upon which extrinsic evidence is admissible and in fact a considerable volume of evidence was led before the learned District Judge and considered by him. This evidence consisted in the main of the following matters: (*a*) The Testator acquired at

separate dates two estates adjoining each other, the Galpokuna estate and the Udabaddawa estate. He combined these two into a single group called Galpokuna group. Field No. 1 originally formed part of Galpokuna estate. (*b*) On 5th October 1936 two maps were prepared by the same surveyor, a Mr. Pieris, who gave evidence at the trial. One of these maps (Exhibit P. 21) showed the Galpokuna group as a whole and was entitlted "Plan of Galpokuna group including Udabaddawa Division". The field in question was depicted on this plan in a manner which appears to separate it from the Udabaddawa Division, and a tabular statement grouped it together with other Galpokuna fields and separately from the three Udabaddawa fields. However, the plan did not in terms make any reference to a Galpokuna Division. The other plan (Exhibit P. 23D) purported to show Udabaddawa Division Galpokuna group; the area depicted included Field No. 1. Moreover, on the plan, under the words "Udabaddawa Division" there appear in smaller characters the words "including Field No. 1 of Galpokuna". This plan therefore, on the face of it, appears to show the field in question as included in the Udabaddawa Division. (*c*) There was the evidence of a Proctor, Mr. Abeywardene, relating to the preparation of the plan Exhibit P. 23D. He said that he had been instructed in 1936 by the Testator to prepare a statement relating to the title to the block of land included in Exhibit P. 23D. Accordingly he obtained the relevant documents and bound all the title deeds relating to this block into one volume. On the cover page of that volume, in what was proved to be the handwriting of Mr. Abeywardene's clerk, appear the words "Title deeds of Udabaddawa Division Galpokuna group in extent A. 183 — R. 2 — P.1.". The extent of this acreage was such as to include Feild No. 1. Mr. Abeywardene was not able to say precisely for what purpose this volume was assembled though he did say that it was not in connection with any proposed will. The plan (Exhibit P. 23D) was amended on 6th November 1941 by a surveyor so as to include certain new acquisitions. (*d*) Certain evidence was produced as to the management of the Galpokuna group by a firm of estate agents of which the Testator was himself a director. A crop disposals book (Exhibit D. 35) showed that separate crop figures were maintained in relation to each field in the group as a whole and Field No. 1 was there recorded together with 10 other fields of Galpokuna as distinct from the three fields of Udabaddawa. But in the statements sent to the Testator during his lifetime no separate crop figures of Galpokuna Division and Udabaddawa Division were given and the Testator never asked for separate returns in respect of the two divisions.

In addition to these matters of extrinsic evidence, there was a clause in the will itself from which it was sought by either side to draw support. This was clause 21 which declared that in each appropriation to the Testor's children of estates, plantations and premises or divisions of portions thereof, there should be included "not only all land depicted in the most recent of the plan property appropriated as may be in existence at the date of my death, but also " all further or additional land purchased prior to the Testator's death.

These matters, which their Lordships have only summarised as they are very fully set out in the judgment of the District Court, were carefully considered and weighed by the learned District Judge, who came to the conclusion upon the evidence as a whole that the intention of the Testator in clause 15 of his will was to include Field No. 1 in the Udabaddawa Division. In doing so he also took into account the fact that, if this were so, the four elder children of the Testator (the appellant and his three sisters) would receive approximately equal values of land, whereas if the appellant's contention was correct there would be a considerable inequality as between the appellant and two of the daughters on the one hand and the third daughter (Nalini) on the other. The learned judge deduced from the terms of clause 15, subclauses 1-4, of the will an intention both in relation to the number of shares in the Associated Newspapers of Ceylon Ltd., and in relation to immovable property that the children should be treated alike. Their Lordships are in agreement with the learned judge in attaching some significance to this consideration.

The matter cannot be resolved solely as one of construction of the provisions in the will, or merely by a decision as to what constitutes the most recent plan referred to in clause 21. In the first place that clause was designed not so much to lay down what was to be conclusive or decisive evidence as to the extent of land previously devised, as to make it plain that subsequent additions were to be included. Any plan shown to be the "most recent" would be an element to be taken into consideration, but in conjunction with other material evidence as to the Testator's intention. But, secondly, it appears to their Lordships impossible to say with any certainty that the most recent plan there referred to was Exhibit P.21 on the one hand or P.23D on the other. They were contemporaneous, and if P.21 may be said to designate the estate as a whole, or possibly, the two separate divisions, the plan which designated Udabaddawa Division was P.23D.

The identity of the property designated by the Testator therefore fell to be determined upon consideration of the other pieces of extrinsic evidence to which reference has been made. It was on a balance of these that the learned District Judge reached his conclusion that the field devolves as part of the Udabaddawa Division.

In such a matter their Lordships would be reluctant to interfere with the findings of the trial judge, more particularly when these were, as in the present case, concurred in by the Supreme Court. To justify such interference it would be necessary to show that some substantial misdirection or error in law had occurred. After a careful consideration of the judgment of the learned District Judge their Lordships are fully satisfied that no such error or misdirection can be shown and indeed their Lordships find themselves in substantial agreement with his findings. They therefore find that the appellant does not succeed with this objection.

3. This objection relates to a painting to which the appellant claims to be entitled under the will but which has not been made over to him by executors. The painting was one which was commissioned by the Testator during his lifetime from a Mr. Floyd, who, it appears, was invited by the Testator from England in order to execute a number of paintings for him. Mr. Floyd in fact did paint a number of pictures during his stay in Ceylon. The disputed picture was one depicting the scene at the Assembly Hall on Independence Day, 4th February 1948, and showed His Royal Highness the Duke of Gloucester handing over the grant of independence to the Prime Minister of Ceylon. Under the will, in consequence of a nomination made by the Testator's widow, the appellant became entitled to the Testator's pictures and paintings. The case made by the executors at the trial was that the painting did not belong to the deceased and therefore did not pass under his will. They called certain evidence to substantiate this which was rejected by the learned District Judge and it is not now disputed that the painting should have passed to the appellant and that he was entitled to have it made over to him. It is further not now in dispute that the executors wrongly handed it over to a third person. The only question now in issue relates to the value for which the executors are accountable to the appellant in the event of the painting itself not being forthcoming. In his original objections to the executor's accounts the appellant placed an arbitrary value upon the painting of Rs. 12,500/-. At the trial, through his counsel, he indicated his willingness to accept Rs. 10,000/- and this was the figure awarded by the learned judge. On appeal this amount was reduced to Rs. 1,340/-. The appellant now submits that the Supreme Court was not justified in making this reduction and seeks to have the original award restored.

It is unfortunate that the evidence as to the value of this picture is, on any view, exiguous. This is no doubt because it formed a small item in relation to the estate as a whole and because the main dispute at the trial was whether it formed part of the estate or not. Indeed even so late as the time when the executors lodged their objections against the decision of the District Court no clear issue had been stated as regards the picture's value. In these circumstances their Lordships are

reluctant to reach the conclusion that the finding of the District Court should be disturbed. Nevertheless they find it impossible to escape from the conclusion that the evidence before it was insufficient to justify the valuation of Rs. 10,000/-. The figure was based upon the evidence of one Atukorale (a witness found to be unreliable) that he had been asked by Mr. Floyd to sell it for Rs. 10,000/-, an insufficient basis for finding as the judge did find that this was its true value. Their Lordships therefore consider that the Supreme Court was justified in holding that this finding of the District Judge could not be maintained. The substituted figure of Rs. 1,340/- which was accepted by the Supreme Court was arrived at on the basis of an insurance policy taken out in 1948 by the Testator in which the "Assembly Hall" was included and against which the figure of £100 was inserted. It appears that this figure was stated by the Testator himself in a signed list which he sent to the insurance company. No evidence called to show that any valuation at this figure was made or as to the basis on which insurance cover was requested or given so that the figure appearing in the policy can hardly be accepted as satisfactory evidence of value. In the same policy a number of other paintings by the same artist were indifferently valued at £50.

The appellant sought to justify the higher valuation upon the well-known principle that where a wrong-doer has deprived a claimant of the opportunity of having an item of property appraised, he must submit to having it valued as an object of the highest quality of its kind. Admitting the general validity of the rule, it cannot help the appellant here, first because it was not satisfactorily shown that the painting could not have been valued — since its situation at about the time of the trial seems to have been known — and secondly because the appellant was unable to provide the court with a valuation on the highest quality basis. In view of the protracted litigation which has taken place, and the not very considerable sum of money involved, their Lordships are reluctant to remit this issue for a fresh valuation to be obtained but in the circumstances they consider that this is the only possible course to take, and that the decision of the Supreme Court must be varied accordingly. They express the hope that agreement may be possible between the parties interested which will make further proceedings unnecessary.

4. This claim relates to the date for distribution of the Testator's estate. The question arises under clause 15 of the will in which it was directed that the gifts therein contained, which included gifts to the appellant, should take effect on the "date for distribution". The executors claim and their accounts have been submitted on the basis that the date for distribution was 31st December 1957. The appellant's claim (as amended) is that the correct date should be 31st March 1954. These differing dates are in each case related to the making of an assessment for purposes of estate duty. The earlier date contended for by the appellant is related to the fact that an assessment for estate duty was made on 3rd March 1957 and he contends that in accordance with estate duty legislation this assessment became final after three years, on 3rd March 1954, in the absence of fraud or evasion. Consequently it is said the executors could have distributed the estate on 31st March 1954 provided that they had sufficient money in hand. The appellant undertook to show from the accounts that in fact sufficient money was in the hands of the executors. The executors on the other hand contend that the assessment of 3rd March 1951 was a provisional assessment only (it is in fact so described) and the date contended for by them is related to a final assessment for estate duty purposes which was made on 4th June 1958. The effect of this assessment was communicated to the executors in August 1957 and it is consequently contended that distribution could not have been made before 31st December 1957.

Before considering the relevant clause in the will it is necessary to examine the machinery adopted in Ceylon as regards assessment of estate duty. The present Estate Duty Ordinance (Cap. 241, which dates from 1938) does not make any provision for a provisional assessment. It requires that a return should be made by the executors, that estate duty should be assessed by the Commisisoner of Estate Duty and that probate shall not issue until his assessment has been made and a certificate given that the appropriate estate duty has been paid. An additional assessment may be made at any time within three years after the original assessment, but not after this period unless there has been fraud or wilful evasion. This procedure evidently involves practical difficulties in relation to estates of any size or complexity and it was found by the District Court that a practice has been established whereby a provisional assessment is made by the Commissioner based on information suppllied by the executors and whereby Letters of Administration or of Probate are issued upon the strength of a provisional certificate showing that duty in accor-

dance with the provisional assessment has been paid. Later a final assessment is made on the basis of figures officially accepted. This procedure seems to have originated under the earlier Estate Duty Ordinance (No. 8) of 1919 as is confirmed by the case of *Saibo* vs. *Commissioner of Stamps* (1938) 40 N.L.R. 374. The learned judge took the view that the same practice of making a provisional assessment was followed under the present Ordinance, that no final assessment takes place at this stage and that notwithstanding the provisional assessment it is open to the Commissioner to make a final assessment beyond a period of three years of the date of the provisional assessment.

Whether such a procedure, convenient though no doubt it is, is strictly consistent with the terms of the present Ordinance, is not a matter on which their Lordships need express any opinion. For the question for determination is not whether the right procedure has been followed, but what the Testator meant in his will. For this purpose, their Lordships agree with the learned District Judge that the existence *de facto* of the procedure of provisional assessment, followed by final assessment is relevant, and that it is this which has to be related to the relevant testamentary clauses. Their Lordships will deal with these briefly since the applicable dispositions are fully considered in the judgment of the learned District Judge, with which their Lordships are here in full agreement.

The relevant clauses in the will are clauses 14, 15 and 16. The scheme of these clauses is that the distribution which is directed to be made under clause 15 cannot be carried out until the executors have considered whether some adjustment or charge of the assets to be distributed to individual children requires to be made under clause 16 in view of steps taken by the executors to provide for estate duties. These adjustments or charges, however, cannot themselves be decided upon until the value of the relevant properties has been "*finally assessed for estate duty purposes.*" These latter words are those contained in clause 16 and it must be clear in the context of the practice referred to that they contemplate a final assessment made by the authorities rather than any provisional assessment which may have been made on figures supplied by the executors. It follows that the necessity or otherwise for adjustments or charges cannot be decided upon until the final assessment has been made and therefore that the date for distribution must wait upon that final assessment. From what has been said as regards the assessment procedure the conclusion appears inescapable that the date for distribution cannot be prior to, but on the contrary must be deferred until after the final assessment, which in this case was not made until June 1958. Their Lordships are content to accept that, as the assessment figures were in fact communicated to the executors in August 1957, the date on which distribution could have been made can properly be taken to be 31st December 1957.

Their Lordships do not think it necessary to expand upon this particular objection for the reasons that they are fully satisfied with the careful analysis of the will and of the estate duty legislation made by the learned District Judge and with his conclusion. This objection therefore also fails.

To summarise:

1. The appellant was entitled to an appropriate share of the 1,000 Ordinary Shares in Associated Newspapers of Ceylon Ltd. referred to in the Note to Schedule I of the voluntary final account dated 16th July 1958; as well as of any bonus shares issued in respect of the said, 1,000 shares since the death of the deceased. Such appropriate share shall be taken to be one-fifth less any part of the said 1,000 shares (and bonus shares) which the appellant may have already received. The Accounts are to be adjusted accordingly.

2. The Order of the Supreme Court is to be varied by directing that if the executors cannot deliver the painting of the Assembly Hall to the appellant, the executors shall pay him the value of the picture to be assessed by the District Court, the amount of such value to be paid by the executors personally and not out of the estate of the Testator. The proceedings will be remitted to the District Court for the purposes of such assessment.

3. As regards the other objections to the said voluntary account, the appeal is dismissed and the Order of the District Court affirmed.

Their Lordships will humbly advise Her Majesty accordingly:

The respondent executors are to pay to the appellant out of the estate of the deceased one-half of his costs of this appeal. The costs of the respondents are to be paid out of the estate of the deceased.

Decree varied

IN THE COURT OF CRIMINAL APPEAL

Present: **H. N. G. Fernando, C.J.,** (*President*) **Abeyesundere, J., and Manicavasagar, J.**

Appeal No. 66 *of* 1967 *with Application No.* 89 *of* 1967 — *S.C.* 222/66 *M.C. Colombo* 26783/*C*

THE QUEEN *vs.* JAYASINGHE ARACHIGE DON QUINTUS ALWIS JAYASINGHE

Argued and decided on: 15th and 16th July, 1967
Reasons delivered on: 30th July, 1967

Court of Criminal Appeal — Culpable homicide not amounting to murder — Application to cross-examine prosecution witness by Crown — Deposition and Police statement put to witness — Limitations on power to cross-examine — Statements prejudicial to accused, elicited not to contradict — Illegal, irrelevant and inadmissible — Proper direction — But danger that Jury acted on the illegal evidence — Inducing witness to speak the truth — Limits to right of prosecution — Evidence Ordinance (*Cap.* 14), *sections* 154, 155(*c*), *and* 155(*a*), (*b*), (*d*), 140, 143, 145, 146, 147 *and* 132, 148, 149, 150 *and* 153.

The accused-appellant, J, was convicted of the offence of culpable homicide not amounting to murder. The prosecution and the defence respectively proved two contradictory statements of the deceased as to the cause of death.

The only direct evidence available to the prosecution at the trial appeared to have been that of a witness P. This witness denied the presence of the accused at the scene of the offence,in answer to six leading questions by the prosecution.

Having asked another question (No. 24) whether P saw the accused coming there and picking a quarrel with the deceased, which was answered in the negative, Crown Counsel applied to examine P under the provisions of section 154 of the Evidence Ordinance, and this was allowed.

The further examination of P was such that his deposition in the Magistrate's Court was read to him. The witness admitted that evidence, including that relating to the presence of the accused, but repeatedly said that the accused did not come to the scene, and that his different statements to the Magistrate had been lies, one statement to the Magistrate put to P, and categorised by him, as a lie was, "I saw the accused stabbing the deceased." (*Q.* 63).

Thus, evidence was led which made the Jury aware that, in his deposition to the Magistrate, P had not only alleged that the accused was present, but had further testified directly to the facts that the accused did commit the offence charged, and also that he had some motive against the deceased man. The prosecution also proved the whole of the statement P had made to the Police.

Held (1) That the prosecution was quite entitled to repair the damage to the prosecution case by proving that the witness P had in the Magistrate's Court stated that the accused had been present, and proof of that former statement was sufficient and necessary to discredit the witness and to invite the Jury to disregard his denial of the accused's presence.

(2) That there was no occasion for the prosecution to prove the remaining statements, including the statement that P saw the accused stabbing the deceased (*Q.* 63), as this did not amount to proof of former statements inconsistent with his evidence nor was there occasion to prove the statements to the Police, as to which the witness had not testified at the trial. Since at the trial the witness had only denied the presence of the accused, the other statements proved by the prosecution did not amount to inconsistent statements within the meaning of section 155 (c) of the Evidence Ordinance.

(3) That section 155(c), read with section 154, might permit proof of a former inconsistent statement, but does not in law authorise the proof of former statements which might in advance contradict evidence which the prosecution feared that the witness might give. In this case, section 155(c) had been utilised by the prosecution illegally.

Followed: *The Queen* vs. *Fernando* — C.C.A. Appeal No. 27 of 1967, S. C. Minutes of 18.4.1967.

(4) That even Question 24 could not have been asked by Crown Counsel without the permission of the trial Judge, because at that stage section 154 had not yet been invoked.

(5) That in effect the attempt on the part of the prosecution to discredit its own witness had the consequence that a number of former statements were proved which could well have satisfied the Jury of the guilt of the accused, although in law they were completely irrelevant as evidence of his guilt, and not legally admissible.

(6) That although the trial Judge properly directed the Jury that those statements must not be taken into account against the accused, the Court could not, having regard to the gravely incriminatory nature of the statements, think with any confidence that the Judge's warning must have been heeded by the Jury.

(7) That it was quite likely that the Jury preferred the statement made by the deceased, implicating the accused in preference to the contradictory statement, which did not refer to the accused, by reason of their knowledge of the evidence given by P in the Magistrate's Court.

Per **H. N. G. Fernando, C.J.**—"(A).....research into the scope and effect of Section 154 must involve consideration also of Section 155(a), (b)and (d), Section 140, Section 143, Section 145, Section 146, Sections 147 and 132, Section 148, Section 149, Section 150, Section 153 and perhaps of other sections of the Evidence Ordinance."

—(B)"Learned Senior Crown Counsel has submitted that it is the duty of the prosecution to make its best efforts to induce a witness to speak the truth. The argument, in its application in the present context, presupposes that if a witness gives evidence exculpating an accused person, then the witness must be untrue. The argument seems also to be opposed to the presumption of innocence, for evidence exculpating an accused person can be thought to be false only because of a supposition that the accused must be guilty."

E. R. S. R. Coomaraswamy, with *M. D. K. Kulatunga*, *N. Wijeanathan*, *D. Jayawickrema* and *S. C. Crossette Thambiah* (assigned), for the accused-appellant.

E. R. de Fonseka, Senior Crown Counsel, for the Attorney-General.

H. N. G. Fernando, C.J.

This was an appeal from a conviction of the accused at a trial by jury of the offence of culpable homicide not amounting to murder.

It appears that the prosecution expected to prove at the trial that the accused, the deceased man, and the witnesses Thegonis and Pinto had been together on the evening of 1st December 1965, that three of the persons (not including the accused) had shared in the smoking of a ganja cigar, that the accused had complained that he was not given a share of the smoke and abused the others on that account, and that shortly after this incident the accused had stabbed the deceased man with a knife. In regard to the alleged act of stabbing itself, it would appear that the only direct evidence available to the prosecution was the evidence of the witness Pinto. In fact Pinto was the first witness whom the prosecution called. In answer to a leading question "On this day at about 5 p.m. did you and the deceased and one Thegonis decide to smoke a ganja cigarette"? the witness replied: "Yes." Very shortly thereafter, in answer to another question "The deceased, *this accused* Thegonis and you were the persons to smoke this ganja cigarette"? the witness replied "The accused did not come there". In answer to five other leading questions, the witness repeatedly denied that the accused had come to the spot or been in the company of the other three men. Thereafter the learned Crown Counsel asked the following question:—

"24. *Q.* Did you see at any stage the accused coming and picking a quarrel with the deceased about not getting his share of the ganja cigarette?

A. No.

At this stage Crown Counsel applied to examine the witness under the provisions of section 154 of the Evidence Ordinance, and this was allowed by the learned trial Judge.

The further examination of the witness by the Crown Counsel was such that the deposition of the witness in the Magistrate's Court was read to him, and the witness admitted that the sentences thus read to him had in fact constituted his evi-

dence before the Magistrate. One such admission of the witness was that he had stated to the Magistrate that the accused had in fact been present when the other three men smoked the cigar. But, at a very early stage of this further examination, the witness repeatedly said that the accused did not come to the place where the others were smoking the ganja cigar, and in answer to question No. 44 the witness said that his different statement to the Magistrate had been a lie. I reproduce a few of the subsequent questions and answers:—

"47. *Q.* The accused asked Egonis for his share of the ganja as he also contributed?
A. Yes, I said so.
Q. Is that also incorrect?
A. That is not correct. It is a lie.
Q. "I waited there".
A. That is correct.
Q. "The accused then started abusing the deceased because his share of the ganja was not kept for him."
A. Yes, I said so. That is also a lie.
Q. What you have done is to tell the Magistrate bits of truth and chunks of lies?
A. Yes.

.....

62. *Q.* Did you say "I saw the accused and the deceased very clearly by the boutique lights?"'
A. I said so but it is false.
63. *Q.* **"I saw the accused stabbing the deceased?" did you say that?**
A. I said so but it is false.
Q. The deceased was holding his chest and came up to the boutique and fell down?
A. I said so but it is false.
Q. I saw the accused going towards his house?
A. I said so but it is false."

The situation which arose at the very commencement of this trial was almost precisely that which was anticipated in one of the concluding paragraphs of the recent judgment of this Court in the *Queen* vs. *Fernando* (C.C.A. Appeal No. 17 of 1967 delivered on 18th April 1967). But neither the trial Judge nor Counsel were then aware of that unreported judgment. What actually occurred in the present case was that, because the witness Pinto stated at the trial that the accused had never been in the company of the persons who were smoking the ganja cigar, evidence was led which made the Jury aware that, in his deposition to the Magistrate, the witness had not only alleged that the accused was present, but had further testified directly to the facts that the accused did commit the offence charged, and also that he had some motive against the deceased man.

No doubt the witness had damaged the prosecution case by his evidence that the accused had not been present at all; the prospective damage would have been clear to Crown Counsel, who expected that his other witness Thegonis would testify to the presence of the accused during the smoking of the cigar. This damage of course the prosecution was quite entitled to repair by proving that the witness Pinto had in the Magistrate's Court stated that the accused had been present, and proof of that former statement was sufficient and necessary to discredit the witness and to invite the jury to disregard his denial of the accused's presence.

The complaint of Counsel for the accused relates mainly to the Question No. 47 and the subsequent questions which I have reproduced above. Prior to that stage, there had been one, and only one, statement which needed contradiction and it was contradicted. But after that stage the witness did not at the trial give any direct testimony relevant to the commission of the offence charged. For instance, he did not say that the accused did not abuse the others, and thus there was no occasion for the prosecution to prove a former statement inconsistent with his evidence. The same observation has to be made with regard to the much more important Question No. 63.

Again, the prosecution proved the whole of the statement which the witness Pinto had made to the Police, including statements that the accused had been after liquor, and that the witness himself

feared the accused; this although the witness had not testified at the trial that the accused had been sober, or that he did not fear the accused.

Thus (apart from the one matter as to the accused not being present), Section 155 of the Evidence Ordinance was utilized, not to contradict testimony given at the trial, but to prove former statements which might in advance contradict evidence which the prosecution feared that the witness might give. If a witness has given some testimony at a trial, then Section 155(c), read with Section 154, may permit proof of a former inconsistent statement; but Section 155(c) does not in law authorise the slaying of phantom dragons.

We must add that Crown Counsel was not even entitled to ask question No. 24 without the permission of the trial judge, because at that stage Section 154 had not yet been invoked. When Counsel is examining his own witness, and hence not relying on Section 154, it is contrary to common sense, and not only to law, to ask whether X did something on a particular occasion if the witness has already vehemently denied X's presence on that occasion.

In effect, the attempt on the part of the prosecution to discredit its own witness had the consequence that a number of former statements were proved which could well have satisfied the Jury of the guilt of the accused, although in law they were completely irrelevant as evidence of his guilt. The learned trial Judge quite properly directed the Jury that these statements must not be taken into account against the accused; but, having regard to the gravely incriminatory nature of the statements, we cannot think with any confidence that the Judge's warning must have been heeded by the Jury.

The ideal criminal trial is one at which the prosecution leads only evidence which is relevant and admissible in proof of the offence charged, and at which there is accordingly no occasion to instruct the Jury to repress the natural human tendency to take account of all the matters proved in evidence. One major instance in which such an instruction is inevitable is a case where two or more persons are charged together, and a confession by one of them is proved. That exception to the ideal is permitted by our procedure subject to the discretion of a court to order separate trials. Another exception arises under Section 155(c) of the Evidence Ordinance, but it is ordinarily the defence which utilises the section. In this case, the prosecution purported to utilize the section, but did so illegally; hence the major part of the Crown's examination elicited evidence which was not legally admissible.

Learned Senior Crown Counsel has submitted that it is the duty of the prosecution to make its best efforts to induce a witness to speak the truth. The argument, in its application in the present context, presupposes that if a witness gives evidence exculpating an accused person, then the evidence must be untrue. The argument seems also to be opposed to the presumption of innocence, for evidence exculpating an accused person can be thought to be false only because of a supposition that the accused must be guilty.

Learned Senior Crown Counsel made a respectful but somewhat provocative enquiry as to what questions are in our opinion permissible under Section 154 of the Evidence Ordinance, if the limitations mentioned in the recent judgment of this Court and those discussed at the hearing of this appeal are applicable. An answer to his inquiry, if given in this appeal, would be merely obiter, for the recent judgment, and the one now pronounced, deal only with matters provable under Section 155(c) of the Evidence Ordinance. But Counsel is no doubt aware that research into the scope and effect of Section 154 must involve consideration also of Section 155(a), (b) and (d) Section 140, Section 143, Section 146, Sections 147 and 132, Section 148, Section 149, Section 150, Section 153, and perhaps of other sections of the Evidence Ordinance. The fruits of such research will presumably be available if and when the occasion arises for this Court to construe any of these sections as read with Section 154.

Before leaving the matters discussed, we should note that a situation such as that which arose at a very early stage of this trial can sometimes be retrieved if the trial judge in his discretion sees fit to intervene, or if the prosecutor utilises Section 154 otherwise than in the manner provided by Section 155(c). For example, a general reference to the fact that the court is aware of former statements made by the witness, or a suggestion that the witness may have some reason to conceal facts within his knowledge, occasionally serves to "soften up" an unwilling witness. But it is clear that any such treatment would have had no response in the case of the witness Pinto.

Evidence of the following matters was adduced by the prosecution in this case:—

(1) Thegonis stated at the trial that the accused had been present at the smoking party, and had abused the others because he was not given a share of the smoke.

(2) Thegonis also stated that, shortly after the smoking party dispersed, the accused had borrowed a clasp knife from him.

(3) The deceased man was found stabbed and lying a little distance away from the scene of the smoking.

(4) The deceased man had made a statement to the Doctor at the hospital that he had been stabbed by the accused.

The most weighty of the circumstances listed above is a statement made to the Doctor. But much of its value is reduced by the fact that, only a few minutes earlier the deceased had stated to the Apothecary that he had fallen in a paddy field and injured himself. The apothecary had also noticed that the deceased man was smelling of liqour. Having regard to the contradictory nature of these two statements of the deceased man, it is difficult for us to understand why the jury should have preferred to accept the statement made to the Doctor as being true in preference to the statement made to the Apothecary. We thought it quite likely that the preference of the Jury was influenced by their knowledge of the evidence which had been given by the witness Pinto in the Magistrate's Court and which, as we have held, should not have been led at the trial. In these circumstances, we did not think this to be a fit case in which to order a fresh trial.

For these reasons we allowed the appeal and directed that a verdict of acquittal be entered.

Accused acquitted.

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

B. H. R. DE SILVA *vs.* A. P. RANASINGHE

S.C. 758/64 — *D.C. Balapitiya,* 1174/*M*

Argued on: November 8, 1966
Decided on: November 11, 1966

Bills of Exchange Ordinance (Cap. 82), *sections* 49, 50 — *Action against indorser of cheque — Notice of dishonour—Whether giving thereof condition precedent to right of action—When delay in giving notice excused—Accommodation bill—Can such plea be raised for first time in appeal.*

Held: (1) That a notice of dishonour given in terms of section 49, rule 12, of the Bills of Exchange Ordinance is a condition precedent to a right of action against the indorser of a dishonoured cheque.

(1) That the plea that notice of dishonour should be dispensed with, as it was an accommodation bill, could not be raised in appeal as this had not been pleaded nor any issue raised on it at the trial.

Case referred to: *Murugappa Chetty* v. *Silva* (1916) 2 C.W.R. 33

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

S. W. Jayasuriya, for the plaintiff-respondent.

Sirimane, J.

The plaintiff alleged that the defendant had borrowed a sum of Rs. 3,500 from him, on the cheque produced at the trial marked P1. The cheque has been drawn by one Martin Silva, and according to the plaintiff endorsed to him by the defendant.

The cheque was dishonoured (the donor having stopped payment) and the plaintiff filed this action against the endorser (i.e. defendant) only. He obtained judgment in his favour and the defendant has appealed.

The main ground urged by Mr. Goonetilleke for the defendant is that there has been no notice of dishonour given to the defendant as required by section 49, Rule 12, of the Bills of Exchange Act, Cap. 82, which reads as follows:—

49. Notice of dishonour in order to be valid and effectual must be given in accordance with the following rules:—

(12) The notice may be given as soon as the bill is dishonoured, and must be given within a reasonable time thereafter. In the absence of special circumstances notice is

not deemed to have been given within a reasonable time, unless —

(*a*) where the person giving and the person to receive notice reside in the same place, the notice is given or sent off in time to reach the latter on the day after the dishonour of the bill;

(*b*) where the person giving and the person to receive notice reside in different places, the notice is sent off on the day after the dishonour of the bill, if there be a post at a convenient hour on the day, and if there be no such post on the day, then by the next post thereafter.

In the prayer the plaintiff averred that he had given notice of dishonour on 5.7.61, and at the trial a copy of a notice sent by his proctor to the defendant marked P5 bearing that date was produced. The question then arises as to the exact date on which the cheque was dishonoured, and the burden was on the plaintiff to prove that date in view of the defence taken up in the answer. The evidence on the point is not very clear. According to the plaintiff's proctor he had sent the cheque to the Bank (presumably acting as plaintiff's agent) on 20.6.61 and it was returned by the Bank a "few days" later. P4 is a communication relating to the dishonour dated 29.6.61 sent by post to the plaintiff's proctor by the Bank, and one gathers that he received this communication within a "few days" of the date on P4.

The plaintiff's oral evidence on the point which the learned District Judge has accepted is that he met the defendant on the road and told him about the dishonour after the cheque had been handed to the proctor to file action. This date is very vague indeed; it was perhaps after both P4 and P5.

In this state of the evidence it was conceded by counsel for the plaintiff that notice of dishonour had not been given as required by Rule 12 quoted above or even in accordance with Rule 13 which deals with "reasonable time" when a bill is dishonoured in the hands of an agent.

The learned District Judge himself appears to have appreciated this, for he seeks to excuse the delay in the following words:

"A third party's signed cheque leaf had been brought for the purpose of being kept as security for money borrowed and the defendant is not entitled to insist on notice of dishonour reaching him on the day after the dishonour."

Excuses for delay in giving notice of dishonour which may be accepted by a Court are set down in section 50(1). The delay must be "caused by circumstances beyond the control of the party giving notice, and not imputable to his default, misconduct or negligence". The fact that money had been borrowed by a person on a cheque signed by another is hardly an excuse for delay in giving notice of dishonour to the endorser, and learned counsel for the plaintiff did not seek to support this part of the judgment.

Notice of dishonour is a condition precedent to a right of action against an endorser (see *Murugappa Chetty* vs. *Silva* (1916) 2 C.W.R. 33). Respondent's counsel contended however that this was a case in which notice of dishonour should be dispensed with under section 50(2)(*d*)(iii) of Cap. 82, as P1 was an "accommodation cheque". This position was not pleaded in the plaint and no issue was raised at the trial, though I must say that there is some evidence on the record from which such an inference *may* be drawn. This aspect of the matter appears to have escaped the notice of the lawyers and the learned Judge at the trial.

It would not be fair on the defendant to hold against him in appeal on a point which he was not called upon to meet at the trial.

With some reluctance we have decided to grant the application of counsel for the plaintiff that the matter be sent back for re-hearing, and in view of the order we propose to make we do not wish to make any comment on certain other matters referred to by counsel for the appellant in the argument.

The judgment and decree entered in this case are set aside and the case sent back for trial *de novo* before another judge. The parties may be permitted to amend their pleadings if they so desire. The defendant-appellant is entitled to costs of this appeal, all other costs will be in the discretion of the District Judge.

Alles, J.

I agree.

Set aside and sent back.

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

DHARMASENA
vs.
NAVARATNE

S.C. 574/65 (*F*) — *D.C. Colombo* 6399/D

Argued on: 12th May, 1967
Decided on: 20th May, 1967

Evidence — Divorce action — Claim for damages against co-respondent — Confession of adultery by wife — Retracted in evidence — Not admissible against co-respondent — False denial by co-respondent — Proof of adultery — Standard of proof — Beyond reasonable doubt.

Held: (1) A confession by a wife of adultery with the co-respondent, which is retracted by her in her evidence, is not admissible as evidence against the co-respondent.

Followed: *Eliatamby* vs. *Eliatamby* (1925) 27 N.L.R. 396.

(2) A false denial by a man that he has ever spoken to a woman does not raise any strong inference that when he did speak to her he did so to entice her to intercourse.

(3) The general standard of proof beyond reasonable doubt applies for proof of adultery.

Followed: *Jayasinghe* vs. *Jayasinghe* (1954) 55 N.L.R. 410.

E. R. S. R. Coomaraswamy, with *E. C. Chakradaran*, for the 2nd defendant-appellant.

D. R. P. Goonetilake, with *M. D. K. Kulatunga*, for the plaintiff-respondent.

H. N. G. Fernando, C.J.

The plaintiff brought this action for divorce from his wife on the ground of her adultery with the 2nd defendant. The plaintiff and the 2nd defendant are both Police Constables who at the relevant time lived with their wives in the married quarters at the Cinnamon Gardens Police Station; the quarters of the two families adjoined each other.

At about 5.30 in the morning of 7th February 1964, the plaintiff left his quarters in order to report at the Station; his wife remained in the quarters with their young child and the plaintiff's brother. When the plaintiff returned about a half-hour later, his wife was not in the quarters and on inquiry from his brother, he was told that she had gone towards the kitchen at the rear of the premises. The plaintiff stated that a while later he saw his wife "being pushed out" by the 2nd defendant from a doorway in the latter's quarters. The plaintiff immediately assaulted his wife, and she then confessed that she had been called by the 2nd defendant into the latter's quarters and there had intercourse with the 2nd defendant. (The latter's wife, a hospital attendant, had been away from home on night duty). Thereafter, according to the plaintiff, his wife was "dragged" by the 2nd defendant into the latter's quarters and only emerged from there after the lapse of some minutes. The plaintiff immediately informed an Inspector of the incident, and of his wife's admission, but the Inspector was unable to record statements until after 10 o'clock. At that stage, the plaintiff's wife admitted in a statement to the Inspector, an act of intercourse with the 2nd defendant. The latter, however, denied any intimacy and further denied that he had ever spoken to the 1st defendant.

The evidence for the plaintiff at the trial was that which I have summarised above. The wife retracted her confession, stating that she had been forced to make it because of threats by the plaintiff. Both she and the 2nd defendant, however, did admit that she had been called by the 2nd defendant towards the entrance to the latter's room, and had there some conversation about an incident which had occurred in the quarters a few days earlier. The learned trial Judge was satisfied that the confession of adultery had been made voluntarily by the wife, who has not appealed against the finding that she had committed adultery and the decree for divorce.

But in holding against the 2nd defendant that he was guilty of adultery, the trial Judge nowhere refers to the long-established principle that statements made outside Court by the defendant (the wife) in a divorce action are not admissible as evidence against the co-respondent (*Eliatamby* vs. *Eliatamby*, 27 N.L.R. 396). The Judge failed to direct himself that the wife's alleged confession to the Inspector in this case could not be used against the 2nd defendant in proof against him of an act of adultery.

When the confession is excluded from consideration in the case against the 2nd defendant, the only circumstances which remain are:—

(1) that the 1st defendant had apparently entered the neighbouring quarters early in the morning, and that a while later the 2nd defendant pushed her out of those quarters;

(2) that after the plaintiff had assaulted his wife, the 2nd defendant dragged her into his quarters, where she remained for some little time;

(3) that the 2nd defendant falsely denied to the Inspector that he had ever spoken to the woman, whereas he later admitted in evidence that he did call to her and speak to her on this particular morning.

The plaintiff admitted at the trial that the 1st defendant and the wife of the 2nd defendant used to visit each other. Despite this admission, the learned trial Judge refused to believe that the two women had been on friendly terms, and had gone out together to witness the Independence Day celebrations. The reason stated for this disbelief arose from a midirection on the facts. It would appear that the plaintiff and his wife had only occupied the quarters a few weeks before this incident. There was evidence that the 2nd defendant's wife had been on night duty at the hospital during the preceding two weeks. The Judge thought that there was little chance for the women to meet, because one of them had been on duty at the hospital. It was a misdirection to think so, because the duty was night duty, which did not by any means exclude the possibility of meetings during the day. But for the statements in the confession, the visit to the 2nd defendant's quarters on this particular morning was in the circumstances open to an "innocent" explanation.

So far as the 2nd defendant was concerned, there was nothing in the evidence to contradict his version of an innocent conversation with the plaintiff's wife. Even if she did enter his quarters, the plaintiff's own evidence is that the 2nd defendant *pushed* her out, a circumstance which at the least casts doubt on the theory that an act of intimacy had taken place. Counsel for the plaintiff in appeal could point only to the fact which I have mentioned at (3) above; but a false denial by man that he has ever spoken to a woman does not raise any strong inference that when he did speak to her he did so to entice her to intercourse.

Had the trial Judge reminded himself of the principle that the wife's confession was not evidence against the co-respondent, and of the further principle that the general standard of proof beyond reasonable doubt applies for proof of adultery (*Jayasinghe* vs. *Jayasinghe*, 56 N.L.R. 410), I do not see how he could have found the charge proved against the 2nd defendant on such tenuous material.

Siva Supramaniam, J.

I agree.

Set aside

END OF VOLUME LXXII

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අපරාධ අභියාචන අධිකරණය — මිනිමැරීමක තත්ත්වයට නො වැටෙන අනියම් මිනිමැරීමක් — පැමිණිලි පක්ෂයේ සාක්ෂිකරුවකුගෙන් කෝන්තර ඇසීමට පැමිණිලි පක්ෂය විසින් ම ඉල්ලා සිටීම — මහේස්ත්‍රාත් උසාවියේ සාක්ෂි ප්‍රකාශය සහ පොලීසියට කළ ප්‍රකාශය සාක්ෂිකරුවා ලවා කියවනු ලැබීම — කෝන්තර ඇසීමට ඇති බලය සීමා සහිත බව —චෝදිතයාට අහිතකර ප්‍රකාශ ඔහු කී සාක්ෂියක පරස්පර විරෝධය ඔප්පු කිරීමට නොව වෙන අයුරකින් ප්‍රයෝජන ගැනීමට අනාවරණය කරවා ගැනීම — එහි නීති විරෝධි බව, කරුණට අදාල නො වන දේ සාක්ෂි වශයෙන් ඇතුළත් කළ නොහැකි බව — යෝග්‍ය පරිදි ජූරි සභාවට උපදෙස් දීම — නමුත් ජූරි සභාව නීති විරෝධි සාක්ෂි අනුව ක්‍රියා කරනු ලැබිය හැකි වීමේ අවදානම — සාක්ෂිකරු ඇත්ත කීමට පෙළඹ වීම — පැමිණිල්ල මෙහෙයවීමේ අයිතිවාසිකම්වල සීමිත බව — සාක්ෂි ආඥා පනතේ (14 වන අධිකාරය) 154, 155(සී) සහ 155(ඒ), (බී), (ඩී), 140, 143, 145, 146, 147 සහ 152, 148, 149, 150 සහ 153 යන ඡේද.

චෝදිත ඇපැල්කරුවන 'ජේ' මිනිමැරීමක තත්ත්වයට නො වැටෙන අනියම් මිනිමැරීමකට වරදකරු කරනු ලැබී ය. පැමිණිලි පක්ෂයත් විත්ති පක්ෂයත් මරණය සිදුවීමේ හේතු වශයෙන් මියගිය අයගේ පරස්පර විරෝධි ප්‍රකාශ දෙකක් ඔප්පු කරන ලදී.

සිඩිය පිළිබඳව පැමිණිලි පක්ෂයට නඩුවේ දී කෙළින් ම ඉදිරිපත් කළ හැකිව තිබුණු එක ම සාක්ෂිය 'පී' නමැති සාක්ෂිකරුගේ සාක්ෂිය පමණක් යයි පෙනී යන සේ ය. කටට උත්තරය දී ඇසූ ප්‍රශ්න හයකට ම පිළිතුරු දුන් මේ සාක්ෂිකරුවා අපරාධය සිදු වූ තැන චෝදිතයා සිටියේ නැතැයි කීවේ ය.

'පී' නමැත්තා විසින් චෝදිතයා එතැනට පැමිණ මියගිය අය සමග අඩ දබරයක් ඇති කර ගැනීම දුටුවේ දැයි රජයේ අධිනීතිඥවරයා විසින් අසන ලද තවත් ප්‍රශ්නයකට (අංක 24) ඔහු එය නුදුටුවේ යයි පිළිතුරු දුන් විට රජයේ අධිනීතිඥවරයා සාක්ෂි ආඥා පනතේ 154 වන ඡේදය යටතේ ඔහුගෙන් ප්‍රශ්න කිරීමට අයැද සිටියෙන් ඊට ඉඩ ලැබිනි. 'පී' නමැති අයගෙන් තව දුරටත් ප්‍රශ්න ඇසීම සිදු වූයේ ඔහු විසින් මහේස්ත්‍රාත් උසාවියේ දී කරන ලද සාක්ෂි ප්‍රකාශය ඔහුට කියවනු ලැබීමෙනි. චෝදිතයා එතැන සිටි බැව් කියැවෙන ප්‍රකාශය ඇතුළු එම පහළ උසාවියේ ප්‍රකාශය සම්පූර්ණයෙන් ම කළ බව සාක්ෂිකරු පිළිගත් අතර එම ස්ථානයට නො පැමිණි බව පිට පිට ම කියා සිටි ඔහු මහේස්ත්‍රාත්වරයා ඉදිරියෙහි තමා කළ සාක්ෂි ප්‍රකාශය බොරු බව ද කීවේ ය. 'පී' නමැති සාක්ෂිකරුවාට කියවන ලදුව ඔහු අසත්‍යයක් ලෙස වගී කළ එක් ප්‍රකාශයක් නම් ''මියගිය අයට චෝදිතයා පිහියෙන් අනිනු මම දුටුවෙමි'' (ප්‍ර. 63) යන්නයි.

මහේස්ත්‍රාත්තුමා ඉදිරියේ කරන ලද තමාගේ සාක්ෂි ප්‍රකාශයෙහි චෝදිතයා එම ස්ථානයෙහි සිටි බව හැඟෙන කරුණු ඔහු විසින් කියන ලද බව පමණක් නොව, චෝදිතයා චෝදනා ලබා ඇති අපරාධය කරන ලද බවත් මියගිය අයට විරුඬව යම්කිසි චේතනාවක් ඔහු කෙරෙහි තිබුණු බවත් ඔහු විසින් වැඩිදුරටත් දිවුරා කියන ලද බවත් ජූරි සභාවට දැනෙන සේ සාක්ෂි මේ ආකාරයෙන් ඉදිරිපත් කොට තිබෙන බව පෙනේ. 'පී' නමැත්තා පොලීසියට කරන ලද ප්‍රකාශය ද සම්පූර්ණයෙන් ම පැමිණිලි පක්ෂය විසින් ඔප්පු කොට තිබේ.

තීන්දුව: (1) 'පී' නමැති සාක්ෂිකරු මහේස්ත්‍රාත් උසාවියේ දී චෝදිතයා එතැන සිටියේ යයි කී බව ඔප්පු කොට පැමිණිලි පක්ෂය ඉදිරිපත් කළ කරුණු වලට වී ඇති හානිය ප්‍රකෘතිමත්කර ගැනීමට පැමිණිලි පක්ෂයට සම්පූර්ණයෙන් බලය තිබේ. එම සාක්ෂිකරු ඇදහිය නොහැකි පුද්ගලයකු බවට පත් කිරීමට සහ ඔහු විසින් චෝදිතයා එතැන සිටියේ නැතැයි කී ප්‍රකාශය ගණන් නො ගන්නා ලෙස ජූරි සභාවට අයැදීමක් කිරීමට ඒ පිළිබඳව කලින් ඔහු විසින් කරන ලද ප්‍රකාශය ඔප්පු කිරීමට ප්‍රමාණවත් වන අතර ම එය අවශ්‍ය ද දෙයකි.

(2) චෝදිතයා විසින් මියගිය අයට පිහියෙන් අනිනු තමා දුටුවේ යයි (ප්‍ර. 63) කියන ප්‍රකාශය ඇතුළු අවශේෂ ප්‍රකාශ ඔප්පු කිරීමට පැමිණිලි පක්ෂයට අවස්ථාවක් මතු නොවූයේ ඒ ප්‍රකාශ ඉදිරිපත් කිරීම ඔහුගේ සාක්ෂිවලට ඉඳුරා විරුඬව, ඔහු විසින් කරන ලද ප්‍රකාශ ඉදිරිපත් කිරීමක් නො වන නිසා ය. එපමණක් ද නොව සාක්ෂිකරු මෙම නඩු විභාගයේ දී එම කරුණු ගැන සාක්ෂි නුදුන් නිසා ඔහු පොලීසියට දුන් කටඋත්තර ඔප්පු කිරීමට ද පැමිණිලි පක්ෂයට අවස්ථාවක් ඇති නොවීය.

(3) සාක්ෂි ආඥා පනතේ 155(සී) ඡේදය 154 ඡේදය සමග එකට කියූ කල එයින් කලින් අවස්ථාවක කරන ලද පරස්පර විරුඬ ප්‍රකාශයක් ඔප්පු කිරීමට එයින් බලය ලැබෙනු ඇත. නමුත් සාක්ෂිකරු පසුව කියාවී යයි පැමිණිලි පක්ෂයේ භීතියට හේතුවන සාක්ෂිවල ප්‍රතිවිරුඬ භාවය කලින් ම ඔප්පු කිරීමෙන් ජීවමාන නො වූ මකර අවතාර ඝාතනය කිරීමට එයින් බලයනො ලැබේ. මෙම නඩුවේ දී පැමිණිලි පක්ෂය විසින් සාක්ෂි ආඥා පනතේ 155(සී) ඡේදය නීති විරෝධි ලෙස පරිශීලනය කොට තිබේ.

(4) සාක්ෂි ආඥා පනතේ 154 වන ඡේදයේ පිළිසරණ එවකට සොයා නොමැති නිසා විනිශ්චයකාරවරයාගේ අවසරය නො ලබා රජයේ අධිනීතිඥවරයාට අංක 24 දරණ ප්‍රශ්නය ද ඇසිය නො හැකිව තිබුණි.

(5) තමාගේ ම සාක්ෂිකරුවාගේ සත්‍යතාවය බිඳීමට පැමිණිලි පක්ෂය දැරූ පරිශ්‍රමයෝ ප්‍රතිඵලයක් වූයේ මෙම සාක්ෂි ඒකාන්තයෙන් ම චෝදිතයාගේ සාපරාධි බවට අදාල නො වන සාක්ෂි වුවත්, ඒවා නීතියට අනුව සාක්ෂි ලෙස

ඇතුළත් නො කළ හැකි දේ වුවත් එබඳු ප්‍රකාශ සඩබ්‍යාවක් ඔප්පු කරනු ලැබීමෙන් චෝදිතයාගේ සාපරාධී භාවය ගැන ජූරි සභාවට මනා සේ සෑහීමකට පත්වීමට හැකි තත්ත්වයක් ඇති වීම ය.

(6) එම ප්‍රකාශ චෝදිතයාට විරුඬව ගණන් ගැනීම නො කළ යුතුයයි නඩුව විනිශ්චය කළ විනිශ්චයකාරවරයා යෝග්‍ය අන්දමින් ජූරි සභාවට උපදෙස් දුන් නමුත්, එම ප්‍රකාශවල අන්තර්ගත වී ඇති චෝදිතයාගේ උග්‍ර සාපරාධී තත්ත්වය ගැන කල්පනාකර බලන විට විනිශ්චයකාරවරයාගේ එම උපදෙස්වලට සැලකිල්ලක් ජූරි සභාව විසින් දක්වන ලදැයි මෙම අධිකරණයට විශ්වාස තබා සිතා ගැනීමට නො හැකි විය.

(7) චෝදිතයා ගැන සඳහන් නො කරමින් ප්‍රතිවිරුඬ ලෙස මියගිය අය ඇපොතිකරි මහතාට කළ ප්‍රකාශයට වඩා චෝදිතයා පටලවා මියගිය අය දොස්තර මහතාට කළ ප්‍රකාශය පිළිගැනීමට ජූරි සභාව කැමති වූයේ 'පී' නමැති සාක්ෂිකරුවා මහේස්ත්‍රාත් උසාවියේ කී සාක්ෂිය ඔවුන්ට දැන ගැනීමට හැකි වූ නිසා යයි සිතීමට බොහෝ සේ ඉඩ තිබේ.

තීන්දුවෙන් අමතරව එච්. ඇන්. ජී. ප්‍රනාන්දු අග්‍ර විනිශ්චයකාරතුමා: "..... එම පනතේ අංක 154 දරණ ඡේදයේ විෂය හා ක්‍රියාකාරිත්ත්වය පිළිබඳ කෙරෙන ගවේෂණයක දී පනතේ ඇති අංක 155(ඒ), (බී), සහ (ඩී), අංක 140, අංක 143, අංක 145, අංක 146, අංක 147 සහ 132, අංක 148, අංක 149, අංක 150 ,අංක 153 දරණ ඡේද සහ සමහර විට තවත් ඡේද ගැන ද සලකා බැලීමට සිදුවන බව අධිනීතිඥවරයා නිරනුමානව දැන සිටී."

එච්. ඇන්. ජී. ප්‍රානන්දු අග්‍ර විනිශ්චයකාරතුමා: "සාක්ෂිකරුවකු ඇත්ත කීමට පෙළඹවීම පිණිස තමාගේ හැම පරිශ්‍රමයක් ම යෙදීම පැමිණිලි පක්ෂයේ යුතුකම වේ යයි උගත් රජයේ ජ්‍යෙෂ්ඨ අධිනීතිඥවරයා කරුණු සැලකෙළේ ය. දැනට මතු වී තිබෙන පරිසරය අනුව යම් හෙයකින් සාක්ෂිකරුවකු චෝදිතයා වරදින් බැහැර වන අයුරින් සාක්ෂියක් කී කලක ඒ නිසා එම සක්ෂිය බොරුවක් හැටියට සලකා ගත යුතු බවකි. මෙම තර්කයෙන් තව දුරටත් අපේ නීති සම්ප්‍රදාය අනුව ඇති චෝදිතයකු වරද ඔප්පු වන තුරු නිදහස් පුද්ගලයකු ලෙස සලකා ගත යුතුය යන ප්‍රඥප්තියට ද පහර වදී. එයට හේතුව චෝදිත පුද්ගලයකු වරදින් බැහැර කිරීමේ සාක්ෂියක් අසත්‍ය යයි කලින් ම සිතාගත හැක්කේ චෝදිතයා වරදකරු යයි අදහස් කර ගත් විට පමණක් වීම ය."

මහ රැජින එ. ජයසිංහ ආරච්චිගේ දොන් ක්වින්ටස් අල්විස් ජයසිංහ 21

ආඥා පත්‍ර

සර්ටියෝරේරයි සහ/හෝ වැළැක්වීමේ ආඥාවක් — සුළු නගර සභාවක සභාපතිවරයාට විරුඬව ඔඩිටර්-ජනරාල්වරයා අධිකත්වය ගෙවීමේ සහතික පත්‍රයක් දීම — ඇමතිවරයාට අභියාචනයක් කිරීම — අධිකත්වය අභියාචනයේ දී ද අනුමත වීම — අධිකත්වය ගෙවීමේ නියෝගය සහ ඇමතිවරයාගේ නියෝගය අවලංගු කිරීමට සර්ටියෝරේරයි ආඥාවක් ඉල්ලීම — අධිකත්වය ගෙවීමේ නියෝගය ඉවත් කිරීම ප්‍රතික්ෂේප වීම — පෙත්සම් කරුට නො දන්වා අභියාචනයෙහි කටයුතු කිරීම නිසා ඇමතිවරයාගේ නියෝගය නිෂ්ප්‍රභාකොට එය නැවත වරක් පරීක්ෂණය සඳහා ආපසු යැවීම — අධිකත්වය ගෙවීමට ඇමතිවරයා විසින් දෙන ලද දෙවන නියෝගයට අභියෝගයක් ඉදිරිපත් නො වීම — මහේස්ත්‍රාත් උසාවියේ මාර්ගයෙන් එම අධිකත්වයේ මුදල ලබා ගැනීමට පළාත් පාලන කොමසාරිස්වරයා කළ ඉල්ලීමක් — සුළු නගර සභා ආඥා පනතේ (256 වන අධිකාරය) 181(1), 182(1), 182(2), 182(5) දරණ ඡේද.

7.8.59 වන දින සුළු නගර සභා ආඥා පනතේ 181(1) වන ඡේදයට අනුව ක්‍රියා කළ ඔඩිටර්-ජනරාල්වරයා (පළමුවන වගඋත්තරකරු) සුළු නගර සභාවක සභාපතිවරයකුගෙන් රු. 28,962.48 ක් අයකරගැනීමේ නියෝගයක් නිකුත් කර තිබේ. පළාත් පාලන කොමසාරිස්වරයා (දෙවන වගඋත්තරකරු) එම ආඥා පනතේ 182(5) වන ඡේදය අනුව එම මුදල අයකර ගැනීමට මහේස්ත්‍රාත් උසාවියට ඉල්ලීමක් ඉදිරිපත් කෙළේ ය. ඉක්බිති අවුරුදු හයකට අධික කාලයක් ගත වූ පසු අධිකරණ ආඥා පනතේ 42 වන ඡේදය යටතේ සර්ටියෝරේරයි ආඥාවක් සහ/හෝ වැළැක්වීමේ ආඥාවක් ලබා ගැනීම සඳහා මෙම ආයාචනය ඉදිරිපත් වී ඇත.

වර්ෂ 1959 දී පෙත්සම්කරු තමාට විවෘතව ඇති එක පිළිසරණක සහනය ලබා ගැනීම සඳහා ඇමතිවරයාට 182 වන ඡේදය අනුව අභියාචනයක් ඉදිරිපත් කළ බව පිළිගති. මෙම ඇපැල ඇමතිවරයාගේ නියෝගය ද ඉවත් කිරීම පිණිස සර්ටියෝරේරයි ආඥාවක් ඉල්ලා තිබේ. මින් පළමුවන ඉල්ලීම ප්‍රතික්ෂේප කළ ශ්‍රේෂ්ඨාධිකරණය, ඇමතිවරයා පෙත්සම්කරුට නිවේදනයක් නොයවා අභියාචන පරීක්ෂණය පවත්වන ලද නිසා පෙත්සම් කරුට තමාගේ අභියාචනය නිසි පරිදි විසඳවා ගැනීමට ප්‍රස්ථාවක් දීමේ අටියෙන් දෙවන ඉල්ලීමට ඉඩ දුන්නේ ය.

තීන්දුව: (1) අධිකත්වය ගෙවීමේ නියෝග සහතික පත්‍රය දී වර්ෂ හයකට පසුව මෙම ඉල්ලීම ඉදිරිපත් කළ බැවින් එය ප්‍රතික්ෂේප කළ යුතු ය.

(2) නීත්‍යානුකූල ගතයුතු පියවරක් ගත් දෙවන වගඋත්තරකරුට විරුඬව සර්ටියෝරේරයි ආඥාවක් හෝ වැළැක්වීමේ ආඥාවක් නිකුත් කිරීම කළ නො හැක.

(3) ඔහු ගේ කරුණුවලට කන් දීමෙන් පසු ඇමතිවරයා අභියාචනය ඉවත හෙළීමෙන් පසු එයට විරුඬව අභියෝග නො කිරීමෙන් නීතියට අනුව තමාට ලැබී ඇති පිළිසරණ පෙත්සම්කරු

අහෝසිකර ගෙන තිබීම නිසා අධිකරණය මෙසේ ඉල්ලා සිටින ආඥාව නිකුත් නො කළ යුතු ය.

මාදම්පේ නගර සභාපති එ. ඔඩිටර්-ජනරාල්තුමා... 16

උසාවියට අපහාස

උසාවියට අපහාසයක් — උසාවියේ ගෞරවය කෙලෙසෙන අයුරින් පුවත් පතක පළවූවක් — මහජනයා තුළ උසාවි කෙරෙහි තිබිය යුතු ගෞරවය රැක ගැනීමේ අවශ්‍යතාවය — අධිකරණ ආඥා පනත 47 වන ඡෙදය.

තුන්වන වගඋත්තරකරු විසින් 16.10.66 ප්‍රසිඩ කරන ලද පුවත් පත් කලාපයක මෙහි පහත සඳහන් සිරස්තලය සහිත ප්‍රවෘත්ති වාර්තාව පළවීය.

''බණ්ඩාරනායක මහත්මිය: 'මා දේශපාලනයෙන් ඉවත්කර තැබීමේ උපක්‍රමයකි.'

'තමා දේශපාලනයෙන් ඉවත්කර තැබීමට ඩඩ්ලි සේනානායක රජය ප්‍රතිඥා දී තිබේ යයි ද, ඔවුන් තම සොහොයුරන් දෙදෙනාට විරුඬව නිස්සාර චෝදනා සහ තමන්ට විරුඬව ඡන්ද පෙත්සමක් ඉදිරිපත් කෙළේ ඒ නිසා යයි ද සෙනසුරාදා (1966 ඔක්තෝබර් 15 වෙනි දින) බණ්ඩාරවෙල ක්‍රීඩා පිට්ටනියේ පැවැති රැස්වීමක දී සිරිමා බණ්ඩාරනායක මහත්මිය කීවා ය.''

මේ පුවත පළවන අවස්ථාවේ බණ්ඩාරනායක මහත්මියගේ සහෝදරයකුට විරුඬව ඉදිරිපත් වූ මැතිවරණ පෙත්සමක් ඔහුගේ අවාසියට තීරණයවී තිබී එයට විරුඬව ශ්‍රේෂ්ඨාධිකරණයට ඉදිරිපත් කළ අභියාචනය ද නිෂ්ප්‍රභා වී තිබිණි. ඇයගේ තවත් සහෝදරයකුට විරුඬව මේ කාලයේ දී ම නීතිපතිවරයා විසින් ඉදිරිපත් කරන ලද අල්ලස් නඩුවක් ද විභාග වීමට තිබිණි.

බණ්ඩාරනායක මහත්මියටත් (පළමු වන වගඋත්තරකරු), එකී පුවත්පතේ කර්තෘටත් (දෙවන වගඋත්තරකරු) එහි ප්‍රකාශකයාටත් (තුන්වන වගඋත්තරකරු) විරුඬව, උසාවියට අපහාස කිරීම සම්බන්ධයෙන් දඬුවම් නො කිරීමට හේතු දැක්වීමට නියම කරමින් නියෝගයක් නිකුත් කරන මෙන් පෙත්සම්කරු අයැද සිටියේ ය.

පළමුවෙන් ම මෙම ප්‍රශ්නය ඒකපාක්ෂිකව කරුණු සලකා බලා නියෝගයක් නිකුත් කිරීමට සුදුසු දැයි තීරණය කිරීමට උසාවියට ඉදිරිපත් වූ විට පළමු වන වගඋත්තරකාරිය විසින් කරන ලදැයි ඇයට ආරෝපණය කර තිබුණු ප්‍රකාශය සත්‍ය වශයෙන් ම කළ බවට කිසි ම වාචික හෝ ලිඛිත සාක්ෂියක් ඉදිරිපත් නො කර තිබීමේ හේතුවෙන් එසේ නියෝගයක් ඇය වෙත නිකුත් කිරීම ප්‍රතික්ෂේප කළ අධිකරණය දෙවන හා තුන්වන වගඋත්තරකරුවන්ට විරුඬව එබඳු නියෝගයක් නිකුත් කෙළේ ය.

ඒ අනුව ගරු විනිශ්චයකාරතුමන් ඉදිරියේ පෙනී සිටි 2 වන හා 3 වන වගඋත්තරකරුවෝ දිවුරුම් පෙත්සම් ඉදිරිපත් කළහ. දෙවන වගඋත්තරකරු තමාගේ දිවුරුම් පෙත්සමෙහි පහත සඳහන් කරුණු සැලකර සිටියේ ය.

(ඒ) කර්තෘවරයා වශයෙන් එය පළ කිරීම සම්බන්ධයෙන් සම්පූර්ණ වගකීම තමා භාර ගන්නා බව;

(බී) එසේ පළ කිරීමෙන් පාඨකයන් විසින් එය මැතිවරණ අධිකරණයේ හෝ ශ්‍රේෂ්ඨාධිකරණයේ තීන්දුව විවේචනය කිරීමක් හැටියටත් අල්ලස් නඩුව පිළිබඳව එසේ පළ කිරීමෙන් මහජන මතයට හානිකර දෙයක් සිදුවිය හැකිය යන්න අවබෝධ කර නො ගැනීම නිසා ප්‍රමාද දෝෂයකින් එය තමා අතින් වූ දෙයක් බව;

තුන්වන වගඋත්තරකරුවන වෙළඳ සමාගමේ ක්‍රියාකාරක අධ්‍යක්ෂවරයා ද සම්පූර්ණ වගකීම භාර ගත්තේ ය.

තුමන් වරදකරුවන් බව පිළිගත් වගඋත්තරකරුවන් දෙදෙනා ඒ සම්බන්ධව කණගාටුව ප්‍රකාශ කොට එම උසාවි තුනෙන් ම සමාව අයැද සිටියෝ ය. ඔවුන් වෙනුවෙන් පෙනී සිටි නීතිඥවරු දඬුවම අඩු කරන ලෙස අයැද සිටියහ.

තීන්දුව: (1) විරුඬ පක්ෂයේ නායිකාව දේශපාලන කටයුතු වලින් බැහැර කර තැබීමට සේනානායක ආණ්ඩුව ගන්නා ආයාසයට යම්කිසි අන්දමකින් අධිකරණය ද සහයෝගය දේය යන හැඟීම ඇති කිරීමට එහි ලා පළකර ඇති ප්‍රකාශය ප්‍රමාණවත් වේ.

(2) යම්කිසි ලාලනශීලිත්වයක හෝ පක්ෂපාතිත්වයක චේතනාවක් අධිකරණය වෙත පැවරීමෙන් එයට විරුඬව මහජන මතය කලකිරවීමට ඉඩදිය නොහේ.

(3) සමාව ඉල්ලීමේ සම්පූර්ණ භාවය හා දිවුරුම් පෙත්සම්වල දක්වා ඇති කරුණු සහ තත්ත්වය සලකා එක් එක් වගඋත්තරකරුවකුට රු: 1000/- බැගින් දඩ ගැසිය යුතු ය. මෙය නො ගෙවා පැහැර හැරියොත් මාස දෙකක වැඩ නැතුව සිරගෙයි සිටිය යුතු ය.

ගරු ටී. ඇස්. ප්‍රනාන්දු විනිශ්චයකාරතුමා: ''කලින් අවස්ථාවල දී මෙම උසාවිය මගින් නොයෙක් විට පෙන්වා දී ඇතිමුත්, අපකීර්තිදායක අපහාසාත්මක හා වෙනත් අප්‍රසන්න දේ පළවීම වැළැක්වීම සඳහා යෝජිත ප්‍රකාශනයන් පරීක්ෂා කොට බැලීමට පුවත් පත් කාර්යාලවල එදිනෙදා වැඩවල දී නීතිය පිළිබඳ දැනුමක් හා පළපුරුද්දක් තිබෙන පුද්ගලයන් ගේ සහාය ලබන බවක් තවමත් පෙනෙන්නට නැති බව තරමක පුදුමයට කරුණකි.''

ජයරත්න එ. සිරිමාවෝ බණ්ඩාරනායක සහ තවත් දෙදෙනෙක් 13

දේවාලයක භාරකාරත්වය

දේවාලයක බාරකරු — ඔහුට දේවාලය සන්තක ඉඩම්වල අයිතිවාසිකම් ප්‍රකාශ කරවා ගැනීමට නඩුවක් ගෙනයෑමට බලය තිබේ ද? — බෞද්ධ විහාර දේවාලගම් පනතේ 3 වෙනි 4(1), 4(2) වෙනි සහ 8 වෙනි 10 වෙනි ඡෙද.

තීන්දුව: බෞද්ධ විහාර දේවාල ඉඩම් පණතේ 4(1) වෙනි උප ඡෙදය යටතේ ක්‍රියාත්මකවීමෙන් නිදහස් වූ දේවාලයක තත්ත්වාකාර භාරකරුවකුට (de facto trustee) එම දේවාලය සන්තක ඉඩමක හිමිකම ප්‍රකාශ කරවා ගැනීමේ නඩුවක් පවරා එය කියා ගෙන යාමට බලය තිබේ.

ගරු ජී. පී. ඒ. සිල්වා විනිශ්චයකාරතුමා: ''(ඒ) එහෙයින් පනතේ 3 වෙනි සහ 4 වෙනි ඡෙද සලකා බලන විට විහාර කොටස් තුනකට බෙදා ඇති බව පෙනේ. එනම්, පනතේ ක්‍රියාකිරීමට යටත්වන විහාර; (4)1 වෙනි උපඡෙදයේ ක්‍රියා කිරීමෙන් පමණක් නිදහස් වන විහාර; සහ පනතින් මුළුමනින් ම නිදහස් වන විහාර.''

''(බී) එහෙයින් දේවාලයක් 4(1) වෙනි උප ඡෙදයේ ක්‍රියා කිරීමෙන් නිදහස් කර ඇතිවිට එම දේවාලයේ ඉඩකඩම් වල කළමනාකාරත්වය පැවරීම සම්බන්ධයෙන් පනත නිශ්ශබ්ද වන්නේය තවද එය කරණ කොටගෙන දේවාලයට බාරකාරයෙක් පත්කිරීම සඳහා 8 වෙනි ඡෙදයේ රෙකුලාසි අනුව ක්‍රියා කිරීමට නො හැකි වන්නේය. එහෙයින් 8 වෙනි ඡෙදයෙන්, අන් සෑම දේවාලයක ම භාරකරු මහා භාරකරු විසින් පත්කළ යුතු යැයි සඳහන් වන නමුත්, ''අන් සෑම දේවාලයක ම'' යන වචන තේරුම් ගත යුත්තේ පනතේ ක්‍රියා කිරීමෙන් නිදහස් නොකරන ලද දේවාලවලට පමණයි.''

එරගොඩ ආරච්චිලාගේ මුදියන්සේ එ. ටී. ඇම්. ඩිංගිරි බණ්ඩා 5

භාරකාර අඥාපනත

භාරකාර ආඥා පණතේ 93 වන ඡෙදය — බෙදුම් නඩුවකට භාජන වූ ඉඩමක තමන්ට අවසාන නියෝගයට පසු ලැබෙන අයිතිවාසිකම් හා උරුම විකිණීමට සමහර හවුල් අයිතිකරුවන් කැමති වීම — එම කැමැත්ත අනුව එම නඩුවේ අවසාන නියෝගයෙන් පැවරුනු බෙදූ කොටස් පැමිණිලිකරුට පැවරීමක් ක්‍රියාවේ යෙදවීම — විකිණීමට කැමති වීමෙන් පසුව එහෙත් නඩුවේ අවසාන නියෝගයට පෙරාතුව පොලී මරා උකස්කරයකින් සමහර හවුල්කරුවන් තම තමන්ගේ උරුම-කරුම විත්ති කරුට ලබා දීම — භුක්තිය ලබා ගැනීමට පැමිණිලිකරු දැමූ නඩුවක් — මෙම උකස භාරකාර ආඥා පණතේ 93 වන ඡෙදයෙහි ඇති ''දේපල'' යන වචනයට ඇතුළත් ද යන වග — බෙදූ කොටස් පවරා දීමෙන් පසු විශේෂයෙන් ක්‍රියාවෙහි යෙදවිය යුතු යයි ගිණිය හැකි කොන්ත්‍රාත්තුවක් තිබේ ද යන්න —

බෙදුම් නඩුවක පාර්ශ්වකරුවන් වූ 'ඒ', 'ඇල්', 'ජේ' සහ 'පී' යන අය යථා පරිදි ලියා පදිංචි කරන ලදුව පී1 දමා සලකුණු ලද 1956.9.20 දාතමින් යුත් ඔප්පුවකින් තම තමන්ට ලැබෙන උරුම හා අයිතිවාසිකම් පැමිණිලිකරුට නඩුවේ අවසාන නියෝගය සටහන් කිරීමෙන් තුන් මසක් ඇතුළත දී විකිණීමට පොරොන්දු වූහ.

1963.3.5 වන දින නඩුවේ අවසාන නියෝගය සටහන් කර ප්‍රකාශයට පත් කරන ලදුව ඉඩමේ 2, 3 සහ 4 යන කොටස් පිළිවෙලින් 'ඒ', 'ඇල්', සහ 'ජේ' යන තිදෙනාට හිමිවන අයුරු බෙදුම් සැලැස්මේ නිරූපණය විය. මොවුන් විසින් 1965.4.6 දාතමින් යුත් පී4 දමා සලකුණු කරන ලද ඔප්පුවෙන් ඉහත සඳහන් පී1 දරණ පොරොන්දුවට අනුකූලව තමන්ගේ අයිතිවාසිකම් පැමිණිලිකරුට ඉඩම්වල කිසි ම අවහිරයක් නොමැති බව කියමින් පවරා දෙන ලදී. බෙදුම් නඩුවේ අවසාන නියෝගය අනුව 'පී' නමැත්තාට අයිතියක් ලැබේයයි ප්‍රකාශ නොවිනි.

පී1 දමා ලකුණු කරන ලද පොරොන්දු පත්‍රය ලියූ දිනට පසු එහෙත් බෙදුම් නඩුවේ අවසාන නියෝගය වාර්තා ගතවීමට සහ පී4 දමා ලකුණු කරන ලද විකිණීමේ ඔප්පුව ලිවීමට කලින් 'ඒ', සහ 'ජේ' යන දෙදෙනා පිළිවෙලින් ඩී1 සහ ඩී 2 දමා සලකුණු කරන ලද යථා පරිදි ලියා පදිංචි වූ උකස්කර දෙකකින් එම ඉඩමෙහි තමන්ට ලැබෙන අයිතිවාසිකම් විත්තිකරුගේ වාසියට ''උකස ගත් අයට, ඔහුගේ ඇටෝර්නි බලකරුට ,උරුමක්කරු වනට, පොල්මක්කාර, අද්මිනිස්ත්‍රාසිකාර යනාදීන්ටත් උකස්කරු විසින් ලියා පවරා දෙන්නන්ටත් එහි පොලිය වෙනුවට භුක්ති විඳීමට ඉඩ ලැබෙන සේ '' පිරිනමා තිබේ.

එකී ඉඩම් කොටස්වල භුක්තිය ලබා ගැනීමට පැමිණිලිකරු විසින් දමන ලද නඩුවක් උගත් දිස්ත්‍රික් විනිශ්චයකාරතුමා විසින් භාරකාර ආඥා පණතේ 93 වන ඡෙදයේ ඇති ''දේපොල'' යන වචනයට උකසකින් ලැබෙන අයිතිවාසිකම් ඇතුළත් නොවේය යන හැඟීම පිට එම පැමිණිලිකරුට විරුඬව තීන්දු කිරීම නිසා ඔහු එයට විරුඬව ඇපැල් පෙත්සමක් ඉදිරිපත් කළේ ය.

තීන්දුව: (1) අංක 2 සහ 4 යන ඉඩම් කොටස්වල භුක්තිය ඩී1 සහ ඩී2 යන උකස්කරවලට අනුව විත්තිකරුට ලැබුනු විට ඔහු භාරකාර ආඥා පණතේ අංක 93 දරණ ඡෙදයට අනුව දේපොල ලබා ගත්තෙන් පැමිණිලිකරු එම ඡෙදයෙන් ලැබෙන ආරක්ෂාව ලැබීමට සුදුස්සකු වන හෙයින් විත්ති කරු ඉඩමෙන් පිටමං කළ යුතු ය.

විත්තිකාර-වගඋත්තරකරු වෙනුවෙන් පහත සඳහන් කරුණු උඩ ද තර්ක ඉදිරිපත් කරන ලදී.

(ඒ) පී4 දමා සලකුණු කර ඇති ඔප්පුව ලියා ඇත්තේ මෙම නඩුව දැමීමට පෙර නිසා භාරකාර ආඥා පණතේ 93 වන ඡෙදය එයට බලපවත්වනු

නොලැබේ. මේ හේතුවෙන් විශේෂයෙන් ම ක්‍රියාවේ යෙදිය හැකි කොන්ත්‍රාත්තුවක් දැන් නොපවතී.

(බී) විත්තිකරු එම ඉඩම පැමිණිලිකරුගේ ශුභ සිඩියට අවනතව තබා ගත යුත්තේ එම කොන්ත්‍රාත්තුව ක්‍රියාවේ යෙදවීමට අවශ්‍යවන සීමාව දක්වා පමණක් බැවින් දැන් එම කොන්ත්‍රාත්තුව පී4 දරණ ඔප්පුව ලිවීමෙන් ඉටු වී ඇති නිසා තවත් එම කොන්ත්‍රාත්තුව ක්‍රියාවේ යෙදවීමේ අවශ්‍යතාවය ඉතිරි නොවී ඇත.

තීන්දුව: (2) විශේෂයෙන් ම ක්‍රියාවට නැගිය යුතු යයි ගිණිය හැකි කොන්ත්‍රාත්තුවක් ඇද්ද නැද්ද යන්න තීරණය කිරීමෙහි දී ඊට මේ නඩුවේ අදාළ දිනය හෝ දින වශයෙන් ගතයුතු වන්නේ ඩී1 සහ ඩී2 දරණ උකස්කර ලියන ලද දින හෝ දිනයන් වේ. එම දිනවල පී1 දරණ කොන්ත්‍රාත්තුව විශේෂයෙන් ම ක්‍රියාවේ යෙදිය යුතු කොන්ත්‍රාත්තුවක් වශයෙන් තිබුනි.

(3) පී1 දරන ගිවිසුම, හිරිහැරයෙන් තොර පැවරීමේ ගිවිසුමක් විනා ඩී1 සහ ඩී2 දරන උකස්කර වලට යටත් අයිතියක් දීමෙන් ඒ පොරොන්දුව ඉටු නොවේ. පී4 ඉටු කිරීමෙන් ම ගිවිසුම සපුරාලීම සිදුවිය යන තර්කය, එබැවින්, පිළිගත නොහැක්කේ ය.

ඇම්. ආර්. දොන් පීරිස් එ. ඇම්. පී. සී. මාරසිංහ ... 2

මැතිවරණ ජඳු පෙත්සම්

ජන්ද පෙත්සමක් සම්බන්ධයෙන් නීති ප්‍රශ්නයක් පමණක් අදාල ඇපැලකි. කරුණක් පිළිබඳ ඇත්ත නැත්ත ගැන තීරණයක් නිෂ්ප්‍රභා කළ හැක්කේ කවර අවස්ථාවක ද?

1946 ලංකා (පාර්ලිමේන්තු මැතිවරණ) රාජාඥාව — ''නියෝජිතයා'' යන්නෙහි තේරුම.

සාක්ෂි — සාමාන්‍යයෙන් විනිශ්චයකරු විසින් විශ්වාසයක් තබනු නො ලැබූ තමාගේ ම සාක්ෂිකරුවකු විසින් දෙන ලද විරුද්ධ සාක්ෂියකින් ඔහු කැඳ වූ පාර්ශ්වකරුට හානියක් විය යුතු ද?

මෙය, 1946 ලංකා (පාර්ලිමේන්තු මැතිවරණ රාජාඥාවේ 82 ඒ වැනි වගන්තිය ප්‍රකාර මැතිවරණ විනිශ්චය කරුවකු ගේ නිගමනයක් පිළිබඳව නීති ප්‍රශ්නයක් උඩ පමණක් ඉදිරිපත් කිරීමට ඉඩ දීමේ අවස්ථාවකි.

තීරණය: (1) සාධාරණ බව සනාථ කිරීමට සාක්ෂි නො මැතිව හෝ ප්‍රතිවිරුද්ධ නිගමනයකට සාක්ෂි තිබීම අමතක වීමෙන් එවැනි සාක්ෂි නැතැ යි යන හේතුව උඩ හෝ කරුණක් පිළිබඳව ගනු ලබන ඇත්ත නැත්ත පිළිගැනීමේ නිගමනයක් නීති දෝෂයක් ලෙස සලකා නිෂ්ප්‍රභා කළ හැකි ය.

(2) කරුණක් පිළිබඳව ඇත්ත නැත්ත පමණක් පිළිගැනීමේ දී කෙරෙන නිගමනයක් නිෂ්ප්‍රභා කළ යුතු දැයි බැලීමේ දී උපයෝගී කරගත යුතු පරීක්ෂණය නම්, කරනු ලබන ප්‍රතිවිරුද්ධ නිගමනය, ඔප්පුවුණු කරුණු අනුව කළ හැකි සත්‍ය වූ එක ම සාධාරණ නිගමනය දැ යි සලකා බැලීම ය.

පී. ඇල්. චන්ද්‍රසේන වගඋත්තරකරුගේ නියෝජිතයකු ලෙස ඔප්පු වී නැතැ යි මැතිවරණ විනිශ්චයකරු නිගමනය කර තිබෙන අතර, චන්ද්‍රසේන වගඋත්තරකරුට වැඩ කළ අයගෙන් ප්‍රධාන කෙනකු බවට අබේවික්‍රම දුන් සාක්ෂිය සහ චන්ද්‍රසේන වගඋත්තරකරු වෙනුවෙන් ඡන්ද ඉල්ලීමේ යෙදුණු බවට ඡන්ද නියෝජිතයා වන ප්‍රනාන්දු දුන් සාක්ෂිය වාර්තා වී තිබේ.

තීරණය: මැතිවරණ සම්බන්ධ නීතියේ දැක්වෙන අර්ථයෙන් ම චන්ද්‍රසේන වගඋත්තරකරුගේ නියෝජිතයකු බව සනාථ කිරීමට එවැනි සාක්ෂි ප්‍රමාණවත් ය.

අදාල ප්‍රශ්නය වන්නේ පත්‍රිකාව මුද්‍රණය කිරීම, බෙදා හැරීම සහ ඒ සඳහා වියදම් කිරීම සිදු වී ඇත්තේ වගඋත්තරකරුගේ මැතිවරණ නියෝජිතයාගේ අනුදැනුම ඇතිව දැයි යන්න ය. වගඋත්තරකරු වෙනුවෙන් සාක්ෂි දීමට කැඳවනු ලැබූ අබේවික්‍රම, අදාල පත්‍රිකාව බලයක් නො මැතිව මුද්‍රණය කරනු ලබන බවට ලැබුණු ආරංචි අනුව තමා මැතිවරණ නියෝජිතයාට එය දැන් වූ බව ද, පත්‍රිකාව බෙදා නො හරින ලෙස මැතිවරණ නියෝජිතයා උපදෙස් දුන් අතර ඒ අනුව පත්‍රිකාව බෙදා හැරීම නැවතුනු බව ද කියා තිබේ. අබේවික්‍රම කෙරෙහි විශ්වාසය නො තැබූ මැතිවරණ විනිශ්චයකාරතුමා පත්‍රිකාව ඇත්ත වශයෙන් ම බෙදා හැර තිබෙන බව ද, එහෙත් ඒ ගැන මැතිවරණ නියෝජිතයා දැන සිටි බවට සාක්ෂි නො තිබුණු බව ද තීරණය කෙළේ ය.

ඇපැල් විභාගයේ දී පෙත්සම්කාර-ඇපැල්කරු වෙනුවෙන් කියා සිටින ලද්දේ පත්‍රිකාව තිබීම ගැන මැතිවරණ නියෝජිතයා දැන සිටි බව වගඋත්තරකරු වෙනුවෙන් ඉදිරිපත් කරනු ලැබූ සාක්ෂිකරුවකු වන අබේවික්‍රමගේ සාක්ෂියෙන් මනා ලෙස පැහැදිලි වන බව ය.

තීරණය: පාර්ශ්වකරුවකු වෙනුවෙන් කැඳවනු ලබන සාක්ෂිකරුවකු කෙරෙහි නඩුව විභාග කරන විනිශ්චයකරු විශ්වාසය නො තැබූ විට, ඔහු කි සාක්ෂිය පාර්ශ්වකරු වෙනුවෙන් වූ පළියට ම එම සාක්ෂිය පාර්ශ්වකරුට විරුඬව පාවිච්චි කිරීම සම්පූර්ණයෙන් ම අයුතු සහගත ය.

ඇස්. ඩබ්ලිව්. දහනායක එ. සී. ඇන්. කන්නන්ගර 9

බෙදුම් ආඥා පනත

භාරකාර ආඥාපනත යට බලනු 2

රථ වාහන ගමනා ගමන පනත

රථවාහන ගමනාගමන පණත — චෝදනාව 214(1) (ඒ) ඡෙදය යටතේ 1951 රථවාහන නිර්මාන පිළිබඳ රෙගුලාසි අතරෙන් අංක 10(1) දරණ රෙගුලාසියට විරුඬව ක්‍රියා කිරීම ගැන — නමුත් තීන්දුව දෙන ලද්දේ 214(ඒ) ඡෙදය යටතේ නොව 214(බී) ඡෙදය යටතේ — වැරදිකරුට එම ඡෙදය පිළිබඳ නිදහසට කරුණු ඉදිරිපත් කිරීමට අවස්ථාවක් නොලැබීම — තීන්දුව ඉවත දැමිය යුතු ද? — යට කී 10(1) රෙගුලාසිය — එය මෝටර් රථ නිර්මාන වැඩ සම්බන්ධයෙන් පමණක් ද?

ඇපැල්කරුට විරුඬව චෝදනාව ඉදිරිපත් කරන ලද්දේ රථවාහන ගමනාගමන පනතේ 214(1) (ඒ) ඡෙදය යටතේ ය. මෝටර් රථයක්, එහි ඉදිරිපිට සෑහෙන ප්‍රමාණයකට දුරට සුදු එළියක් විහිදුවන ලාම්පු දෙකක් සවිනොකර පැදවීමෙන් රථ වාහන ගමනාගමන වාහන නිර්මාන රෙගුලාසි (Motor Traffic Construction of Vehicles Regulations) වල අංක 10 (1) රෙගුලාසිය උල්ලංඝණය කළාය කියායි. එහෙත් තීන්දුව දෙන ලද්දේ 214(2) (බී) ඡෙදය යටතේ ය. තවද වෙනස් කරන ලද චෝදනාව ඇපැල්කරුට කියවා පැහැදිලිකර නොදෙන ලදී. ඔහුට එය සම්බන්ධයෙන් සාක්ෂි ඉදිරිපත් කිරීමට ද අවස්ථාවක් නොලැබුනේ ය.

තීන්දුව: (1) මහේස්ත්‍රාත් තුමා විසින් අපරාධ නඩු සංවිධාන සංග්‍රහයේ 702(2) ඡෙදය හා 173 වෙනි 174 වෙනි ඡෙදවලට අනුකූලව ක්‍රියා නොකරන ලද නිසා වරදකරු නිදහස් කළ යුතු වේ.

(2) මෝටර් රථ ගමනාගමන විධිවිධාන පනතේ 10(1) විධිවිධානයෙන් සඳහන් වන්නේ රිය සකස් කිරීම පමණක් නොව එය පැදවීමත් ය.

ධනපාල එ. උප-පරීක්ෂක, කුරුඳුවත්ත පොලිසිය 7

විනිමය පත්‍ර ආඥා පනත

විනිමය පත්‍ර ආඥා පනත, 49(12) සහ 50(2) (1) (v) වැනි වගන්ති — චැක් පත් බැංකුව විසින් ගරු නොකිරීම සම්බන්ධයෙන් දැන්වීම — එය වහා ම දිය යුතු ද? — ගෙවීම තහනම් කිරීම — ගරු නොකිරීම සම්බන්ධයෙන් දැන්වීම නුවුවමනා අවස්ථා.

පැමිණිලිකාර සමාගම විසින් 'ඒ' සහ 'බී' අකුරු ලකුණු කරන ලද චෙක් පත් දෙකක් පිට පළමු වැනි සහ දෙ වැනි වගඋත්තරකරුවන් දෙදෙනාට විරුඬව නඩු තීන්දුවක් ලබා ගන්නා ලදී. පළමු වැනි වගඋත්තරකරු පමණක් එම තීන්දුවට විරුද්ධව ඇපැල් ගෙන සිටී.

'ඒ' සලකුණ දරන චැක් පත රු: 1,000/- කට පළමු වැනි වගඋත්තරකරු විසින් දෙ වැනි වගඋත්තරකරු නමට නිකුත් කරන ලද්දකි. 'බී' සලකුණ දරණ චැක් පත ද එවැනි ම මුදලක් සඳහා නාඳුනන පුද්ගලයකු විසින් නිකුත් කරනු ලැබ, එහෙත්, පළමු වැනි වගඋත්තරකරු විසින් දෙ වැනි වගඋත්තරකරු නමට පිට ලියා පවරනු ලැබුවකි. දෙ වැනි වගඋත්තරකරු එම චැක් පත් දෙකේම මුදල පැමිණිලිකාර සමාගමෙන් ලබා ගෙන තිබේ. ගෙවීම සඳහා බැංකුවට ඉදිරිපත් කළ අවස්ථාවේ චැක් පත් දෙක ම ගරු නොකරනු ලැබී ය.

'ඒ' සලකුන දරන චැක් පත 62.4.3 වැනි දින ගරු නොකරන ලද්දේ පළමු වැනි වගඋත්තකරු විසින් එහි ගෙවීම තහනම් කළ හෙයින් ය. 'බී' සලකුන දරන චැක් පත 62.5.11 දින ගරු නොකරන ලද්දේ, බැංකුව විසින් පිට ලිවීමේ යොදා ඇති වචනවලින් ම කියතොත් ''අය නිෂ්කාෂණය වී නැති'' (effects not cleared) නිසා ය.

චැක් පත් දෙක ම සම්ටන්ධයෙන් ගරු නොකිරීමේ දැන්වීම පළමුවැනි වගඋත්තරකරුට යවන ලද්දේ 64.6.11 වැනි දිනයේ දී ය.

තීන්දුව: (1) විනිමය පත්‍ර ආඥා පනතේ 49(12) වගන්තිය අනුව, ගරු නොකිරීම පිළිබඳ දැන්වීම, විනිමය පත්‍රයත් අත්සනින් පවරන්නාට හෝ අණදායිට හෝ විරුඬව නඩු පැවරීමේ අයිතියක් ලැබීමේ පෙරටුව යා යුතු කොන්දේසියකි.

(2) ගරු නොකිරීමෙන් මාසයක පසු එම දැන්වීම යැවීම, ආඥා පනතේ වගන්තියේ රෙගුලාසි අනුව නොකෙරී ඇත.

(3) විනිමය පත්‍ර ආඥා පනතේ 50(2) (සී) (වී) වැනි වගන්තිය අනුව අණදායි විසින් ගෙවීම තහනම් කරනු ලැබූ විට ගරු නොකිරීම පිළිබඳ දැන්වීම ඕනෑ නැත. පළමු වැනි වගඋත්තරකරු 'ඒ' දරණ චැක් පතට වගකිව යුතු ය.

(4) නඩු තීන්දුවට විරුඬව දෙ වැනි වගඋත්තරකරු ඇපැල් ගෙන නැති නිසා ඔහුට විරුඬව තිබෙන නඩු තීන්දුව ඒ පරිද්දෙන් ම තිබීමට හැරිය යුතු ය.

ඩී. පී. විජේසුන්දර එ. කුංජිමුසා සමාගම සහ තවත් අයෙක් 19

සාක්ෂි ආඥා පනත

අපරාධ අභියාචන අධිකරණ තීන්දු යටතේ බලනු 21

ගරු ටී. ඇස්. ප්‍රනාන්දු, ගරු සිවසුප්‍රමණියම් සහ ගරු සමරවික්‍රම විනිශ්චයකාරතුමන් ඉදිරිපිට

එම්. ආර්. දෙන් පිරිස් එ. ඇම්. පී. සී. මාරසිංහ*

ශ්‍රෙෂ්ඨාධිකරණයේ අංකය 10/65 එෆ්ජ් — කුරුණෑගල දිස්ත්‍රික් උසාවි අංකය 1598/ඇල්.

විවාද කළ දිනය: 1967 ජනවාරි 21
තීන්දු කළ දිනය: 1967 පෙබරවාරි 11.

භාරකාර ආඥා පණතේ 93 වන ඡේදය—බෙදුම් නඩුවකට භාජන වූ ඉඩමක තමන්ට අවසාන නියෝගයට පසු ලැබෙන අයිතිවාසිකම් හා උරුම විකිණීමට සමහර හවුල් අයිතිකරුවන් කැමති වීම—එම කැමැත්ත අනුව එම නඩුවේ අවසාන නියෝගයෙන් පැවරුනු බෙදූ කොටස් පැමිණිලි කරුට පැවරීමක් ක්‍රියාවේ යෙදවීම — විකිණීමට කැමතිවීමෙන් පසුව එහෙත් නඩුවේ අවසාන නියෝගයට පෙරාතුව පොලී මරා උකස්කරයකින් සමහර හවුල්කරුවන් තම තමන්ගේ උරුම-කරුම විත්තිකරුට ලබා දීම—භුක්තිය ලබා ගැනීමට පැමිණිලිකරු දැමූ නඩුවක් — මෙම උකස භාරකාර ආඥා පණතේ 93 වන ඡේදයෙහි ඇති ''දේපල'' යන වචනයට ඇතුළත් ද යන වග—බෙදූ කොටස් පවරා දීමෙන් පසු විශේෂයෙන් ක්‍රියාවෙහි යෙදවිය යුතු යයි ගිණිය හැකි කොන්ත්‍රාත්තුවක් තිබේ ද යන්න—

බෙදුම් නඩුවක පාර්ශ්වකරුවන් වූ 'ඒ', 'ඇල්', 'ජේ' සහ 'පී' යන අය යථා පරිදි ලියා පදිංචි කරන ලදුව පී1 දමා සලකුණු ලද 1956.9.20 දිනමින් යුත් ඔප්පුවකින් තම තමන්ට ලැබෙන උරුම හා අයිතිවාසිකම් පැමිණිලිකරුට නඩුවේ අවසාන නියෝගය සටහන් කිරීමෙන් තුන් මසක් ඇතුළත දී විකිණීමට පොරොන්දු වූහ.

1963.3.5 වන දින නඩුවේ අවසාන නියෝගය සටහන් කර ප්‍රකාශයට පත් කරන ලදුව ඉඩමේ 2, 3 සහ 4 යන කොටස් පිළිවෙලින් 'ඒ', 'ඇල්', සහ 'ජේ' යන තිදෙනාට හිමිවන අයුරු බෙදුම් සැලැස්මේ නිරූපණය විය. මොවුන් විසින් 1965.4.6 දිනමින් යුත් පී4 දමා සලකුණු කරන ලද ඔප්පුවෙන් ඉහත සඳහන් පී1 දරණ පොරොන්දුවට අනුකූලව තමන්ගේ අයිතිවාසිකම් පැමිණිලිකරුට ඉඩම්වල කිසි ම අවහිරයක් නොමැති බව කියමින් පවරා දෙන ලදි. බෙදුම් නඩුවේ අවසාන නියෝගය අනුව 'පී' නමැත්තාට අයිතියක් ලැබෙයයි ප්‍රකාශ නොවිනි.

පී1 දමා ලකුණු කරන ලද පොරොන්දු පත්‍රය ලියූ දිනට පසු එහෙත් බෙදුම් නඩුවේ අවසාන නියෝගය වාර්තා ගතවීමට සහ පී4 දමා ලකුණු කරන ලද විකිණීමේ ඔප්පුව ලිවීමට කලින් 'ඒ', සහ 'ජේ' යන දෙදෙනා පිළිවෙලින් ඩී1 සහ ඩී2 දමා සලකුණු කරන ලද යථා පරිදි ලියා පදිංචි වූ උකස්කර දෙකකින් එම ඉඩමෙහි තමන්ට ලැබෙන අයිතිවාසිකම් විත්තිකරුගේ වාසියට ''උකස ගත් අයට, ඔහුගේ ඇටෝර්නි බලකරුට, උරුමක්කරුවනට, පොල්මක්කාර, අද්මිනිස්ත්‍රාසිකාර යනාදීන්ටත් උකස්කරු විසින් ලියා පවරා දෙන්නන්ටත් එහි පොලිය වෙනුවට භුක්ති විඳීමට ඉඩ ලැබෙන සේ '' පිරිනමා තිබේ.

එකී ඉඩම් කොටස්වල භුක්තිය ලබා ගැනීමට පැමිණිලිකරු විසින් දමන ලද නඩුවක් උගත් දිස්ත්‍රික් විනිශ්චය කාරතුමා විසින් භාරකාර ආඥා පණතේ 93 වන ඡේදයේ ඇති ''දේපොල'' යන වචනයට උකසකින් ලැබෙන අයිතිවාසිකම් ඇතුළත් නොවේය යන හැඟීම පිට එම පැමිණිලිකරුට විරුඬව තීන්දු කිරීම නිසා ඔහු එයට විරුඬව ඇපැල් පෙත්සමක් ඉදිරිපත් කළේ ය.

තීන්දුව: (1) අංක 2 සහ 4 යන ඉඩම් කොටස්වල භුක්තිය ඩී1 සහ ඩී2 යන උකස්කරවලට අනුව විත්තිකරුට ලැබුනු විට ඔහු භාරකාර ආඥා පණතේ අංක 93 දරණ ඡේදයට අනුව දේපොල ලබාගත්තෙන් පැමිණිලිකරු එම ඡේදයෙන් ලැබෙන ආරක්ෂාව ලැබීමට සුදුස්සකු වන හෙයින් විත්තිකරු ඉඩමෙන් පිටමං කළ යුතු ය.

විත්තිකාර-වගඋත්තරකරු වෙනුවෙන් පහත සඳහන් කරුණු උඩ ද තර්ක ඉදිරිපත් කරන ලදී:

*ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 72 වෙනි කා., 1 වෙනි පිට බලනු.

(ඒ) පී4 දමා සලකුණු කර ඇති ඔප්පුව ලියා ඇත්තේ මෙම නඩුව දැමීමට පෙර නිසා භාරකාර ආඥා පණතේ 93 වන ඡෙදය එයට බලපවත්වනු නොලැබේ. මේ හේතුවෙන් විශේෂයෙන් ම ක්‍රියාවේ යෙදිය හැකි කොන්ත්‍රාත්තුවක් දැන් නොපවතී.

(බී) විත්තිකරු එම ඉඩම පැමිණිලිකරුගේ ශුභ සිද්ධියට අවනතව තබා ගත යුත්තේ එම කොන්ත්‍රාත්තුව ක්‍රියාවේ යෙදවීමට අවශ්‍යවන සීමාව දක්වා පමණක් බැවින් දැන් එම කොන්ත්‍රාත්තුව පී4 දරණ ඔප්පුව ලිවීමෙන් ඉටු වී ඇති නිසා තවත් එම කොන්ත්‍රාත්තුව ක්‍රියාවේ යෙදවීමේ අවශ්‍යතාවය ඉතිරි නොවී ඇත.

තීන්දුව: (2) විශේෂයෙන්ම ක්‍රියාවට නැගිය යුතු යයි ගිණිය හැකි කොන්ත්‍රාත්තුවක් ඇද්ද නැද්ද යන්න තීරණය කිරීමෙහිදී ඊට මේ නඩුවේ අදළ දිනය හෝ දින වශයෙන් ගතයුතු වන්නේ ඩී1 සහ ඩී2 දරණ උකස්කර ලියන ලද දින හෝ දිනයන් වේ. එම දිනවල පී1 දරණ කොන්ත්‍රාත්තුව විශේෂයෙන් ම ක්‍රියාවේ යෙදිය යුතු කොන්ත්‍රාත්තුවක් වශයෙන් තිබුනි.

(3) පී 1 දරන ගිවිසුම, හිරිහැරයෙන් තොර පැවරීමේ ගිවිසුමක් විනා ඩී 1 සහ ඩී. 2 දරන උකස් කර වලට යටත් අයිතියක් දීමෙන් ඒ පොරොන්දුව ඉටු නොවේ. පී 4 ඉටු කිරීමෙන්ම ගිවිසුම සපුරාලීම සිදුවිය යන තර්කය, එබැවින්, පිළිගත නොහැක්කේය.

නීතිඥවරු: රාජනීතිඥ එච්. ඩබ්ලිව්. ජයවර්ධන මහතා, ඩී. ඇස්. විජයවර්ධන සහ ජී. ඇස්. මාරපන යන අධිනීතිඥ වරුන් සමග පැමිණිලිකාර-ඇපැල්කරු වෙනුවෙන්.

ඩබ්ලිව්. ඩී. ගුණසේකර සහ ඩබ්ලිව්. ඇස්. වීරසූරිය යන අධිනීතිඥවරුන් විත්තිකාර-වගඋත්තරකරු වෙනුවෙන්.

ගරු ටී. ඇස්. ප්‍රනාන්දු විනිශ්චයකාරතුමා

අප ඉදිරිපිටට මේ ඇපැල පමුණුවනු ලැබුවේ පළමු වෙන් එය පමුණුවනු ලැබූ ගරු විනිශ්චයකාරවරුන් දෙදෙනා අතර පැන නැගුණු මත භෙදය නිසාය. භාරකාර ආඥා පනතේ (පරි: 87) 93 වන වගන්තියේ පදර්ථ, නිරූපණය සම්බන්ධ ප්‍රශ්න මෙයින් පැන නගින අතර ඒවා නිරාකරණය කිරීමට අදලවන කරුණු යට දැක්වේ.

පී. 1 න් හැඳින්වෙන 1956 සැප්තැම්බර් 20 දනම දරණ නොතාරිස් පොරොන්දු පත්‍රය සාක්ෂි දරණ අයුරු අංක 10627 බෙදුම් නඩුවේ පාර්ශ්වකරුවන් වූ ඇඩිලේඩ් ස්ටේන්වෝල්, ඇග්නස් ලැන්ඩර්ස්, ජෝන් ජේවි සහ ලෙටීෂියා පීටර්ස් යන සිව්දෙනා, ඒ නඩුවට විෂය වූ ඉඩමෙන් ලැබෙන තම අයිතිවාසිකම් සියල්ල ම, අවසාන තීන්දු ප්‍රකාශනයෙන් තුන් මසක් ඉකුත්වීමට ප්‍රථම පැමිණිලිකරුට විකිණීමටත් එය පැමිණිලිකරු මිල දී ගැනීමටත් පොරොන්දු වූහ. පී 1, යථා පරිදි ලියා පදිංචිකොට ඇත. එහෙයින් ලියා පදිංචි කිරීමෙහි පූර්වතාවය පිළිබඳව හෝ නිරවද්‍යතාවය පිළිබඳව හෝ ප්‍රශ්නයක් මෙහි දී පැන නොනැගේ. අංක 1765 දරණ බෙදුම් පැලැනයේ 2, 3 සහ 4 යන බෙද වෙන්කරන ලද කොටස්වලට, පී 1 හි නම් කොට ඇති ප්‍රථම විකුණුම් කරුවන් තිදෙනා — හිමිකරුවන් කොට 1963 මාර්තු 5 වෙනි දින නඩුවේ අවසාන තීන්දු ප්‍රකාශය සටහන් කරන ලදී. ඒ තීන්දු ප්‍රකාශය අනුව ලෙටීෂියා පීටර්ස්ට අයිතිවාසිකම් කිසිවක් නොලැබිණි. අනතුරුව පී 4 න් දැක්වෙන 1963 අප්‍රෙල් 6, දනම ලත් පැවරුම් ඔප්පුවෙන් පී 1 දරණ පොරොන්දු පත්‍රයේ නියමිත කාල සීමාව තුළ දී, විකුණුම්කරුවන් තිදෙනා ඒ ඉඩම් කොටස්වල අයිතිකරය පැමිණිලිකරුට පවරා ඇත. මේ කොටස් තුන සියළු අතිභාරයන්ගෙන් නිදහස් බව ද විකුණුම් කරුවන් තිදෙනා පී 4 න් ප්‍රකාශ කොට ඇත.

පී 1 දරණ ගිවිසුමේ සඳහන් දිනයට පසුව එහෙත් පී 4 දැක්වෙන විකිණීම ක්‍රියාවේ යෙදවීමට හෝ අවසාන තීන්දු ප්‍රකාශය සටහන් කිරීමට හෝ ප්‍රථමයෙන්, එහි නම් කොට ඇති විකුණුම්කරුවන් තිදෙනාගෙන් එක් අයෙකුවූ ඇඩිලේඩ් ස්ටේන්වෝල්, පවතිමින් තිබූ බෙදුම් නඩුවෙන් ලැබෙන අයිතිවාසිකම් 1961 අප්‍රෙල් 20 දනම ලත් ඩී 1 දරණ උකස්කරය මගින් වගඋත්තර කරුට උකස්කොට රු: 500/- ලැබිය. ඒ අයුරුම, ඉහත සඳහන් විකුණුම් කරුවන්ගෙන් තව කෙනෙකුවූ ජෝන් ජේවි, එම ඉඩමේ තම අයිතිවාසිකම් 1961 අප්‍රෙල් 6 වෙනි දින (ඩී 2) දරණ උකස්කරය මගින් රු: 1,000/- ක් භාරගෙන වගඋත්තරකරුට පවරනු ලැබුවේ ය. ඩී 1 සහ ඩී 2 පොලී මරා උකස්කරයන් දෙකකි. ඒ අනුව උකස්කරුවන්, "උකස් හිමිට ඔහුගේ ඇටෝර්නි බල කරුට ,උරුමකරුවන්ට, පොල්මෑකරුවන්ට, අද්මිනිස්ත්‍රාසිකරුවන්ට හෝ පැවරුම් ලාභීන්ට ඒ ඉඩම් පොලියේ සරියට භුක්ති විඳීමට අවසර දීමට භාරගන්නා ලදී. ඩී 1 සහ ඩී 2 යථා පරිදි ලියා පදිංචි කළ ද, පී 1 ලියා පදිංචි කිරීමෙන් පසුව සිදුවූවකි එය.

පී 4 දරණ විකුණුම අත්සන් කිරීමෙන් පසුව, පී 4 හි සඳහන් විකුණුම්කරුවන් තිදෙනාට භුක්තිය හිමිකරන අයුරු බෙදුම් නඩුව අරභයා නිකුත් කරන ලද භුක්ති විදීමේ ආඥාවක් අනුව ක්‍රියාකළ පිස්කල් තැන විසින් 2, 3 සහ 4 යන ඉඩම් කොටස් වල භුක්තිය පැමිණිලි කරුට අයත් කර දෙන ලද බව දක්නට ඇත. ඔහුට අයත් ඩී 1 සහ ඩී 2 දරණ පොලී මරා උකස්කරයන් දෙක නිසා වගඋත්තරකරු නෙරපා පැමිණිලිකරුව භුක්තියෙහි පිහිටුවීමට අයිතියක් නැති බව මේ සිද්ධිය සම්බන්ධයෙන් උගත් දිස්ත්‍රික් නඩුකාර තුමා සඳහන්කර ඇත්තේ ය. වගඋත්තරකරු ඒ අයුරු නෙරපීම යෝග්‍ය නොවන අතර ඒ සඳහා ගත් උපක්‍රම නිසැකයෙන් ම සැකකටයුතුයි. ඒ කෙසේ වෙතත් 1963 අගෝස්තු 16 වෙනි දින, බෙදුම් පැලැණයේ 2 සහ 4 යන කොටස්වල භුක්තිය වගඋත්තරකරු නැවත ලබාගත්ත ද එය බලහත්කාරයෙන් කරන ලද්දක් බව පැමිණිලිකරුගේ මතය වේ. වගඋත්තරකරු විසින් 2 සහ 4 යන කොටස් වල භුක්තිය නැවත ලබාගැනීමේ ප්‍රතිඵලයක් වශයෙන් මේ නඩුව දමන ලදි. 3 න් සනිටුහන් වන කොටස ගැන ආරවුලක් නැත්තේය. ඩී 1 සහ ඩී 2 යන්න ක්‍රියාත්මක කළ උකස්කරුවන් දෙදෙනාගෙන් කිසිවකුට එය අයත්ව නොතිබිණි.

පවතිමින් තිබූ බෙදුම් නඩුවක ඉඩමේ අයිතිවාසිකම් අරභයා ඇතිවන ගනුදෙනුවල ප්‍රතිඵලය සහ වලංගුකම පිළිබඳ නීතිය තිදෙනකුගෙන් යුත් විනිශ්චය මණ්ඩලයක් විසින් **සිරිසෝම එ. සරනේලිස් අප්පුහාමි** (1950 51 න.නී.වා. 337) යන නඩුවේ දී සැලකිල්ලට භාජනය කොට ඇත.

එම විනිශ්චය මණ්ඩලය, පිළිගත් නීතිය හැටියට සැලැකෙන සිද්ධාන්තයන් ප්‍රකාශ කරන අතරම තවත් කරුණු සමග මෙසේ ද සඳහන් කෙළේය.

''ඒ නීත්‍යානුකූල ලේඛනය, නියත වශයෙන් ම අනාගත අයිතිවාසිකමක් අත්කර ගතහොත්, එවැනි අවස්ථාවක දී එය උකස් කිරීමේ හෝ අන්සතු කිරීමේ හෝ පොරොන්දුවක් පමණක් නම්, ඒ පොරොන්දුව යථා පරිදි ක්‍රියාත්මක කිරීමෙන් විනා, දීමනාකරුට අයිතිවාසිකම් අත්වීමෙන් ම, අයිතිය හෝ උකස පිළිබඳ අයිතිවාසිකම් (පොරොන්දුවේ සඳහන් අයුරු) ලැබුම්කරු වෙත නොපැවරේ. යම්හෙයකින් දීමනාකරු පොරොන්දුව ක්‍රියාත්මක නොකොට තීන්දු ප්‍රකාශයෙන් තමා ලත් අයිතිවාසිකම් තෙවන පක්ෂයට පැවරූ විට, ඒ පක්ෂයත් මුල් ලැබුම්කරුත් අතර ඇතිවන අයිතිය පිළිබඳ තරඟය තීරණය කළ යුත්තේ, භාරකාර ආඥා පනතේ 93 කොටසේ බලපැවැත්වීම වැනි වෙනත් නීති පද්ධතියක් ආශ්‍රිතව ය.''

පොරොන්දුව එසේම ක්‍රියාත්මක කළ හැකි (Specific Performance) ගණයේ ගිවිසුමක් තව අයෙකු සමග ඇති බව දැන යම් කෙනෙකු ඒ හා අදල දේපොල හිමිකර ගත්තේ නම්, මුල් ගිවිසුම ක්‍රියාත්මක කිරීමට අවශ්‍ය ප්‍රමාණයට දෙවැන්නා විසින් පළමුවැන්නාගේ ප්‍රයෝජනය සඳහා ඒ දේපොල දැරිය යුතු බව භාරකාර ආඥා පනතේ 93 කොටස පනවයි. ඉඩම් විකිණීමේ ගිවිසුමක් යථා පරිදි ලියා පදිංචි කිරීමම, ගිවිසුමට පසුව ඒ ඉඩම අයත් කරගන්නාට භාරකාර ආඥා පනතේ 93 වන ඡේදයේ අර්ථයට අනුකූල දැන්වීමක් වන බව, **සිල්වා එ. සලෝනෝනා** (1930) 32 න.නී.වා. 81 යන නඩුවේ දී උසාවිය තීරණය කළේ ය. පැමිණිලිකරුට විරුඬව තීරණය කරමින් නඩුව විසඳූ විනිශ්චයකරු, 93 වන ඡේදයේ දැක්වෙන ''දේපොල'' යන යෙදුම තුළ උකසකින් ලැබෙන අයිතිවාසිකම් අන්තර්ගත කළ නොහැකියැයි ඇති කරගන්නා ලද තම විශ්වාසයෙන් බලපවත්වනු ලබා ඇත. මේ මතය නිවැරදි නම් මිලදී ගැනුම්කරුවෙකුටත් වඩා වාසි තඬයක් උකස් හිමියකුට අයත් වේ. මේ මතය සදෙස් බවට පැමිණිලිකරු ගෙන් තර්ක ඉදිරිපත් වූ අතර එය නියත වශයෙන් ම එසේ නොවන බව දැක්වීමට වගඋත්තරකරුගේ උගත් නීතිවේදී තැන වෙහෙසද නොගත්තේය.

මා ඉදිරියේ ඇති නඩුවට සීමා වූ විට, අප ඉදිරියේ ඇත්තේ වගඋත්තරකරුට අයත් නිශ්චිත දේපොල පිළිබඳ නිකම් ම උකසක් නොව පොලී මරා උකසකි. එය අනුව උකස්කරු උකස්හිමිට ඉඩම් භුක්තිය විදීමට ඉඩ දීමට පොරොන්දුවන අතර නියත වශයෙන් භුක්තිය ද ඔහු වෙත පවරන්නේය.

fපුට් නමැති ග්‍රන්ථ කාරකයාගේ 1 පොතේ 8 වෙනි මාතෘකාවේ 27 වෙනි කොටසේ (1 ගේන් මහතාගේ පරිවර්තනය 172 පිට) එන ද්‍රව්‍ය වර්ගකරණය කෙරෙහි අපගේ සැලකිල්ල යොමු කරන

ලදී. ඒ අනුව පොලී ඇතිව හෝ නැතිව හෝ නිශ්චල දේ පිළිබඳ උකසක් පදනම් වූ ණය සැලකීමට භාජනය වන විට ප්‍රශ්නය වන්නේ චංචල හෝ නිශ්චල දේද යන්න විනා ද්‍රව්‍ය හෝ දේපොල වර්ගකරණයට එය අයත් ද යන්න නොවේ. උකස් තැබීම සහ සහතිකවීම පිළිබඳ ගිවිසුම් ගැන විස්තර කරන fපූට් මහතාගේ පොතේ එම අධිකාරය පොලී මරා උකසක උකස් හිමිගේ අයිති වාසිකම්වල ස්වභාවය ද සාකච්ඡා කොට ඇත. 23 වන කොටසේ (3 ගේන්ගේ පරිවර්තනය 499 පිට බලන්න) ඇන්ටික්‍රෙසිස් යන ගිවිසුම මෙසේ විස්තර කොට ඇත. ''.....එහෙත් ඇන්ටික්‍රෙසිස් (Antichresis) ගිවිසුමක් උකස් වල දී විශේෂයෙන් අනුමත කෙරේ. එවැනි ගිවිසුමකින් ණයකරු ණය ගෙවා නිමවන තුරු පොලී වෙනුවට උකස්ගත් දේපොල ප්‍රයෝජනයට ගැනීමට කටයුතු සැලසේ. ඔහු ම ඒ ඉඩම් වගා කිරීමෙන් හෝ නිවාසවල පදිංචි වීමෙන් හෝ ඒ ඵලප්‍රයෝජන ලැබීමට සතුටු නම්, එසේ හෝ, නැත්නම් ඒවා කුලියට දීමෙන් හෝ මෙය කළ හැක. මෙය කොතෙක් ක්‍රියා කාරී ද යත්, යම් හෙයකින් ණය සම්පූර්ණයෙන් ගෙවීමට ප්‍රථමයෙන් ඒ දේපොල භුක්තිය නැතිවුවහොත් සාමාන්‍ය උකසක දී මෙන් උකස් නඩුවක් මගින් ඒ පොරොන්දුවට යටත් දේපොල ලුහුබැඳ ලබා ගැනීමට හෝ පොරොන්දුව මත නඩුවක් දමා තම ඇන්ටික්‍රෙසිස් හෙවත් අත්තිකාරම් මුදල වෙනුවට දේපොලවල ප්‍රයෝජනයද ලැබිය හැක. වගඋත්තරකරු ඩී 1 සහ ඩී 2 යන බැඳුම්කරයන් මගින් 2 සහ 4 යන ඉඩම් කොටස්වල භුක්තිය ලැබීමෙන් භාරකාර ආඥා පනතේ 93 වන වගන්තියට අනුකූලවන ආකාරයේ ඉඩම් අයිතියක් ලබා ඇතැයි පැමිණිලිකරුගේ නීතිවේදී තැන දැක් වූ තර්කය නිවැරදියයි මගේ හැඟීම වේ. මදුරාසියේ උත්තර අධිකරණය විසින් **කාමේස්වරම්මා එ. සීතරාමණියා** (1905) 29 ඉ.නී.වා. (මදුරාසිය) 177 යන නඩුවේ දී ගත් තීන්දුව ද මෙහි දී මම සඳහන් කරන්නෙමි. ඒ අනුව තමා සොයා බැලිය යුතු යම් වටාපිටා කරුණු ගැන උකස ගන්නා විට දැන් සිටින උකස් හිමි, ඒ අන්දමේ පරීක්ෂණයක් කළ විට තෙවන පක්ෂයක් සමග උකසේ දේපොල සම්බන්ධයෙන් උකස් කරු ප්‍රතිඥාවක් දී ඇති බව තමාට අනාවරණය වුවහොත්, දේපොල පැවරීමේ පනතේ 40 වන ඡේදයෙහි හා භාරකාර පනතේ 91 වන ඡේදයෙහි (භාරකාර ආඥා පනතේ 93 වන ඡේදයට සමානවේ) අන්තර්ගත පිළිවෙත්වලට අනුව උකස් හිමිගේ අයිතිවාසිකම් තෙවන පක්ෂයේ අයිති වාසිකම් වලට යටත් කළ යුතු යි.

වගඋත්තරකරුගේ උගත් නීතිවේදීතැන, විරෝධය පෑ ඇපැල් ගෙන තිබෙන නඩු තීන්දුව තහවුරු කිරීමට වෑයම් කරමින් 93 වන ඡේදය බලනොපවත්වන බවට පහත දැක්වෙන කරුණු ඉදිරිපත් කෙළේ ය. (i) නඩුව දැමීමට ප්‍රථම පී4 කරුණු ඉටුකොට තීබීම නිසා පොරොන්දු ප්‍රකාර ක්‍රියාත්මක කළ හැකි ගිවිසුමක් නොපැවතුනු බව සහ (ii) ගිවිසුම ක්‍රියාත්මක කිරීමට අවශ්‍ය ප්‍රමාණයට, පැමිණිලිකරු වෙනුවෙන් දේපොල රැකීමට වගඋත්තරකරුගේ යුතුකම වීම නිසාත්, පී 4 ඉටුකිරීමෙන්ම ගිවිසුම සපුරාලීම නිසාත් ඒ ගිවිසුම ක්‍රියාත්මක කිරීමේ අවශ්‍ය තාවයක් පිළිබඳ ප්‍රශ්නයක් පැන නොනැගුනි යන්නත් මේ කරුණු විය. ඉන්දියානු උසාවිවල තීන්දු කිහිපයක් මත ඔහුගේ තර්කය රැඳවිය. පොරොන්දුව එසේම ඉටුකරවිය හැකි ගණයේ ගිවිසුමක්වී පැවතුනා ද යන්න තීරණය කිරීමට ඒවා පරීක්ෂා කිරීම අනවශ්‍ය ය. මේ නඩුවට අදාල දිනය හෝ දිනයන් පිළිවෙලින් ඩී1 සහ ඩී2 අත්සන් කළ දිනයන් වේ. ඒ දිනවන විට පී 1 දරණ පොරොන්දුව එසේ ම ඉටුකරවිය හැකි ගිවිසුමක් ව පැවතුනේ ය. පී 4 ඉටුකිරීමෙන් ම ගිවිසුම සපුරාලීම සිදුවිය යන තර්කය ඉදිරිපත් කිරීමේදී, පී 1 න් සාක්ෂි දරණ ගිවිසුම අතිහාරයෙන් තොර පැවරීමේ ගිවිසුමක් නිසා ඩී1 සහ ඩී2 ට යටත් හිමිකමක් පැවරීමෙන් ඒ පොරොන්දු ඉටු නොවේ. වගඋත්තරකරු වෙනුවෙන් ඉදිරිපත් කළ තර්කය මට පිළිගත නොහැක. මගේ අදහසේ හැටියට පැමිණිලිකරුට භාරකාර ආඥා පනතේ 93වන වගන්තියේ ආරක්ෂාව ලැබීමට හිමිකමක් තිබුණි. ඒ නිසා ඩී 1 සහ ඩී 2 යන්න පී. 4 අබිභවා නොසිටිය හැකි බවත්, වගඋත්තරකරුට විරුඬව පැමිණිලිකරුට භුක්තිය ලැබීමට බලයක් ද ලැබී තිබේ යයි සැළකිය යුතුයි.

විරුඬව ඇපැල් ගෙන ඇති නඩු තීන්දු ප්‍රකාශය මෙයින් අවලංගු කරමි. පැමිණිල්ලට සම්බන්ධ පළමුවෙනි සහ තුන්වෙනි උපලේඛනයන්හි විස්තර වන ඉඩකඩම් වලට හිමිකරු කොට පැමිණිලිකරුට පක්ෂව අලුත් තීන්දු ප්‍රකාශයක් සටහන් කොට එයට වග උත්තර කරු නෙරපීමේ නියෝගයක් ද, 1963 අගෝස්තු 16 වෙනි දින සිට, පැමිණිලිකරුට භුක්තිය භාර දෙන දිනය දක්වා, අවශ්‍ය නම් අලුත් ශාක්ෂි ද විමසා දිස්ත්‍රික් උසාවිය තීරණය කරන ප්‍රමාණයේ අලාභ දීට ඇතුළත් කළ යුතුය. නඩුවේ සහ මෙම ඇපැලේ නඩු ගාස්තු වගඋත්තරකාර පක්ෂය විසින් පැමිණිලිකරුට ගෙවිය යුතුය.

ගරු සිවසුප්‍රමණියම් විනිශ්චයකාරතුමා:

මම එකඟ වෙමි.

ගරු සමරවික්‍රම විනිශ්චයකාරතුමා:

මම එකඟ වෙමි.

ඇපැලට ඉඩ දෙන ලදී.

පරිවර්තනය ඇස්. ඇස්. විජේරත්න මහතා විසිනි.

ගරු ජී. පී. ඒ. සිල්වා විනිශ්චයකාරතුමා සහ ගරු අලස් විනිශ්චයකාරතුමා ඉදිරිපිට දී ය.

එරගොඩ ආරච්චිලාගේ මුදියන්සේ එ. ටී. ඇම්. සිංගිරි බණ්ඩා*

ශ්‍රෙෂ්ඨාධිකරණයේ ඉල්ලීමේ අංකය 192/1965

වාදකර තීන්දු කළ දිනය: 1966.10.15

දේවාලයක තත්වාකාර භාරකරු — ඔහුට දේවාලය සන්තක ඉඩම්වල අයිතිවාසිකම් ප්‍රකාශ කරවා ගැනීමට නඩුවක් ගෙනයෑමට බලය තිබේ ද? — බෞද්ධ විහාර දේවාලගම් පනතේ 3 වෙනි 4(1), 4(2) වෙනි සහ 8 වෙනි 10 වෙනි ඡේද.

තීන්දුව: බෞද්ධ විහාර දේවාල ඉඩම් පණතේ 4(1) වෙනි උප ඡේදය යටතේ ක්‍රියාත්මකවීමෙන් නිදහස් වූ දේවාලයක තත්වාකාර භාරකරුවකුට (de facto trustee) එම දේවාලය සන්තක ඉඩමක හිමිකම ප්‍රකාශ කරවා ගැනීමේ නඩුවක් පවරා එය කියා ගෙන යාමට බලය තිබේ.

ගරු ජී. පී. ඒ. සිල්වා විනිශ්චයකාරතුමා: ''(ඒ) එහෙයින් පනතේ 3 වෙනි සහ 4 වෙනි ඡේද සලකා බලන විට විහාර කොටස් තුනකට බෙදා ඇති බව පෙනේ. එනම්, පනතේ ක්‍රියා කිරීමට යටත්වන විහාර; 4(1) වෙනි උප ඡේදයේ ක්‍රියා කිරීමෙන් පමණක් නිදහස් වන විහාර; සහ පනතින් මුළුමනින් ම නිදහස් වන විහාර.''

''(බී) එහෙයින් දේවාලයක් 4(1) වෙනි උප ඡේදයේ ක්‍රියා කිරීමෙන් නිදහස් කර ඇතිවිට එම දේවාලයේ ඉඩකඩම්වල කළමනාකාරත්වය පැවරීම සම්බන්ධයෙන් පනත නිශ්ශබ්ද වන්නේ ය. තවද එය කරණ කොටගෙන දේවාලයට භාරකාරයෙක් පත්කිරීම සඳහා 8 වෙනි ඡේදයේ රෙකුලාසි අනුව ක්‍රියා කිරීමට නොහැකි වන්නේ ය. එහෙයින් 8 වෙනි ඡේදයෙන්, අන් සෑම දේවාලයක ම භාරකරු මහා භාරකරු විසින් පත්කළ යුතු යැයි සඳහන් වන නමුත්, ''අන් සෑම දේවාලයක ම'' යන වචන තේරුම් ගතයුත්තේ පනතේ ක්‍රියා කිරීමෙන් නිදහස් නොකරන ලද දේවාලවලට පමණයි.''

ටී. බී. දිසානායක මහතා සහ ඇස්. මුණසිංහ මහතා, පැමිණිලිකාර-ඇපැල්කරු වෙනුවෙන්.

රාජනීතිඥ ටී. ජෝන්ක්ලස් මහතා, ජී. කන්දප්පා මහතා සමග, විත්තිකාර-වගඋත්තරකරු වෙනුවෙන්.

ගරු ජී. පී. ඒ. සිල්වා විනිශ්චයකාරතුමා:

පැමිණිලිකාර-ඇපැල්කරු තමා එරගොඩ පත්තිනි දේවාලයේ පරම්පරාගත කපුරාල යැයි ද, තත්වාකාර භාරකරු යැයි ද සඳහන්කර, භාරකරු මෙන් විත්තිකාර-වගඋත්තරකරුට විරුද්ධව මෙම නඩුව ඉදිරිපත්කර ඇත්තේ දේවාලයට අයත් ඉඩම් කැබැල්ලකට අයිතිය ප්‍රකාශ කිරීමටත් විත්තිකරු ඉඩමෙන් ඉවත් කිරීමටත් ය. තවද විත්තිකාර-වගඋත්තරකරු සහ ඇගේ පුරුෂයා දේවාලයට අයත් ඉඩම් කැබැල්ලකට බදු ගැනුම්කරු මෙන් අතුළුවී පසුව පැමිණිලිකරුගේ අයිතිවාසිකමට විරුද්ධත්වයක් දක්වනවා යැයි සඳහන් කර ඇත. නඩු විභාගයේ දී විසඳිය යුතු ප්‍රශ්න කීපයක් ඉදිරිපත් කළ නමුත්, පැමිණිලිකරුට මෙම නඩුව ගෙන යෑමට බලයක් හෝ අයිතියක් ඇතැයි ද යන ප්‍රශ්නය නඩුවේ ප්‍රමුඛ ස්ථානයක් ගන්නා හෙයින් දෙපක්ෂයේ ම එම ප්‍රශ්නය පළමුවෙන් විසඳිය යුතු යැයි පිළිගන්නා ලදී. මෙය කරණ කොටගෙන දිස්ත්‍රික් නඩුකාර තුමා එම ප්‍රශ්නය පළමුවෙන් විසඳා පැමිණිලිකරුට නඩුව ගෙන යෑමට අයිතියක් නැතැයි තීන්දු කරන ලදී. පැමිණිලිකරු එම තීන්දුවෙන් ඇපැල් ගනී. එහෙයින් මහා භාරකාරතුමා විසින් පත්වීමක් දෙනු ලැබූ දේවාලයක තත්වාකාර භාරකරුට එම දේවාලයට අයත් යැයි කියන ඉඩම් සම්බන්ධයෙන් අයිතිවාසිකම ප්‍රකාශ කිරීම පිණිස නඩුවක් ගෙන යෑමට පුළුවන් ද යන ප්‍රශ්නය පමණකි මෙම උසාවියට විසඳීමට ඉදිරිපත් කර ඇත්තේ.

බෞද්ධ විහාර දේවාලගම් පනතේ දෙවෙනි ඡේදයේ අර්ථ නිරූපණයෙන් ''පන්සල'' යන වචනයෙන් ''විහාරය'' යනු ද ''දේවාලය'' යනු ද අදහස් වන්නේ ය. තුන්වෙනි ඡේදයෙන් මෙම පනතේ ප්‍රතිපාදන සියල්ල ගෙන් හෝ එක ඡේදයකින්, ඇමති තුමා විසින් කරන ලද නියෝගයක් අනුව යම්කිසි පන්සලක් නිදහස්කර ඇති අවස්ථා හැර, අන් සෑම අවස්ථාවන්වල එහි ප්‍රතිපාදන ලංකාවේ සෑම පන්සලකට ම බලපානවා යැයි සඳහන් වී ඇත. පැමිණිලිකරු වෙනුවෙන් සහ විත්තිකරු වෙනුවෙන් පෙනී සිටි නීතිඥවරු දෙදෙනා විසින් පනත යටතේ ''විහාරයක්'' මෙන් තේරුම් දී ඇති මෙම දේවාලය 4(1) වෙනි උප ඡේදය ක්‍රියාකිරීමෙන් නිදහස් කර ඇතැයි පිළිගන්නා ලදී. එහෙයින් ප්‍රශ්නය විසඳිය යුත්තේ එම අදහස මත ය.

*ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 72 වෙනි කා., 51 වෙනි පිට බලනු.

පනතේ 4 වෙනි සහ 8 වෙනි ඡෙද සම්බන්ධයෙන් බොහෝ තර්ක ඇතිවූ හෙයින්, මෙම ප්‍රශ්නය සම්බන්ධයෙන් එම ඡෙදයන් කෙසේ බලපානවා දැයි සලකා බැලිය යුතු යි. 4(1) උප ඡෙදය යටතේ එම ඡෙදයේ ක්‍රියාකිරීමෙන් නිදහස් නොවන සෑම පන්සලකට ම අයත් ඉඩකඩම්වල කළමනාකාරත්වය පැහැදිලිකර ඇත. ඊට අනුව එම කළමනාකාරත්වය පනතේ 8 වෙනි ඡෙදය යටතේ නීත්‍යානුකූලව, පත්කර ඇති භාරකරුවකුට හෝ භාරකරුවන්ට අයත් වන්නේ ය. මෙම නඩුවට භාජන වූ දේවාලය උප ඡෙදයේ ක්‍රියා කිරීමෙන් නිදහස් කර ඇති හෙයින් කළමනාකාරත්වය පැවරීමේ ප්‍රතිපාදන එයට නොයෙදිය යුතුයි. 4(1) උපඡෙදයේ ක්‍රියා කිරීමෙන් නිදහස් වුවත් පනතින් මුළුමනින් ම නිදහස් නොවූ පන්සල්වලට අයත් ඉඩම්වල කළමනාකාරත්වය 4(2) උප ඡෙදයෙන් සඳහන්වන අතර එම කළමනාකාරත්වය විහාරයේ විහාරාධිපතිකමට බාරකර ඇත.

එහෙයින් පනතේ 3 වෙනි සහ 4 වෙනි ඡෙද සලකා බලන විට විහාර කොටස් තුනකට බෙදා ඇති බව පෙනේ. එනම්: පනතේ ක්‍රියා කිරීමට යටත්වන විහාර, 4(1) වෙනි උප ඡෙදයේ ක්‍රියාකිරීමෙන් පමණක් නිදහස් වන විහාර සහ පනතින් මුළුමනින්ම නිදහස්වන විහාරද වෙති. මෙම නඩුවේ අවශ්‍යතාවය අනුව, 4(1) වෙනි උප ඡෙදයේ ක්‍රියා කිරීමෙන් නිදහස් නොවූ පන්සල්වල කළමනාකාරත්වය ගැන සඳහන් කර ඇත. ඊට අනුව කළමනාකාරත්වය විහාරාධිපතිට පවරා ඇති නමුත්, එම ඡෙදයෙහි යොදා ඇති වචන ගැලපීමේ දී යම්කිසි වචන නිසා අර්ථය පිරිසිදු නැත. විහාරාධිපති ධුරයක් තිබිය හැක්කේ විහාරයක පමණයි. දේවාලයක එවැනි ධුරයක් නොමැත. මේ කරණ කොටගෙන 4(2) වෙනි උප ඡෙදයෙන් විහාරයක් හෝ දේවාලයක් විය හැකි පන්සලක ඉඩම් කළමනාකාරත්වය සඳහන් වී ඇතත් එම කළමනාකාරත්වය විහාරාධිපති කෙනෙකුට පමණක් පවරා තිබීමෙන් මෙම උප ඡෙදයේ ක්‍රියා කිරීම දේවාලවලට නොයොදා විහාරවලට පමණක් සීමා කිරීමට අවශ්‍යතාවයක් පැන නැගී ඇත. එහෙයින් දේවාලයක් 4(1) වෙනි උප ඡෙදයේ ක්‍රියා කිරීමෙන් නිදහස් කර ඇතිවිට එම දේවාලයේ ඉඩකඩම්වල කළමනාකාරත්වය පැවරීම සම්බන්ධයෙන් පනත නිශ්ශබ්ද වන්නේ ය. තවද එය කරණ කොටගෙන දේවාලයට භාරකාරයෙක් පත් කිරීම සඳහා 8 වෙනි ඡෙදයේ රෙකුලාසි අනුව ක්‍රියා කිරීමට නොහැකි වන්නේ ය. එහෙයින් 8 වෙනි ඡෙදයෙන්, අන් සෑම දේවාලයක ම භාරකරු මහා භාරකරු විසින් පත්කළ යුතුයයි සඳහන් වන නමුත්, ''අන් සෑම දේවාලයකම'' යන වචන තේරුම් ගත යුත්තේ පනතේ ක්‍රියා කිරීමෙන් නිදහස් නොකරන ලද දේවාල පිළිබඳ යෙදීමට පමණයි. මෙවැනි ප්‍රශ්නයක් 4(1) වෙනි නව නීති සංග්‍රහයේ 527 වෙනි පිටුවේ **පීටර් සිඤ්ඤෝ** එ. **අප්පුහාමි** යන නඩුවෙහි තීරණය කිරීමට පැන නැගුනු විට විජයවර්ධන විනිශ්චයකාරතුමා විසින්, බෞද්ධ විහාර දේවාලගම් පනතේ 4 වෙනි ඡෙදයේ (1) වෙනි උප ඡෙදයේ ක්‍රියා කිරීමෙන් නිදහස් කර ඇති, දේවාලයක් පනතින් සම්පූර්ණයෙන් ම නිදහස් වී ඇතැයි යන මතය ප්‍රකාශ කරන ලදී. ජෝන්ක්ලාස් මහතා විසින් ඉදිරිපත් කරන ලද තර්කය, එනම් 8 වෙනි ඡෙදයට සෑම දේවාලයක් ම ඇතුළත් කළ හැකිය, යන තර්කය පිළිගැනීමට නම්, පනතින් යම්කිසි දේවාල (එනම් ''පන්සල්'' යන වචනයට ඇතුළත් දේවාල) නිදහස් කර ඇතත් ඒවා 8 වෙනි ඡෙදයට යට වනවා යන මතය පිළිපැදිය යුතුයි. එවැනි අර්ථ නිරූපණයක් පනතේ විධිවිධානවලට නොගැලපෙන හෙයින් එය ඉවත දැමිය යුතු ය.

ඇපැල්කරු වෙනුවෙන් ඉදිරිපත් වූ නීතිඥ මහතා විසින් ඉහත සඳහන් වන නඩුව පමණක් නොව ඊට ප්‍රථමයෙන් තීන්දු කරන ලද නඩු කීපයක්ද තම තර්කීය වන දේවාලයක තත්වාකාර භාරකරුවකුට දේවාල ඉඩකඩම් සම්බන්ධයෙන් අයිතිය ප්‍රකාශ කිරීමේ නඩුවක් කියා ගෙන යා හැකිය යන්න, තහවුරු කිරීමට ඉදිරිපත් කරන ලදී. **සිඩාර්ථ උන්නාන්සේ** ස. **උදයාර** 6 සී.ඩබ්ලිව්.ආර්. 29 යන නඩුවේ ද සම්පායෝ විනිශ්චයකාරතුමා විසින්, අවුරුදු කීපයකට භුක්ති විඳ පසුව ඉඩමෙන් පහකර ඇතැයි ඔප්පුකළ, දගැබක තත්වාකාර භාරකරුවකුට භුක්තිය ලබා ගැනීමේ නඩුවක් කියා ගෙන යෑමට බලය ඇතැයි තීරණය කරන ලදී. ඒ තීරණයෙහි ද සම්පායෝ විනිශ්චයකාරතුමා, **අබ්දුල් අසීස්** එ. **අබ්දුල් රහිමන්** 41 නව නීති සංග්‍රහයේ 317 වෙනි පිටුවේ ඇති නඩුවේ රාජාධිකරණ තීන්දුව සඳහන් කරයි. ඊට අනුව භුක්ති විඳින කෙනෙකුට ඔප්පු තිරප්පු ආදී නීත්‍යානුකූල පදනමක් පිට හිමිකමක්

නොලැබුනත්, භුක්තිය ලබාගැනීමේ නඩුවක් ගෙන යෑමට පුළුවන් යන ප්‍රතිපත්තිය ස්ථිර කරන ලදී. තවද රාජාධිකරණය විසින් **වාගාරපිල්ලේ එ. වෙල්ලයියා** (1905) 2 බාලසිංහම් 49 පිටේ සඳහන් නඩුවේ බොන්සර් අග්‍ර විනිශ්චයකාර තුමාගේ ප්‍රකාශනය වන ''පන්සලේ අධිකාරි යැයි සඳහන් කර ඇති විත්තිකරුට පන්සලේ ද ඊට අයත් ඉඩකඩම් වල ද පාලනය ලැබී ඇත්නම්, ඔහු පන්සලේ හෝ ඊට අයත් ඉඩකඩම්වල වැඩදායි අයිතිවාසිකම කට හිමිකම් පාන්නේ නැතුව පන්සලේ දායකවරුන්ට භාරකාරයකු මෙන් පමණක් ක්‍රියාකර නමුත් නඩුව ගෙන යෑම පිණිස අවශ්‍ය භුක්තිය ඇතැයි කිවහැක'' යි සඳහන් කර ඇත.

ඉහත සඳහන් නඩු තීන්දු දෙක මුස්ලිම් පල්ලියක සහ හින්දු දේවාලයක භාරකරු නම්බන්ධයෙන් වුවත්, ඉහත සඳහන් නඩු තුනෙන් ම යම්කිසි ප්‍රතිපත්තියක් පැන නැගෙන්නේ ය. එනම්, දේවාලයක්, පන්සලක් නැතහොත් මුස්ලිම් පල්ලියක් වැනි ආගමික සංස්ථාවක භාරකරු මෙන් ක්‍රියා කරන්නකු නීත්‍යානුකූලව එම ධුරයට පිළිනොගෙන තිබුනත් එම ආගමික සංස්ථාවට අයත් ඉඩකඩම් ආරක්ෂා කිරීම සම්බන්ධයෙන් නඩු ගෙන යෑමට අවස්ථාවක් ඇති වූ විට, තත්වාකාර භාරකරු මෙන් සැලකිය යුතුයි. වග උත්තරකරු වෙනුවෙන් පෙනී සිටි අධිනීතිඥතුමා ඉහත සඳහන් නඩු සියල්ල ම 1931 බෞද්ධ විහාර දේවාලගම් ආඥා පනත පැනවීමට ප්‍රථමයෙන් තීන්දු කළ හෙයින් මෙම නඩුවට නොයෙදිය යුතු යයි තර්ක කළේය. තවද ඔහුගේ තර්කය ස්ථිර කිරීම පිණිස ඉහත සඳහන් වී ඇති මතය, එනම් පනතේ 8 වෙනි ඡේදයට සෑම දේවාලයක් ම යටත් වනවා යැයි සඳහන් කළේ ය. පනතේ ප්‍රතිපාදනයලින් නිදහස් කර ඇති පන්සලකට 8 වෙනි ඡේදය බලපාන්නේ නැතැයි මාගේ මතය ඉහතින් ප්‍රකාශ කර ඇති හෙයින් අධිනීතිඥතුමාගේ තර්කය සාර්ථක නොවන්නේ ය.

ඉහත සඳහන් කරුණු මතුපිට පැමිණිලිකරුට මෙම නඩුව ගෙන යෑමට බලය ඇතැයි මා තීරණය කරන්නේ ඔහුට සාක්ෂි මත තමා දේවාලයේ තත්වාකාර භාර කරු යැයි පෙන්වීමට පුළුවන් යයි අදහස කරණකොට ගෙන ය. එහෙයින් ඇපෑල සාර්ථක යැයි තීරණය කොට, දිස්ත්‍රික් නඩුකාර තුමාගේ නියෝගය අවලංගු කර, නඩුව ආපසු විභාග කිරීම පිණිස අරින්නෙමි. ඇපැල්කරුට මෙම උසාවියේත්, පහළ උසාවියේත් නඩු ගාස්තු ගෙවිය යුතුයි.

ගරු අලස් විනිශ්චයකාරතුමා:

මම එකඟ වෙමි.

ඇපෑලට ඉඩ දෙන ලදී.

පරිවර්තනය: වජිරා ශ්‍රීමතී ලේනදුව මෙනෙවිය විසිනි.

ගරු මානික්කවාසගර් විනිශ්චයකාරතුමා ඉදිරිපිට

ධනපාල එ. උප පරීක්ෂක, කුරුඳුවත්ත පොලීසිය*

ශ්‍රෙෂ්ඨාධිකරණයේ අංකය 660/1966

නාරාහේන්පිට මහේස්ත්‍රාත් උසාවියේ අංකය 53580

විවාදකොට තීරණය කළ දිනය: 1966 සැප්තැම්බර් 7

රථවාහන ගමනාගමන පණත — චෝදනාව 214(1) (ඒ) ඡේදය යටතේ 1951 රථවාහන නිර්මාන පිළිබඳ රෙගුලාසි අතරෙන් අංක 10(1) දරණ රෙගුලාසියට විරුඬව ක්‍රියා කිරීම ගැන—නමුත් තීන්දුව දෙන ලද්දේ 214(ඒ) ඡේදය යටතේ නොව 214(2) (බී) ඡේදය යටතේ—වැරදිකරුට එම ඡේදය පිළිබඳ නිදහසට කරුණු ඉදිරිපත් කිරීමට අවස්ථාවක් නොලැබීම—තීන්දුව ඉවත දැමිය යුතුද?—යට කී 10(1) රෙගුලාසිය — එය මෝටර් රථ නිර්මාන වැඩ සම්බන්ධයෙන් පමණක් ද?

ඇපැල්කරුට විරුඬව චෝදනාව ඉදිරිපත් කරන ලද්දේ රථවාහන ගමනාගමන පනතේ 214(1)(ඒ) ඡේදය යටතේ ය. මෝටර් රථයක්, එහි ඉදිරිපිට සෑහෙන ප්‍රමාණයකට දුරට සුදු එළියක් විහිදුවන ලාම්පු දෙකක් සවිනොකර පැදවීමෙන් රථවාහන ගමනාගමන වාහන නිර්මාන රෙගුලාසි (Motor Traffic Construction of Vehicles Regulations) වල අංක 10(1) රෙගුලාසිය උල්ලංඝණය කළාය කියායි. එහෙත් තීන්දුව දෙන ලද්දේ 214(2) (බී) ඡේදය යටතේ ය. තවද වෙනස් කරන ලද චෝදනාව ඇපැල්කරුට කියවා පැහැදිලිකර නොදෙන ලදී. ඔහුට එය සම්බන්ධයෙන් සාක්ෂි ඉදිරිපත් කිරීමට ද අවස්ථාවක් නොලැබුනේ ය.

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* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 72 වෙනි කා., 34 වෙනි පිට බලනු.

තීන්දුව: (1) මහේස්ත්‍රාත් තුමා විසින් අපරාධ නඩු සංවිධාන සංග්‍රහයේ 172(2) ඡෙදය හා 173 වෙනි 174 වෙනි ඡෙදවලට අනුකූලව ක්‍රියා නොකරන ලද නිසා වරදකරු නිදහස් කළ යුතු වේ.

(2) මෝටර් රථ ගමනාගමන විධිවිධාන පනතේ 10(1) විධිවිධානයෙන් සඳහන් වන්නේ රිය සකස් කිරීම පමණක් නොව එය පැදවීමත් ය.

නීතිඥවරු: ඇම්. ඇම්. කුමාරකුලසිංහම් සහ ඇෆ්. ඇන්. ඩී. ජයසූරිය, ඇපැල්කරු වෙනුවෙන්.
ඇස්. ඩබ්ලිව්. බී. වඩුගොඩපිටිය රජයේ නීතිඥ,

ගරු මානික්කවාසගර් විනිශ්චයකාරතුමා

1965 හේ මැයි මස 21 වෙනි දින රාත්‍රියේ, කොළඹ කේම්බ්‍රිජ් පෙදෙසෙහි නො: සී. ඇන්. 9735 දරණ මෝටර් රථයක්, එහි ඉදිරිපිට සෑහෙන ප්‍රමාණයකට සුදු එළියක් විහිදුවන ලාම්පු දෙකක් සවි නොකර පැදවූවා යැයි චෝදනාවක් ඇපැල්කරුට විරුඬව ඉදිරිපත් කරන ලදී. එබැවින් 1951 කේ රථවාහන ගමනාගමන විධිවිධාන පනතේ 19 වෙනි ඡෙදය සහ 237 වෙනි ඡෙද සම්බන්ධ කර සාද ඇති රථවාහන නිර්මාන රෙකුලාසි අතරෙන් 10(1) රෙකුලාසියට විරුඬව ක්‍රියා කර ඇතැයි ද, පණතෙහි 214(1) (ඒ) ඡෙදය යටතේ එමවරදට දඬුවම් ලැබිය යුතුයයි සඳහන් විය.

ඇපැල්කරු වැරැදිකරුවා හැටියට තීන්දු කරන ලද්දේ 214(1)(ඒ) ඡෙදය යටතේ නොව 214(2)(බී) ඡෙදය යටතේ කළ වරදක් වශයෙනි. මෙම වෙනස් කරන ලද චෝදනාව සම්බන්ධයෙන් ආයාචනා කිරීමට ඔහුට කිසිම අවස්ථාවක් නොදෙන ලදී. මහේස්ත්‍රාත්තුමා, වෙනස් කරන ලද චෝදනාව ඇපැල්කරුට කියවා පැහැදිලිකර නොදීමෙන් අපරාධ නඩු සංවිධාන සංග්‍රහයේ 172(2) ඡෙදයට අනුකූලව ක්‍රියා නොකළේ ය. තවද එතුමා සංග්‍රහයේ 173 ඡෙදයෙහි හෝ 174 ඡෙදයෙහි සඳහන් වී ඇති ක්‍රියා මාර්ග ද ගැන සැලකිල්ලක් නැතුව ඒ වෙනුවට ඇපැල්කරුට කිසිම අවාසියක් නොවූවා යැයි ද පළමුවන චෝදනාවේ අඩුපාඩු අපරාධ නඩු සංවිධාන සංග්‍රහයේ 425 ඡෙදය යටතේ පිරිමැසෙනවා යැයි ද සඳහන් කර, ඇපැල්කරු වරදකරුවා හැටියට තීන්දු කරන ලදී.

මහේස්ත්‍රාත්තුමා විසින් අනුගමනය කරන ලද ක්‍රියා මාර්ගයෙහි දෝෂයක් ඇත. ඔහු මා විසින් ඉහත සඳහන් කර ඇති සංග්‍රහයේ ක්‍රියා මාර්ගය අනුගමනය නොකළා පමණක් නොව, එසේ නොකිරීමෙන් ඇපැල්කරුට අයුක්තියක් ද සිදුකර ඇත. මන්ද? ඇපැල්කරුට මෝටර් රථ ගමනාගමන සංග්‍රහයේ 214(2) ඡෙදයේ පළමුවැනි අතුරු විධානයෙන් ආරක්ෂාව ලැබීම පිණිස කරුණු තිබුනත් එම කරුණු ඉදිරිපත් කිරීමට අවස්ථාවක් නොලැබුන නිසා ය.

ඉහත සඳහන් කරුණු මත පමණක් තීන්දුව ඉවත දැමිය යුතුයි. මෙය හේතුකොටගෙන වැරදිකරු බවට දී ඇති තීරණය ඉවත දමා, ඇපැල්කරු නිදහස් කරමි.

මා විසින් ඉහත සඳහන් කරන ලද තීරණය කරණ කොට ගෙන නව නීති වාර්තා අංක 55 හේ 396 වැනි පිටෙහි සහ අංක 59 යේ 452 වැනි පිටෙහි සඳහන් වී ඇති නඩු තීන්දු දෙක මත ඇපැල්කරු වෙනුවෙන් ඉදිරිපත් වූ නීතිඥ මහතා විසින් ඉදිරිපත් කරන ලද තර්කය වැඩි දුරට පරීක්ෂා කිරීම අනවශ්‍යය. එහෙත් මා එය කෙටියෙන් විස්තරකොට, එය පිළිබඳ මගේ අදහස් ප්‍රකාශ කරන්නෙමි.

සාක්ෂි සම්බන්ධයෙන් මහේස්ත්‍රාත්තුමාගේ තීරණය අනුව, මෝටර් රථයේ ඉදිරිපිට ලාම්පු දෙකක් තිබුනත්, ඒවා එළියකර තිබුනේ නැත. චෝදනාව ඉදිරිපත් කර ඇත්තේ මෙම තීන්දුවේ පළමුවැනි ඡෙදයෙහි සඳහන් කර ඇති අන්දමට 10(1) විධානය යටතෙහි ය. 10(1) විධානය සකස් කර ඇති ''මෝටර් රථ නිර්මාන කිරීමේ විධිවිධාන'' යන මාතෘකාව යටතෙහි ඇතුළත්කර ඇති විධිවිධාන කිහිපයකින් එකක් වන්නේ ය. චෝදනාවෙන් සඳහන් වන්නේ මෝටර් රථය පැදවීම වුවත් නීතිඥ මහතාගේ තර්කය අනුව 10(1) විධිවිධානය නියමිත කරන්නේ මෝටර් රථ සම්පාදනය කිරීම මිස එය පාවිච්චි කිරීම නොවේ. මගේ මතය වන්නේ, නීතිඥ තුමා විසින් ඉදිරිපත් කරන ලද නඩු තීන්දු දෙකේ විධිවිධානයන්හි (පාවිච්චියට) විරුඬව තහනමක් නොතිබුන හෙයින් එය 10(1) විධිවිධානයට වෙනස් වන්නේ ය. 10(1) විධිවිධානයේ වචන මෝටර් රථ පැදවීම සම්බන්ධයෙන් ද යොදා ඇති බව පැහැදිලි ලෙස පෙනේ. තවද එය ''මෝටර් රථ නිර්මාන කිරීමේ විධිවිධාන'' යන විධිවිධාන යටතේ ඇතුළත් වී තිබුනත් එය ''ගමන් කරන විට ද'' යන වචනයන්ගෙන් හැඳින් වන 'රථයක් පැදවීම' යන තේරුම වෙනස් නොවන්නේ ය.

ඇපැලට ඉඩ දී නිදහස් කරන ලදී.

පරිවර්තනය: වජිරා ශ්‍රීමතී ලේනදුව මෙනෙවිය විසිනි.

ගරු ටී. ඇස්. ප්‍රනාන්දු විනිශ්චයකාරතුමා, ගරු අබේසුන්දර විනිශ්චයකාරතුමා සහ ගරු අලස් විනිශ්චයකාරතුමා ඉදිරිපිට

ඇස්. ඩබ්ලිව් දහනායක එ. සී. ඇන්. කන්නන්ගර*

1966 වර්ෂයේ ඡන්ද පෙත්සම් ඇපැල අංක. 13
මැතිවරණ කොට්ඨාසය අංක 66 — දෙනියාය.

විවාද කළ දිනය : 1967 ජනවාරි 28, 29, 30 සහ 31 යන දිනයන්හි
තීන්දු කළ දිනය: 1967 පෙබරවාරි 28

ඡන්ද පෙත්සමක් සම්බන්ධයෙන් නීති ප්‍රශ්නයක් පමණක් අදල ඇපැලකි. කරුණක් පිළිබඳ ඇත්ත නැත්ත ගැන තීරණයක් නිෂ්ප්‍රභා කළ හැක්කේ කවර අවස්ථාවක ද?

1946 ලංකා (පාර්ලිමේන්තු මැතිවරණ) රාජාඥව — "නියෝජිතයා" යන්නෙහි තේරුම.

සාක්ෂි — සාමාන්‍යයෙන් විනිශ්චයකරු විසින් විශ්වාසයක් තබනු නො ලැබූ තමාගේ ම සාක්ෂිකරුවකු විසින් දෙන ලද විරුද්ධ සාක්ෂියකින් ඔහු කැඳවූ පාර්ශවකරුට හානියක් විය යුතු ද?

මෙය, 1946 ලංකා (පාර්ලිමේන්තු මැතිවරණ) රාජාඥවේ 82 ඒ වැනි වගන්තිය ප්‍රකාර මැතිවරණ විනිශ්චය කරුවකු ගේ නිගමනයක් පිළිබඳව නීති ප්‍රශ්නයක් උඩ පමණක් ඉදිරිපත් කිරීමට ඉඩ දීමේ අවස්ථාවකි.

තීරණය: (1) සාධාරණ බව සනාථ කිරීමට සාක්ෂි නො මැතිව හෝ ප්‍රතිවිරුද්ධ නිගමනයකට සාක්ෂි තිබීම අමතක වීමෙන් එවැනි සාක්ෂි නැතැයි යන හේතුව උඩ හෝ කරුණක් පිළිබඳව ගනු ලබන ඇත්ත නැත්ත පිළිගැනීමේ නිගමනයක් නීති දෝෂයක් ලෙස සලකා නිෂ්ප්‍රභා කළ හැකිය.

(2) කරුණක් පිළිබඳව ඇත්ත නැත්ත පමණක් පිළිගැනීමේ දී කෙරෙන නිගමනයක් නිෂ්ප්‍රභා කළ යුතු ද යි බැලීමේ දී උපයෝගි කරගත යුතු පරීක්ෂණය නම්, කරනු ලබන ප්‍රතිවිරුද්ධ නිගමනය, ඔප්පුවුණු කරුණු අනුව කළ හැකි සත්‍යවූ එක ම සාධාරණ නිගමනය ද යි සලකා බැලීම ය.

පී. ඇල්. චන්ද්‍රසේන වගඋත්තරකරු ගේ නියෝජිතයකු ලෙස ඔප්පු වී නැතැ යි මැතිවරණ විනිශ්චයකරු නිගමනය කර තිබෙන අතර, චන්ද්‍රසේන වගඋත්තරකරුට වැඩ කළ අයගෙන් ප්‍රධාන කෙනකු බවට අබේවික්‍රම දුන් සාක්ෂිය සහ චන්ද්‍රසේන වගඋත්තරකරු වෙනුවෙන් ඡන්ද ඉල්ලීමේ යෙදුණු බවට ඡන්ද නියෝජිතයා වන ප්‍රනාන්දු දුන් සාක්ෂිය වාර්තා වී තිබේ.

තීරණය: මැතිවරණ සම්බන්ධ නීතියේ දැක්වෙන අර්ථයෙන්ම චන්ද්‍රසේන වගඋත්තරකරුගේ නියෝජිතයෙකු බව සනාථ කිරීමට එවැනි සාක්ෂි ප්‍රමාණවත් ය.

අදල ප්‍රශ්නය වන්නේ පත්‍රිකාව මුද්‍රණය කිරීම, බෙදා හැරීම සහ ඒ සඳහා වියදම් කිරීම සිදු වී ඇත්තේ වගඋත්තරකරු ගේ මැතිවරණ නියෝජිතයා ගේ අනුදැනුම ඇතිව ද යි යන්න ය. වගඋත්තරකරු වෙනුවෙන් සාක්ෂි දීමට කැඳවනු ලැබූ අබේවික්‍රම, අදල පත්‍රිකාව බලයක් නො මැතිව මුද්‍රණය කරනු ලබන බවට ලැබුණු ආරංචි අනුව තමා මැතිවරණ නියෝජිතයාට එය දැන් වූ බව ද, පත්‍රිකාව බෙදා නො හරින ලෙස මැතිවරණ නියෝජිතයා උපදෙස් දුන් අතර ඒ අනුව පත්‍රිකාව බෙදා හැරීම නැවතුනු බව ද කියා තිබේ. අබේවික්‍රම කෙරෙහි විශ්වාසය නො තැබූ මැතිවරණ විනිශ්චයකාරතුමා පත්‍රිකාව ඇත්ත වශයෙන් ම බෙදා හැර තිබෙන බව ද, එහෙත් ඒ ගැන මැතිවරණ නියෝජිතයා දැන සිටි බවට සාක්ෂි නො තිබුණු බව ද තීරණය කෙළේ ය.

ඇපැල් විභාගයේ දී පෙත්සම්කාර-ඇපැල්කරු වෙනුවෙන් කියා සිටින ලද්දේ පත්‍රිකාව තිබීම ගැන මැතිවරණ නියෝජිතයා දැන සිටි බව වගඋත්තරකරු වෙනුවෙන් ඉදිරිපත් කරනු ලැබූ සාක්ෂිකරුවකු වන අබේවික්‍රම ගේ සාක්ෂියෙන් මනා ලෙස පැහැදිලි වන බව ය.

තීරණය: පාර්ශ්වකරුවකු වෙනුවෙන් කැඳවනු ලබන සාක්ෂිකරුවකු කෙරෙහි නඩුව විභාග කරන විනිශ්චයකරු විශ්වාසය නො තැබූ විට, ඔහු කී සාක්ෂිය පාර්ශ්වකරු වෙනුවෙන් වූ පළියටම එම සාක්ෂිය පාර්ශ්වකරුට විරුද්ධව පාවිච්චි කිරීම සම්පූර්ණයෙන් ම අයුතු සහගත ය.

ගෙන හැර දැක් වූ නඩු තීන්දු: එඩ්වර්ඩ්ස් එ. බෙයාර්ස්ටෝව් (1950 ඒ.සී. 14).
ග්‍රිපිත්ස් එ. සීමාසහිත හැරිසන් (වැම්පෝර්ඩ්) (1963 ඒ.සී. 1).

නීතිඥවරු: කොල්වින් ආර්. ද සිල්වා (නිහාල් ජයවික්‍රම සහ වී. නානායක්කාර සමග) ඇපැල්කරු වෙනුවෙන්.
රාජනීතිඥ ජී. ඊ. විටිටි (ඒ. ඇම්. කුමාරස්වාමි, ආර්. ඇල්. ජයසූරිය, ඇම්. අන්ඩර්වුඩ් සහ සුනිල් ද සිල්වා සමග) වගඋත්තරකරුවෙනුවෙන්.

*ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 72 වෙනි කා., 62 වෙනි පිට බලනු.

ගරු ටී. ඇස්. ප්‍රනාන්දු විනිශ්චයකාරතුමා

අංක 66 දරණ දෙනියාය ජන්ද කොට්ඨාශය වෙනුවෙන් නියෝජිත මන්ත්‍රී මණ්ඩලයට නියෝජිතයකු තෝරා පත්කිරීම පිණිස 1965 මාර්තු 22 වැනි දින පැවති මැතිවරණයේ දී තරඟ කොට පරාජය වූ අපේක්ෂකයන්ගෙන් කෙනකුවන ඇපැල්කරු — (1) තමාගේ පෞද්ගලික චරිතයට අදල අසත්‍ය ප්‍රකාශ කිරීමෙන් හා (2) අයුතු බලපෑමෙන්, වගඋත්තරකරු හෝ ඔහුගේ නියෝජිතයන් දූෂණ ක්‍රියාවක් කර ඇතැයි යන චෝදනාව උඩ, ජයග්‍රාහකයා වන වගඋත්තරකරුට විරුඬව ජන්ද පෙත්සමක් ඉදිරිපත් කෙළේ ය. පාර්ලිමේන්තු මැතිවරණ ආඥා පනතේ 77(අ) වැනි වගන්තියේ සඳහන් හේතූන් උඩ ඒම තේරී පත්වීම අවලංගු විය යුතුයැයි යන චෝදනාවක් ද ජන්ද පෙත්සමේ අන්තර්ගතව තිබිණි. වගඋත්තරකරු හෝ ඔහුගේ නියෝජිතයා විසින් මැතිවරණ වියදම් පිළිබඳ අසත්‍ය වාර්තාවක් ඉදිරිපත් කරන ලදැයි යන තවත් චෝදනාවක් අඩංගු කිරීමෙන්, වගඋත්තරකරු සිය මැතිවරණ වියදම් වාර්තාව ඉදිරිපත් කිරීමට පසුව, උසාවියේ අවසරය ඇතිව ජන්ද පෙත්සම සංශෝධනය කරන ලදී.

ජන්ද පෙත්සම් විභාගයේ දී ඉදිරිපත් කරනු ලැබූ සාක්ෂි, මැතිවරණ වියදම් පිළිබඳ වූ අමතර චෝදනාවත්, පෞද්ගලික චරිතයට අදල අසත්‍ය ප්‍රකාශ කිරීම පිළිබඳ වූ පළමුවැනි චෝදනාවත් යන චෝදනා දෙක සනාථ කිරීමේ කාර්‍යය සඳහා සීමා විය. විභාගය අවසානයේ දී, චෝදනා දෙක ඔප්පු කිරීමට ඇපැල්කරු සමත් වී නැතැයි තීන්දු කළ මැතිවරණ විනිශ්චයකාරතුමා, ජන්ද පෙත්සම නිෂ්ප්‍රභා කෙළේ ය.

පෞද්ගලික චරිතයට අදලවන අසත්‍ය ප්‍රකාශ කිරීමේ චෝදනාව සම්බන්ධයෙන් මෙම ඇපැල් විභාගයේ දී කෙරුණු විවාදය පෙත්සම්කරු සපයා තිබෙන විස්තර ලැයිස්තුවේ අඩංගු කාරණා තුනකට සීමා විය. එනම්:

(1) වගඋත්තරකරු නීති විරෝධී ලෙස මැණික් ගරා විශාල මුදලක් රැස් කරගත් බවට පාල පතිරණ නමැති කෙනකු වගඋත්තරකරුට ආධාර පිණිස 1965 මාර්තු 9 වෙනි දින දූරන්ගල පැවති රැස්වීමක දී කළ ප්‍රකාශය (විස්තර ලැයිස්තුවේ 3 වෙනි කාරණය)

(2) නීති විරෝධී ලෙස මැණික් ගරා නඩුවකට අසු වීමෙන් වගඋත්තරකරු සිය නෑයන්ට අපකීර්තියක් ලබා දුන් බවට විදන පතිරණ නම් කෙනකු විසින් වගඋත්තරකරුට ආධාර පිණිස 1965 මාර්තු 17 වැනි දින මිනිපෙගොඩ පැවති රැස්වීමක දී කරන ලද බව කියන ප්‍රකාශය. (විස්තර ලැයිස්තුවේ 5 වෙනි කාරණය)

(3) අංක පී. 47 දරණ පත්‍රිකාව ප්‍රසිඬ කිරීම (විස්තර ලැයිස්තුවේ 9 වෙනි කාරණය)

පාල පතිරණ කළ බව කියන ප්‍රකාශය සම්බන්ධව ඩේවිඩ් සහ ආරියදස යන ඇපැල්කරුගේ සාක්ෂිකරුවන් දුන් සාක්ෂි විශ්වාස කිරීමට ජන්ද පෙත්සම විභාග කළ විනිශ්චයකාරතුමා පෙළඹී නැත. එහෙත් පාල පතිරණ කථා කළ වචන ඇපැල්කරුගේ යට කී සාක්ෂිකරුවන් සඳහන් කළ දෙය ම යයි වගඋත්තරකරු වෙනුවෙන් සාක්ෂි දීමට කැඳවනු ලැබූ පාල පතිරණ ම පිළිගත් වග ජන්ද පෙත්සම විභාග කළ විනිශ්චයකාරතුමා පිළිගනී. එතකුදු වුවත්, ඇපැල්කරුගේ ක්‍රියාකලාපය නීතිවිරෝධී මැණික් ගැරීමට ඔහු සම්බන්ධ බවක් පෙන්වන නිසා චෝදනාව ඔප්පු නොවන අතර එසේ කළ බවට ඔප්පු වී ඇති ප්‍රකාශය ඒ නිසා අසත්‍ය නොවන බව ජන්ද පෙත්සම විභාග කළ විනිශ්චයකාරතුමා පිළිගනී.

අදල ප්‍රකාශය කිරීමෙන් මාස හතරකට පසු, එනම් 1965 ජූලි මාසයේ දී, ඇපැල්කරු ළඟ මැණික් වගයක් තිබුණේ යයි යන අදල නොවන සාක්ෂියක් පිළිගෙන ජන්ද පෙත්සම විභාග කළ විනිශ්චයකාරතුමා ක්‍රියා කොට ඇතැයි යනුවෙන් ද පොලිසියට අවහිර කිරීමෙන් ඇපැල්කරු බලාපොරොත්තු වූයේ නීති විරෝධී ලෙස මැණික් ගැරීම වැළැක්වීමේ පොලිසියේ රාජකාරියට බාධා කිරීමට යයි මැතිවරණ විනිශ්චයකාරතුමා කළ නිගමනය වැරදි සහිත යයි යනුවෙන් ද ඇපැල්කරුගේ උගත් නීතිඥයා ඉදිරිපත් කළ තර්කයේ හරයක් ඇතැයි මම සිතමි. අදල සාක්කි සියල්ල සලකා බැලූ කල, එසේ කළ බවට ඔප්පුවුණු ප්‍රකාශයේ සත්‍යතාව සාධාරණ සැකයෙන් තොරව ඔප්පු වී නැතැයි මැතිවරණ විනිශ්චයකාරතුමා එළඹුණු තීරණය ඒ අයුරින් කිරීමට මැතිවරණ විනිශ්චයකාරතුමාට අයිතියක් නැතැයි අපට කිව නොහැකි ය. එහෙයින් මෙම තර්කයට පිළිතුරු දීමට අපි වගඋත්තරකරුගේ නීතිඥයාට ආරාධනය නො කෙළෙමු.

1965 මාර්තු 17 වැනි ද මිනිපේගොඩ දී විදන පතිරණ කළ බව කියන ප්‍රකාශය සම්බන්ධයෙන් අප ඉදිරියේ කියා සිටින ලද්දේ ඇපැල්කරුගේ සාක්ෂිකරුවන් වන දයානන්දගේ සහ දිසානායකගේ සාක්ෂි පිළිගැනීමට හෝ නොකැමැති වූ මැතිවරණ විනිශ්චයකාරතුමා මැණික් ගැරීමේ ප්‍රතිඵලයක් වශයෙන් ඇපැල්කරුට පොලිසිය සමග කරදර තිබිණැයි අදල රැස්වීමක දී විදන පතිරණ කී බවට ඔහු ම දුන් සාක්ෂිය සලකා බැලීම සම්පූර්ණයෙන් ම අත හැර තිබෙන බව ය.

ඇපැල්කරුගේ සාක්ෂිකරුවන් කෙරෙහි විශ්වාසය නොතැබුවත්, විරුඬකරුගේ සාක්ෂි පෙන්වා තම නඩුව තහවුරු කිරීමට ඇපැල්කරුට හැකි යයි යන තර්කය

අප සිත් නොගත්තා නොවුව ද කලින් දක් වූ හේතූන් නිසා එම කරුණු සම්බන්ධයෙන් වගඋත්තරකරු වෙනුවෙන් පිළිතුරු දීමට නීතිඥයාට අපි ආරාධනා නොකෙළෙමු. එම හේතුව නම් ප්‍රකාශයේ අසත්‍යතාව අවශ්‍ය පිළිවෙළට සනාථ නොවී යයි තීරණය කිරීමෙන් මැතිවරණ විනිශ්චයකාරතුමාට වැරැද්දක් වී ඇතැයි අපට කිව නොහැකිය යනුයි.

පී. 47 දරණ පත්‍රිකාව බෙදා හරින ලද බව සනාථ කිරීමට ඇපැල්කරු වෙනුවෙන් කැඳවනු ලැබූ සාක්කි කරුවන් කෙරෙහි විශ්වාසය තැබීමට මැතිවරණ විනිශ්චයකාරතුමා පෙළඹී නැත. එතකුදු වුවත්, බෙදහැරීමට කල් ඇතිව එම පත්‍රිකාවේ පිටපත් ලැබී ඇති බව හා පත්‍රිකාව බෙදා හැරීමට ඉඩ තිබුණු බව විනිශ්චයකාරතුමා පිළිගනී. මුදල් ගෙවනු ලැබ, බෙදා හැරීමට සූදානම්ව තිබුණු පත්‍රිකාවක් ඇත්ත වශයෙන් බෙදා හරිනු නොලැබිණැයි පිළිගැනීම අසාධාරණ යයි යන තර්කයේ හරයක් ඇතැයි යනු මගේ පිළිගැනීමයි. බෙදහැරීමට කල්වේලා ඇතිව පත්‍රිකාව නොලැබුණු බව කී සාක්ෂිකරු කෙරෙහි විශ්වාසය නොතැබූ කල විශේෂයෙන් එසේ සැලකේ. බෙදා හැරී බව සනාථ කිරීමට, විශේෂයෙන් පත්‍රිකාවේ පිටපත් මුද්‍රණය කිරීමට දෙවතාවක් ම ඇණවුම් කර ඇති විට, පරිවේෂණ සාක්ෂි ප්‍රමාණවත්වන අතර මෙහි දී ඉස්මතු වන ප්‍රශ්නය සම්පූර්ණයෙන්ම සත්‍ය අසත්‍ය පිළිගැනීමේ කරුණකට අයත් දෙයකි.

තවද, නඩු විභාගයේ දී ඉදිරිපත් කරන ලද පී. 47 දරණ ප්‍රකාශයන් නියම වශයෙන් ම පෞද්ගලික චරිතයට හෝ කල්ක්‍රියාවට සම්බන්ධද යි යනු මට තරමක සැක සහිත ය.

අප වගඋත්තරකරුගේ නීතිඥයාට පිළිතුරු දීමට කීවේ ඇපැල්කරු වෙනුවෙන් ඉදිරිපත් කරන ලද අන්තිම කාරණය සම්බන්ධයෙන් පමණකි. එනම්, මැතිවරණ වියදම් වාර්තාව පිළිබඳ දැනුවත්වම අසත්‍ය ප්‍රකාශයක් කිරීමේ දූෂණ ක්‍රියාවක් කළ බව සනාථ කිරීමට පෙත්සම්කරු අසමත් වී යැයි යන මැතිවරණ විනිශ්චයකාරතුමාගේ නිගමනය පිළිබඳ කරුණයි.

පාර්ලිමේන්තු මැතිවරණ ආඥා පනතේ 59 වැනි වගන්තිය යටතේ වගඋත්තරකරු විසින් නම් කරනු ලැබූ මැතිවරණ නියෝජිතයා වන්නේ සාක්ෂිකරුවකු වන වයි. ඇම්. ප්‍රනාන්දු ය. මෙම ඇපැල් විභාගයේ දී සැලකිල්ලට භාජන කළ යුතුව තිබෙන එක ම වියදම් විස්තරය නම් මොරවක කඩ වීදියේ පැවැත්වීමට තිබුණු (වගඋත්තරකරුගේ මැතිවරණ ව්‍යාපාරයේ මංගල රැස්වීම වශයෙන් විස්තර වුණු) රැස්වීමක් ප්‍රචාරය කෙරුණු පී. 51 සහ පී. 62 දරණ පත්‍රිකා පිටපත් මුද්‍රණය කිරීම සඳහා 'නිල්වලා' මුද්‍රණාලයට ගෙවන ලද රු. 20 පිළිබඳ වියදම් විස්තරය යි. වියදම් වාර්තාවේ මෙම වියදම් විස්තරය සඳහන් නොවීම සාමාන්‍ය දෙයකි. එම රැස්වීම නොපැවති බව හෝ එම පත්‍රිකා නොබෙදූ බව හෝ ඔප්පු කිරීමට වගඋත්තරකරු කිසි ම උත්සාහයක් දරා නැත. වගඋත්තරකරුගේ මැතිවරණ ව්‍යාපාර කමිටුව වෙනුවෙන් වරල්ලේ පී. ඇල්. චන්ද්‍රසේන නමැත්තකු විසින් එම දැන්වීම් පත්‍රිකා ප්‍රසිද්ධ කරන ලද බව ඒවායේ සඳහන් වෙයි. එම දැන්වීම් මුද්‍රණය කිරීම සඳහා ඇණවුම් කිරීම සහ මුදල් ගෙවීම කරන ලද්දේ වරල්ලේ පී. ඇල්. චන්ද්‍රසේන වශයෙන් නමත්, ලිපිනයත් දුන් කෙනකු විසින් බව මුද්‍රණකරුගේ සාක්ෂියෙන් සනාථ වේ. වරල්ලේ මේ නම් ඇති වගඋත්තරකරුගේ ආධාරකරුවකු සිටින බව වගඋත්තරකරු විසින් කැඳවන ලද සාක්ෂිකරුවකුගේ සාක්ෂියකින් පැහැදිලි වෙයි. මෙම ඡන්ද පෙත්සමේ කිසි ම පක්ෂයක් විසින් චන්ද්‍රසේන සාක්ෂියට කැඳවනු නොලැබී ය. මෙම දැන්වීම් පත්‍රිකා සඳහා ඇණවුම් කිරීම හා මුදල් ගෙවීම තමා කළ බවට වගඋත්තරකරුගේ ආධාරකරුවකු සාක්ෂි කියතැයි ඇපැල්කරු බලාපොරොත්තු නොවූවා විය හැකි ය. එහෙත් වගඋත්තරකරු වෙනුවෙන් ඡන්ද පෙත්සම විභාගයේ දී සාක්ෂි දුන් වගඋත්තරකරුගේ නියෝජිතයකු වන අබේවික්‍රම නම් තැනැත්තකුගේ සාක්ෂියක් ප්‍රයෝජනයට ගැනීමට ඇපැල්කරු දැන් උත්සාහ දරයි. චන්ද්‍රසේනගේ නමින් ප්‍රසිද්ධ කරන ලද බව පෙන්වන මොරවක රැස්වීමක් ප්‍රචාරය කෙරෙන දැන්වීම් වගයක් මොරවක තරුණ සමිතිය විසින් මුද්‍රණය කර තිබුණු බවත් එම ක්‍රියාව ගැන විරුද්ධ වූ චන්ද්‍රසේන ඒ ගැන ප්‍රනාන්දුට සැල කළ අවස්ථාවේ ප්‍රනාන්දු දැන්වීම් නොබෙදීමට උපදෙස් දුන් බවත් චන්ද්‍රසේන තමාට දැන් වූ බව අබේවික්‍රම සාක්ෂි දෙමින් කියා තිබේ. දැන්වීම්වල පිටපත් මොරවක පක්ෂ කාර්යාලයේ තැන්පත් කර තිබෙන අතර ඒවා බෙදා හැරීම නවත්වා තිබෙන බව ඔහු වැඩි දුරටත් කියා තිබේ. වගඋත්තරකරුට ආධාර පිණිස පැවැත්වෙන රැස්වීමක් ප්‍රචාරය කෙරෙන මේවා අනතුරු දායක නොවන දැන්වීම් වූ අතර චන්ද්‍රසේනගේ විරුද්ධවීම හෝ දැන්වීම් බෙදීම නැවැත්වීම තේරුම් ගත නොහැකි දෙයකි. අබේවික්‍රමගේ සාක්ෂිය තේරුම් සහගතව විශ්වාස නොකළ ඡන්ද පෙත්සම විභාග කළ විනිශ්චයකාරතුමා, දැන්වීම ඇත්ත වශයෙන් බෙදා, හරින්නට ඇතැයි පිළිගෙන තිබේ. බෙදා හැරීම පෙත්සම්කාර පක්ෂය විසින් කෙතෙක් දුරට ඔප්පු කළ යුතු ද යි යන්න පිළිබඳව මැතිවරණ විනිශ්චයකාරතුමාට වැරදීමක් වී ඇති බවට විටිටි මහතා තර්ක කළ මුත්, ප්‍රකාශනය සහ බෙදා හැරීම සාධාරණ සැකයෙන් තොරව ඔප්පු කළ යුතු යයි විනිශ්චයකාරතුමා මනා ලෙස දැන සිටි බව නඩු තීන්දුවේ සෙසු කොටස්වලින් පැහැදිලි වෙයි. චන්ද්‍රසේන වගඋත්තරකරුගේ නියෝජිතයා වී නම් අදල වියදම් විස්තරය මැතිවරණ වියදම් වාර්තාවේ සඳහන් විය යුතුව තිබුණේය යි විනිශ්චයකාරතුමා කර ඇති ප්‍රකාශිත නිගමනයෙන් බෙදහැරීම සිදු වූ බවට විනිශ්චයකාරතුමා සෑහීමකට පත්ව සිටි බව තව දුරටත් මතු වී පෙනෙයි.

විනිශ්චයකාරතුමා, නියෝජිත භාවය පිළිබඳව ඉදිරිපත් වූ සාක්ෂි විභාග කිරීමෙන් පසු, චන්ද්‍රසේන වගඋත්තරකරුගේ නියෝජිතයකු බව ඔප්පු වී නැතැයි නිගමනය කර ඇත. මෙම නිගමනයට එළඹීමේ දී පැහැදිලිව ම මැතිවරණ විනිශ්චයකාරතුමාට වැරදී ඇති බවට මම සෑහීමකට පත්වීමි. මැතිවරණ විනිශ්චයකාරතුමා විසින් ම අසන ලද පහත දැක්වෙන ප්‍රශ්නයට මැතිවරණ නියෝජිත ප්‍රනාන්දු දී ඇති පිළිතුර විනිශ්චයකාරතුමාට නොපෙනී ගොස් තිබෙන බව පෙනේ.

ප්‍රශ්නය: වගඋත්තරකරුගේ මැතිවරණ ව්‍යාපාරය සම්බන්ධව ඔහුට (චන්ද්‍රසේනට) කිරීමට කිසි වැඩක් තිබුණා ද?

පිළිතුර වූයේ ''චන්ද්‍රසේන වගඋත්තරකරුට ඡන්ද ඉල්ලීමේ යෙදුණේ ය.'' යනු යි.

චන්ද්‍රසේන වගඋත්තරකරුගේ ප්‍රධාන ආධාරකරුවන් ගෙන් කෙනකු බවට අබේවික්‍රම (වග උත්තරකරු වෙනුවෙන් දෙන ලද) කි සාක්ෂියත් සමග ගත් කල, මැතිවරණ නීතියෙන් කියැවෙන අර්ථයෙන් ම චන්ද්‍රසේන වගඋත්තරකරුගේ නියෝජිතයා බව සනාථ කිරීමට මගේ අදහස හැටියට, ප්‍රනාන්දුගේ එම පිළිතුර ප්‍රමාණවත් ය. ඡන්ද ඉල්ලීමේ ප්‍රචාරක වැඩ කිරීමට බලය පැවරුණු තැනැත්තාට ඒ සඳහා රැස්වීම් කැඳවීමේ බලය ද තිබුණු බව සිතා ගත හැකි ය. තහවුරු කිරීමට සාක්ෂි නොමැතිව කරුණක් සම්බන්ධයෙන් කරන ලද තීරණයක් නීති දෝෂයක් වීමේ හේතුව උඩ නිෂ්ප්‍රභා කළ හැකිවා සේ ම, තහවුරු කිරීමට සාක්ෂි නැතැයි, එවැනි සාක්ෂි තිබීම අමතක වීමෙන්, ගනු ලබන තීරණයක් ද එවැනිම හේතුවක් උඩ නිෂ්ප්‍රභා කළ හැකි වෙයි.

ඇත්ත නැත්ත විසඳීමේ කරුණක් පිළිබඳව නිගමනයක් ඇපැලේදී නිෂ්ප්‍රභා කළ යුතුදැයි යන්න තීරණය කිරීමේ දී රැඩ්ක්ලිප් සාමිවරයා, **එඩ්වර්ඩ්ස් එ. බෙයර්ස්ටෝව්** (1956 ඒ.සී. 14, පිටුව 36) නඩුවේ දී, ඔප්පුවුණු කරුණු අනුව එළඹෙන ප්‍රතිවිරුඬ තීරණය සත්‍ය වූ එක ම සාධාරණ තීරණය ද යි පරීක්ෂාකර බැලීමේ මිනුම් දණ්ඩ උපයෝගී කර ගැනීමට පක්ෂ විය. එඩ්වර්ඩ්ස් එ. බෙයර්ස්ටෝව් නඩුවේ දී රැඩ්ක්ලිප් සාමිවරයා සමග විනිශ්චයේ යෙදුණු සිමන්ඩ්ස් වයිකවුන්ට්වරයා ම ඊට අවුරුදු හතකට පසු ග්‍රිපිත්ස් එ. සීමාසහිත හැරිසන් (වැට්පෝඩ්) (1963 ඒ.සී. 1 පිටුව 11) නඩුවේ දී මෙම මිනුම් දණ්ඩ උපයෝගී කර ගෙන තිබේ.

මැතිවරණ විනිශ්චයකාරතුමා විසින් පිළිගන්නා ලද වගඋත්තරකරුගේ ම නියෝජිතයාගේ සාක්ෂි අනුව, මා හිතන්නේ, මේ ඡන්ද පෙත්සම් විභාගයේ දී මැතිවරණ විනිශ්චයකාරතුමාට කළ හැකිව තිබුණු සත්‍ය හා එක ම සාධාරණ තීරණය වන්නේ චන්ද්‍රසේන වගඋත්තරකරුගේ නියෝජිතයා බව තීරණය කිරීමය.

සිදු කළ බව කියන නීති විරෝධී ක්‍රියා සනාථ කිරීමට යට දැක්වෙන එම තීරණය ප්‍රමාණවත්වේ ද? මැතිවරණ ආඥා පනතේ 68(බී) දරණ වගන්තිය යටතේ දඬුවම් කළ හැකිවනුයේ අසත්‍ය නොවූ බව හෙළිවන මැතිවරණ වියදම් සම්බන්ධව හැම ප්‍රකාශයක් ම පිළිබඳව නොවේ. එසේ දඬුවම් කරනු ලබනුයේ අසත්‍යතාවය දැන කරනු ලබන ප්‍රකාශයන් සම්බන්ධයෙන් පමණකි. දැන්වීම් මුද්‍රණය කිරීම බෙදා හැරීම සහ ඒ සඳහා මුදල් ගෙවීම කරන ලද්දේ වගඋත්තරකරුගේ නියෝජිතයාවන චන්ද්‍රසේන විසින් බව සනාථ වී ඇතැයි යන පදනම මත සිට ද සිල්වා මහතා, හැම පත්‍රිකාවක් ම බෙදා හැරීම කරන ලද්දේ තමාගේ බලය පිට බවටත්, ගෙවීම් කරන ලද්දේ තමා විසින් බවටත් හැම පත්‍රිකාවක් ම විසුරුවා හරින ලද්දේ තමා දුන් බලය පිට බවටත් කි සාක්කිය ගෙන හැර පාමින්, අංක පී. 51 සහ පී. 62 දරණ පිටපත් ද මුද්‍රණය කරන ලද්දේ ප්‍රනාන්දු දුන් බලය පිට ම බව සනාථ වී ඇතැයි තර්ක කෙළේ ය.

මේ පිළිවෙළට, ප්‍රනාන්දුගේ ප්‍රකාශය අසත්‍ය බව දැනුවත්ව කරන ලද්දක් බවට අප ඉදිරියේ තර්ක ඉදිරිපත් කරන ලදී. එහෙත් ප්‍රනාන්දුගේ සාක්ෂිය නීතිඥයා දැක් වූ අන්දමට ගණන් ගැනීමට උත්සාහ කිරීම වැරදි ය. ප්‍රනාන්දු වගකීම භාර ගත්තේ ඔහු බලය දුන් බව කී පත්‍රිකා සම්බන්ධයෙන් පමණකි. වගඋත්තරකරු වෙනුවෙන් ඇත්ත වශයෙන් නිකුත් කරන ලද හැම පත්‍රිකාවක් සඳහා ම තමා බලය දුන් බවට ප්‍රනාන්දු දුන් සාක්ෂියක් නැත. එවැනි අදහසක් ඉදිරිපත් කිරීමට ඔහු සිතූ බව අදහස් කිරීම අසාධාරණය. ඊට හේතුව ,ඔහු එසේ අදහස් කළේ නම්, ඡන්ද පෙත්සමේ මෙම කොටසේ විසඳීමට ඇති ප්‍රශ්නය සම්බන්ධයෙන්, එය, විරුඬ පක්ෂයට පාවාදීමක් වීම ය.

ඊළඟට විශ්වාසය තබන ලද්දේ පී. 51 සහ පී. 62 දරණ දැන්වීම් මුද්‍රණය කිරීම පිළිබඳව දැන ගැනීමට ලැබුණු පසු තම බලය නොලත් ප්‍රකාශන ලෙස ප්‍රනාන්දු ඒවා බෙදා හැරීම නැවැත් වූ බවට අබේවික්‍රම දුන් සාක්ෂිය කෙරෙහි ය. ප්‍රනාන්දු එවැන්නක් නො කී අතර ඔහුගෙන් හරස් ප්‍රශ්න ඇසීමක් ද නො වී ය. මැතිවරණ විනිශ්චයකාරතුමා අබේවික්‍රම විශ්වාස කළේ නම්, එම විශ්වාසය වගඋත්තරකරුගේ නියෝජිතයකුගේ උඩරණය පිට මුද්‍රණය කිරීම සිදුවුණු බව ප්‍රනාන්දු දැන සිටියේ යයි යන නිගමනයට තුඩු දෙන බව කීමට හැකිව තිබිණි. එහෙත්, මැතිවරණ විනිශ්චයකාරතුමා අබේවික්‍රමගේ සාක්ෂි විශ්වාස කර නැති නිසා (එසේ විශ්වාස නොකිරීමට ප්‍රමාණවත් හේතු නඩු තීන්දුවේ දක්වා තිබේ.) වගඋත්තරකරු වෙනුවෙන් ඉදිරිපත් කෙරුණු පළියට සාක්ෂියක් ඔහුට විරුඬව පාවිච්චි කිරීම හරි නැත. වගඋත්තරකරු එම සාක්ෂිය මත විශ්වාසය තැබියයි තර්ක කළ හැකි වුව ද එය පිළිගැනීමට විනිශ්චයකාරතුමා බැඳී නැත. ඇත්ත වශයෙන් මෙහි දී සිදු වී ඇත්තේ මැතිවරණ විනිශ්චයකාරතුමා ප්‍රකාශිත වශයෙන් ම එය විශ්වාස නොකිරීම ය. සිදුවන්නට බෙහෙවින් ඉඩ ඇතැයි සිතිය හැක්කේ පී. 51 සහ පී. 62 දරණ දැන්වීම් ප්‍රකාශනය ගැන එහි සැලකිල්ලක් නොදක්වනු ලැබූ බවත්, අබේවික්‍රමගේ සාක්ෂිය ඉදිරිපත් කර තිබෙන්නේ වියදම් වාර්තාවේ මෙම වියදම් ශීර්ෂය අඩංගු නොකිරීම වසන්කර ගැනීමේ නුහුරු උත්සාහයක් දරමින්, ප්‍රනාන්දු විසින් ඒවා බෙදා හැරීම නැවැත්වීමක් පිළිබඳ සම්පූර්ණ අසත්‍ය විස්තරයක් ඉදිරිපත් කිරීමත් ය.

අන්තිමේ දී විසඳීමට ඉතිරිවන ප්‍රශ්නය මැතිවරණ නියෝජිත ප්‍රනාන්දුගේ දැනුම ඇතුව සිදුවූවක්ද යන ප්‍රශ්නයක් බවට පෙරළෙයි. මෙම ප්‍රශ්නය සම්බන්ධයෙන් මැතිවරණ විනිශ්චයකාරතුමා වියදම් වාර්තාව අසත්‍ය වග ප්‍රනාන්දු දැන සිටි බව සාක්ෂිවලින් පෙන්නුම් නොකෙරෙන බව කියා තිබේ. එම ප්‍රශ්නය පිළිබඳව විනිශ්චයකාරතුමා කළ මෙම තීරණය දෝෂ සහගත යයි පෙන්වීමට ඇපැල්කරු සමත් වී නැත. ඒ නිසා නඩු ගාස්තුවට ද යටත් කොට මම මෙම ඇපැල නිෂ්ප්‍රභා කරමි.

ගරු අබේසුන්දර විනිශ්චයකාරතුමා

මම එකඟවෙමි.

ගරු අලස් විනිශ්චයකාරතුමා

ගාස්තුවට යටත් කොට ඇපැල නිෂ්ප්‍රභා කිරීමට මම එකඟ වෙමි.

ඇපැල නිෂ්ප්‍රභා විය.

පරිවර්තනය: ටී. බී. ඒකනායක විසිනි.

ගරු ටී. ඇස්. ප්‍රනාන්දු විනිශ්චයකාරතුමා, ගරු අබේසුන්දර විනිශ්චයකාරතුමා සහ ගරු මානික්කවාසගර් විනිශ්චයකාරතුමා ඉදිරිපිටදී ය.

රාජපක්ෂ අප්පුහාමිලාගේ ජයරත්න එ. සිරිමාවෝ රත්වත්තෙ බඬාර්ගනායක සහ තවත් දෙදෙනෙක්*

ශ්‍රෙ. අ. 1966 වර්ෂයේ 470 දරණ පෙත්සම

විවාද වූ දිනය: 1967 පෙබරවාරි 26 වෙනි දින
තීන්දුව දෙන ලද දිනය: 1967 පෙබරවාරි 26 වෙනි දින
හේතු ප්‍රකාශ කරන ලද දිනය: 1967 පෙබරවාරි 28 වෙනි දින

උසාවියට අපහාස කිරීම සම්බන්ධව උසාවි ආඥා පනතේ 47 වෙනි වගන්තිය යටතේ නොතිසි නිකුත්කිරීමට ඉල්ලීමක් පිළිබඳ කාරණාවකි

උසාවියට අපහාසයක්— උසාවියේ ගෞරවය කෙලෙසෙන අයුරින් පුවත් පතක පළවූවක්—මහ ජනයා තුළ උසාවි කෙරෙහි තිබිය යුතු ගෞරවය රැක ගැනීමේ අවශ්‍යතාවය — අධිකරණ ආඥා පනත 47 වන ඡෙදය.

තුන්වන වගඋත්තරකරු විසින් 16. 10. 66 ප්‍රසිඩ කරන ලද පුවත් පත් කලාපයක මෙහි පහත සඳහන් සිරස්තලය සහිත ප්‍රවෘත්ති වාර්තාව පළවීය.

''බණ්ඩාරනායක මහත්මිය: 'මා දේශපාලනයෙන් ඉවත්කර තැබීමේ උපක්‍රමයකි.'

'තමා දේශපාලනයෙන් ඉවත්කර තැබීමට ඩඩ්ලි සේනානායක රජය ප්‍රතිඥා දී තිබේ ය යි ද, ඔවුන් තම සොහොයුරන් දෙදෙනාට විරුඬව නිස්සාර චෝදනා සහ තමන්ට විරුඬව ඡන්ද පෙත්සමක් ඉදිරිපත් කෙළේ ඒ නිසා යයි ද සෙනසුරාද (1966 ඔක්තෝබර් 15 වෙනි දින) බණ්ඩාරවෙල ක්‍රීඩා පිට්ටනියේ පැවැති රැස්වීමක දී සිරිමා බණ්ඩාරනායක මහත්මිය කීවා ය.''

මෙම පුවත පළවන අවස්ථාවේ බණ්ඩාරනායක මහත්මියගේ සහෝදරයකුට විරුඬව ඉදිරිපත් වූ මැතිවරණ පෙත්සමක් ඔහුගේ අවාසියට තීරණය වී තිබී එයට විරුඬව ශ්‍රෙෂ්ඨාධිකරණයට ඉදිරිපත්කළ අභියාචනය ද නිෂ්ප්‍රභා වී තිබිණි. ඇයගේ තවත් සහෝදරයකුට විරුඬව මේ කාලයේදීම නීතිපතිවරයා විසින් ඉදිරිපත් කරන ලද අල්ලස් නඩුවක් ද විභාග වීමට තිබිණි.

බණ්ඩාරනායක මහත්මියටත් (පළමු වන වගඋත්තරකරු), එකී පුවත් පතේ කර්තෘටත් (දෙවන වගඋත්තරකරු) එහි ප්‍රකාශකයාටත් (තුන්වන වගඋත්තරකරු) විරුඬව, උසාවියට අපහාස කිරීම සම්බන්ධයෙන් දඬුවම් නො කිරීමට හේතු දැක්වීමට නියම කරමින් නියෝගයක් නිකුත් කරන මෙන් පෙත්සම්කරු අයැද සිටියේය.

පළමුවෙන් ම මෙම ප්‍රශ්නය ඒකපාක්ෂිකව කරුණු සලකා බලා නියෝගයක් නිකුත් කිරීමට සුදුසු ද යි තීරණය කිරීමට උසාවියට ඉදිරිපත් වූ විට පළමු වන වගඋත්තරකාරිය විසින් කරණ ලද යි ඇයට ආරෝපණය කර තිබුණු ප්‍රකාශය සත්‍යවශයෙන් ම කළ බවට කිසි ම වාචික හෝ ලිඛිත සාක්ෂියක් ඉදිරිපත් නො කර තිබීමේ හේතුවෙන් එසේ නියෝගයක් ඇය වෙත නිකුත් කිරීම ප්‍රතික්ෂේප කළ අධිකරණය දෙවන හා තුන්වන වගඋත්තරකරුවන්ට විරුඬව එබඳු නියෝගයක් නිකුත් කෙළේ ය.

ඒ අනුව ගරු විනිශ්චයකාරතුමන් ඉදිරියේ පෙනී සිටි 2 වන හා 3 වන වගඋත්තරකරුවෝ දිවුරුම් පෙත්සම් ඉදිරිපත් කළහ. දෙවන වගඋත්තරකරු තමා ගේ දිවුරුම් පෙත්සමෙහි පහත සඳහන් කරුණු සැලකර සිටියේ ය.

(ඒ) කර්තෘවරයා වශයෙන් එය පළ කිරීම සම්බන්ධයෙන් සම්පූර්ණ වගකීම තමා භාර ගන්නා බව:

(බී) එසේ පළ කිරීමෙන් පාඨකයන් විසින් එය මැතිවරණ අධිකරණයේ හෝ ශ්‍රෙෂ්ඨාධිකරණයේ තීන්දුව විවේචනය කිරීමක් හැටියටත් අල්ලස් නඩුව පිළිබඳව එසේ පළ කිරීමෙන් මහජන මතයට හානිකර දෙයක් සිදුවිය හැකිය යන්න අවබෝධ කර නො ගැනීම නිසා ප්‍රමාද දෝෂයකින් එය තමා අතින් වූ දෙයක් බව;

*ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 72 වෙනි කා., 54 වෙනි පිට බලනු.

තුන්වන වගඋත්තරකරු වන වෙළඳ සමාගමේ ක්‍රියාකාරක අධ්‍යක්ෂවරයා ද සම්පූර්ණ වගකීම භාර ගත්තේය.

තමන් වරදකරුවන් බව පිළිගත් වගඋත්තරකරුවෝ දෙදෙනා ඒ සම්බන්ධව කණගාටුව ප්‍රකාශ කොට එම උසාවි තුනෙන් ම සමාව අයැද සිටියෝ ය. ඔවුන් වෙනුවෙන් පෙනී සිටි නීතිඥවරු දඬුවම අඩු කරන ලෙස අයැද සිටියහ.

තීන්දුව: (1) විරුඬ පක්ෂයේ නායිකාව දේශපාලන කටයුතු වලින් බැහැර කර තැබීමට සේනානායක ආණ්ඩුව ගන්නා ආයාසයට යම්කිසි අන්දමකින් අධිකරණය ද සහයෝගය දේය යන හැඟීම ඇති කිරීමට එහි ලා පළකර ඇති ප්‍රකාශය ප්‍රමාණවත් වේ.

(2) යම්කිසි ලාලනශීලිත්වයක හෝ පක්ෂපාතිත්වයක චේතනාවක් අධිකරණය වෙත පැවරීමෙන් එයට විරුඬව මහජන මතය කලකිරවීමට ඉඩදිය නොහේ.

(3) සමාව ඉල්ලීමේ සම්පූර්ණ භාවය හා දිවිරුම් පෙත්සම්වල දක්වා ඇති කරුණු සහ තත්ත්වය සලකා එක් එක් වගඋත්තරකරුවකුට රු: 1,000/- බැගින් දඩ ගැසිය යුතු ය. මෙය නො ගෙවා පැහැර හැරියොත් මාස දෙකක වැඩ නැතුව සිරගෙයි සිටිය යුතු ය.

ගරු ටී. ඇස්. ප්‍රනාන්දු විනිශ්චයකාරතුමා: ''කලින් අවස්ථාවල දී මෙම උසාවිය මගින් නොයෙක් විට පෙන්වා දී ඇතිමුත්, අපකීර්තිදායක අපහාසාත්මක හා වෙනත් අප්‍රසන්න දේ පළවීම වැළැක්වීම සඳහා යෝජිත ප්‍රකාශනයන් පරීක්ෂා කොට බැලීමට පුවත් පත් කාර්යාලවල එදිනෙද වැඩවල දී නීතිය පිළිබඳ දැනුමක් හා පළපුරුද්දක් තිබෙන පුද්ගලයන් ගේ සහාය ලබන බවක් තවමත් පෙනෙන්නට නැති බව තරමක පුදුමයට කරුණකි.''

නීතිඥවරු: කේ. සී. නඩරාජා මහතා (ආනන්ද පරණවිතාන මහතා සමග), පෙත්සම්කරු වෙනුවෙන්. රාජනීතිඥ සී. රෙංගනාදන් මහතා (ඇන්. ඊ. වීරසූරිය (කණිෂ්ඨ) මහතා සමග) 2 වෙනි හා 3 වෙනි වගඋත්තරකරුවන් වෙනුවෙන්.

නියෝජ්‍ය සොලිසිටර් ජනරාල් වී. ටී. තමෝදරම් මහතා (ආණ්ඩුවේ නීතිඥ එච්. ඇල්. ද සිල්වා මහතා සමග), නීතිපතිවරයා වෙනුවෙන් අධිකරණ සහායක වශයෙන්.

සඳහන් කළ නඩු: අම්බර්ඩ එ. ටරිනිඩැඩ් සහ ටොබැගෝහි නීතිපතිවරයා නඩුව (1966 ඒ.සී. වාර්තා පොතේ 322 සහ 335 වෙනි පිටු)

ගරු ටී. ඇස්. ප්‍රනාන්දු විනිශ්චයකාරතුමා

1966 නොවැම්බර් මස 6 වෙනි දින මෙම උසාවියට ඉදිරිපත් කරන ලද පෙත්සමෙන්, උසාවියට අපහාස කිරීම පිළිබඳව දඬුවම් නො කිරීමට හේතු දක්වන ලෙස වගඋත්තරකරුවන්ට විරුඬව උසාවි ආඥා පනතේ 47 වෙනි වගන්තිය යටතේ නොතීසි නිකුත් කරන මෙන් මෙම පෙත්සම්කරු ඉල්ලා සිටී. ඉල්ලීම කිරීමට තුඩු දී ඇත්තේ 3 වෙනි වගඋත්තරකාර සමාගම මගින් ප්‍රසිඬ කරනු ලබන පුවත් පතක 1966 ඔක්තෝබර් මස 16 වෙනි දින නිකුත් කරන ලද මුද්‍රණයේ පහත සඳහන් සිරස්තලය යටතේ පළකර තිබුණු පහත දැක්වෙන පුවත ය.

''බණ්ඩාරනායක මහත්මිය: 'මා දේශපාලනයෙන් ඉවත්කර තැබීමේ උපක්‍රමයකි.'

'තමා දේශපාලනයෙන් ඉවත්කර තැබීමට ඩඩ්ලි සේනානායක රජය ප්‍රතිඥ දී තිබේ යයි ද, ඔවුන් තම සොහොයුරන් දෙදෙනාට විරුඬව නිස්සාර චෝදනා සහ තමන්ට විරුඬව ඡන්ද පෙත්සමක් ඉදිරිපත් කෙළේ ඒ නිසා යයි ද සෙනසුරාදා (1966 ඔක්තෝබර් මස 15 වෙනි දින) බණ්ඩාරවෙල ක්‍රීඩා පිට්ටනියේ පැවති ප්‍රසිඬ රැස්වීමක දී සිරිමා බණ්ඩාරනායක මහත්මිය කීවා ය.''

මෙම පුවත පළකරනු ලැබූ වකවානුවේ (එනම්, 1966 ඔක්තෝබර් මස 16 වෙනි දින) බණ්ඩාරනායක මහත්මිය ගේ එක් සොහොයුරකුට විරුඬව ඡන්ද පෙත්සමක් ඉදිරිපත් කරනු ලැබ, එම ඡන්ද පෙත්සම් විභාගයේ දී ඔහු ගේ අවාසියට මැතිවරණ විනිශ්චයකාරතුමා විසින් දෙන ලද තීන්දුවට විරුඬව ඉදිරිපත් කරන ලද ඇපැල නිෂ්ප්‍රභ කර තිබිණි.

පුවත් පතේ පළ වූ අන්දමේ ප්‍රකාශයක් බණ්ඩාරනායක මහත්මිය කළ බවට දිවුරුම් පෙත්සමක් යට කී ඉල්ලීම සමග ඉදිරිපත් කර නැත. නොතීසි නිකුත් කළ යුතු ද යන්න සලකා බැලීම පිණිස දින දහයකට පසුව, එනම්, 1966 නොවැම්බර් මස 16 වෙනි දින පෙත්සම ඒක පාක්ෂිකව විභාග කිරීම සඳහා ගනු ලැබූ අවස්ථාවේ

පෙත්සම්කරු හා ඔහු ගේ නීතිඥයා උසාවියට පැමිණ සිටියමුත් පළමුවෙනි වගඋත්තරකාරිය යට කී ප්‍රකාශය කළ බව තහවුරු කිරීමට වාචික හෝ ලිඛිත සාක්ෂි ඉදිරිපත් කිරීමට කිසි ම ප්‍රයත්නයක් දරා නැති අතර, උසාවියට අපහාස කිරීමේ චෝදනාවක් උඩ වරද පැමිණවීමකට පදනම් විය හැකි සාක්ෂි ඉදිරිපත් වී නැති බැව් සඳහන් කළ මෙම උසාවිය (ගරු එච්. ඇන්. ජී. ප්‍රනාන්දු ජ්‍යෙෂ්ඨ ශ්‍රෙෂ්ඨාධිකරණ විනිශ්චයකාර තුමා සහ ගරු අලස් විනිශ්චයකාරතුමා), පළමුවැනි වගඋත්තරකාරියට විරුඬව නොතීසි නිකුත් කිරීම ප්‍රතික්ෂේප කෙළේ ය. එහෙත්, එම ප්‍රකාශය පළ කිරීමෙන් පුවත් පත උසාවියට අපහාසයක් කර ඇද්ද යි යන්න විවාදයකට හා තීරණයකට කැප කිරීමට සෑහෙන ප්‍රශ්නයක් ලෙස පිළිගත් උසාවිය 2 වෙනි හා 3 වෙනි වගඋත්තරකරුවන්ට නොතීසි නිකුත් කිරීමට නියෝග කෙළේ ය.

ඒ අනුව කරන ලද නියෝගය පරිදි 2 වෙනි හා 3 වෙනි වගඋත්තරකරුවෝ අප ඉදිරියේ පෙනී සිටියාහ.

2 වෙනි වගඋත්තරකරු වූ කලී අදාල පුවත් පතේ කර්තෘ වන අතර, අදාල වකවානුවේ එම පුවත් පතේ කර්තෘව සිටියේ ද ඔහුමය. 3 වෙනි වගඋත්තරකරු සමාගම වෙනුවෙන් එහි ක්‍රියාකාරී අධ්‍යක්ෂවරයකු පෙනී සිටියේ ය.

වගඋත්තරකරුවෝ දෙදෙනා ම අප වෙත දිවුරුම් පෙත්සම් ඉදිරිපත් කළහ. අතුරු මැතිවරණයක් සම්බන්ධයෙන් පළමුවෙනි වගඋත්තරකාරිය ගේ ප්‍රකාශයක ද ඇතුළත් 1966 ඔක්තෝබර් මස 15 වෙනි දින බණ්ඩාරවෙල පැවති ප්‍රසිඬ රැස්වීමක වාර්තාවක් අඩංගු ප්‍රවෘත්ති විදුලි පණිවුඩයක් තම බණ්ඩාරවෙල වාර්තාකරුගෙන් එදින ම ලැබුණු බව 2 වෙනි වගඋත්තරකරු සිය දිවුරුම් පෙත්සමින් දක්වා සිටී. විදුලි පණිවුඩය ලැබීමෙන් පසු එය උප කර්තෘවරයකු විසින් සංස්කරණය කරනු ලැබ පුවත් පතේ පළ කිරීමේ අනුමැතිය ලැබීම සඳහා ඉදිරිපත් කරනු ලැබූ අවස්ථාවේ 2 වෙනි වගඋත්තරකරු එය පළ කිරීම අනුමත කෙළේ ය. ඔහු එම ප්‍රකාශනය පිළිබඳ සම්පූර්ණ වගකීම බාර ගනී. වැඩිදුරටත් කරුණු දක්වන ඔහු, එම ප්‍රකාශය මැතිවරණ උසාවියේ තීන්දුව හා මෙම උසාවියේ ඇපැල් තීන්දුව සම්බන්ධයෙන් කෙරෙන විවේචනයක් කොට පාඨකයින් තේරුම් ගැනීමට ඉඩ තිබුණු බව හෝ විභාගවෙමින් තිබුණු අල්ලස් නඩුව සම්බන්ධයෙන් මහජනයා ගේ සිත් තුළ අගතියක් ඇති කිරීමට හැකියාවක් තිබුණු බව හෝ වටහා නොගෙන ප්‍රමාද දෝෂයකින් තමා එය අනුමත කළ බව කිය යි. උසාවි තුනෙන් එකකටවත් තමා අපහාසයක් කිරීමට නො සිතූ බව කියන ඔහු, එම ප්‍රකාශනය මැතිවරණ උසාවියේ තීන්දුව සහ මෙම උසාවියේ තීන්දුව සම්බන්ධයෙන් කෙරෙන විවේචනයක් ලෙස පාඨකයින් තේරුම් ගැනීමටත්, අල්ලස් නඩුව පිළිබඳ මහජනයා ගේ සිත් තුළ අගතියක් ඇති කිරීමටත් ඉඩ තිබුණු බව තමාට දැන් වැටහෙන බවත් කියා තම බලවත් කණගාටුව පළකොට උසාවි තුනෙන් ම සමාව අයැද සිටී.

3 වෙනි වගඋත්තරකාර සමාගම වෙනුවෙන් එහි ක්‍රියාකාරී අධ්‍යක්ෂවරයකු දිවුරුම් පෙත්සමක් ඉදිරිපත් කරමින් ප්‍රකාශනය පිළිබඳ සම්පූර්ණ වගකීම සමාගම භාර ගන්නා බව සඳහන් කර සමාගම වෙනුවෙන් බලවත් කණගාටුව ප්‍රකාශ කොට උසාවි තුනෙන් ම සමාව අයදි යි.

වගඋත්තරකරුවන් දෙදෙනා ම චෝදනාවට වරදකරුවන් බව කියා සිටින අතර, දඬුවම් ලිහිල් කිරීමට ඉල්ලා ඔවුන්ගේ නීතිඥයා උසාවියට කරුණු දක්වමින්, වාර්තාව පුවත්පතේ පළකිරීමට අනුමැතිය දීමේ දී දෙවෙනි වගඋත්තරකරුට සිදු වී ඇත්තේ තමා අනුමැතිය දෙන්නේ සේනානායක රජයට විරුඬව නගන ලද චෝදනාවක් පිළිබඳ පුවතක් පුවත් පතේ පළකිරීමට යයි යන අදහසට ප්‍රධාන වී මනස ක්‍රියා කිරීම නිසා ප්‍රකාශනයේ අනික් කොටසින් උසාවියට අපහාසයක් වීමට ඉඩ තිබීම ගැන ඔහුට කල්පනා නො වීම බව කියා සිටියේ ය.

උසාවි තීන්දු විවේචන කිරීමේ පිළිගත් ක්‍රම තිබේ. මේ සම්බන්ධයෙන් අම්බර්ඩ් එ. ටරිනිඩැඩ් සහ ටොබැගෝ හි නීතිපතිවරයා නඩුවේ දී (1966 ඒ.සී. වාර්තා පොතේ 322 සහ 335 වෙනි පිටුවල) ඇටකින් සාමිවරයා කළ ප්‍රකාශය මෙහි ලා සඳහන් කිරීම වටී.

''පුද්ගලිකව විනිශ්චයකරුවකු ගේ බලතල සහ තත්ත්වය සම්බන්ධයෙන් හෝ පොදුවේ අධිකරණ පරිපාලනයට සම්බන්ධයෙන් හෝ මහජන සමාජයේ සාමාජිකයකු ප්‍රසිඬියේ උසාවියේ ක්‍රියාවක් ගැන අවංකව විවේචන කිරීමේ අයිතිය පාවිච්චි කිරීම වරදක් නොවේ. විවේචනය කාහටත් පොදු ප්‍රසිඬ පාරකි. වැරදි කල්පනා ඇත්තවුන්ට එහි දී වැරදීමක් කිරීමට අවසර තිබේ. අධිකරණ පරිපාලනයේ නියුතුවන්ට අයෝග්‍ය අදහස් ආරෝපණය කිරීමෙන් වැළකී අධිකරණ පරිපාලනයට හානි කිරීමෙන් හා ද්වේෂ සහගතව ක්‍රියා කිරීමෙන් තොරව නිර්ව්‍යාජ සිතින් මහජනයා සිය විවේචනය කිරීමේ අයිතිය පාවිච්චි කරන්නේ නම් ඔවුන්ට මුක්තිය හිමිවෙයි. අධිකරණය වූ කලී කිසිවකුට ළඟා විය නො හැකි සේ ආවරණය කරන ලද බල මුළුවක් නො වේ. එය ද පොදු ජනයා ගේ නිර්ව්‍යාජ එහෙත් ගෞරව පූර්වක වූ විවේචනයටත් පිරික්සීමටත් කැපවීමට ඉඩ හැරිය යුතු ය.''

එහෙත්, පක්ෂවාදීව හා පක්ෂපාතීව උසාවිය පිළිබඳව කෙරෙන ඇඟවීමකින් මහජනයා ගේ සිත් තුළ අගතියක් ඇති කිරීමට කිසිවකුට ඉඩ දිය නො හැකි ය. මෙම ප්‍රකාශයේ අර්ථ නිරූපණය කිරීමේ දී තේරුම් යන්නේ, නිස්සාර චෝදනා පිළිගැනීමෙන් උසාවි ද විපක්ෂ නායිකාව දේශපාලනයෙන් ඉවත්කර තැබීමට සේනානායක රජය සමග කිසියම් ආකාරයකින් සහයෝගීව ක්‍රියා කොට ඇතැයි යනු ය. දේශපාලන පක්ෂ අතර පවතින කඹ ඇදිල්ලට නො දැනුවත්ව හෝ උසාවි ඇදී නො ගොස් තිබීම මහජන යහපත පිණිස වේ. එවැනි කඹ ඇදිල්ලකින් ඈත්ව සිටීමට පුවත් පත් උනන්දුවෙන් ක්‍රියා කිරීමේ අවශ්‍යතාවය ද වැදගත්කමින් සුළු නො වේ.

කලින් අවස්ථාවල දී මෙම උසාවිය මගින් නොයෙක් විට පෙන්වා දී ඇති මුත්, අපකීර්තිදයක අපහාසාත්මක හා වෙනත් අප්‍රසන්න දේ පළවීම වැළැක්වීම සඳහා යෝජිත ප්‍රකාශනයන් පරීක්ෂාකොට බැලීමට පුවත් පත් කාර්යාලවල එදිනෙද වැඩවල දී නීතිය පිළිබඳ දැනුමක් හා පළපුරුද්දක් තිබෙන පුද්ගලයන්ගේ සහාය ලබන බවක් තවමත් පෙනෙන්නට නැති බව පුදුමයකි.

දඬුවම් පිළිබඳ ප්‍රශ්නය සලකා බැලීමේ දී අප සත්‍යාසත්‍ය බව විමසීමට සමාගම කුමන පියවරක් ගත්තේද යි 2 වෙනි හා 3 වෙනි වගඋත්තරකරුවන්ගේ නීතිඥයා ගෙන් විමසීමු. අපගේ විමසීමට පිළිතුරු වශයෙන් බණ්ඩාරවෙල වාර්තාකරුගෙන් දිවුරුම් පෙත්සමක් ඉදිරිපත් කරන ලදී. තමා එම රැස්වීමට ගිය බවත්, 1 වෙනි වගඋත්තරකාරිය ඉහත සඳහන් ප්‍රකාශය කරනු තමාට ඇසුණු බවත් ඔහු එම දිවුරුම් පෙත්සමෙන් පවසා තිබේ. එම දිවුරුම් පෙත්සමට පිළිතුරු දීමට 1 වෙනි වගඋත්තරකාරිය අප ඉදිරියේ නැත. පෙත්සම්කරු මෙවැනි දිවුරුම් පෙත්සමක් තමා උසාවියට ඉදිරියට පැමිණීමට හෝ 1 වෙනි වගඋත්තරකාරියට විරුඬව නොතීසි නිකුත් කිරීම ප්‍රතික්ෂේප කරනු ලැබීමට කලින් ලබා ගැනීම වැදගත් යයි නොසිතීම පුදුමයට කාරණයකි.

කිසි ම උසාවියකට අපහාස කිරීමේ අදහසක් 2 වෙනි හා 3 වෙනි වගඋත්තරකරුවන් තුළ නො තිබුණු බව අපි පිළිගනිමු. එහෙත් මෙම ප්‍රකාශනය යහපත් රාජ්‍ය පාලනයක් තිබීම සඳහා අවශ්‍ය වන මහජනයා තුළ උසාවි කෙරෙහි තිබිය යුතු ගෞරවයට හානිකර ය. සමාව අයැදීමෙන්, දිවුරුම් පෙත්සම්වල කියා සිටි කරුණුවලින් ප්‍රමාණවත්කම සලකා රු. 1,000/- බැගින් දඩ ගෙවීමටත්, එය පැහැර හැරියහොත් බරපතල වැඩ රහිතව දෙමසක සිර දඬුවම් විඳීමටත් වගඋත්තර කරුවන් දෙදෙනාට ම අපි නියම කෙළෙමු.

ගරු අබේසුන්දර විනිශ්චයකාරතුමා:
මම එකඟ වෙමි.

ගරු මානික්කවාසගර් විනිශ්චයකාරතුමා:
මම එකඟවෙමි.

දෙවෙනි හා තුන්වෙනි වගඋත්තරකරුවෝ වරදකරුවෝ වෙත්.

පරිවර්තනය: ටී. බී. ඒකනායක විසිනි.

ගරු සිරිමාන්න විනිශ්චයකාරතුමා සහ ගරු සමරවික්‍රම විනිශ්චයකාරතුමා ඉදිරිපිටදිය

මාදම්පෙ නගර සභාපති එ. ඔඩිටර්ජනරාල්තුමා*

ශ්‍රෙ. අ. ඉල්ලීම් අංක 482/1965

අධිකරණ ආඥා පනතේ 42 වන ඡේදය යටතේ සර්ටියෝරේරයි ආඥාවක් හෝ වැළැක්වීමේ ආඥාවක් නිකුත් කරන ලෙස ඉල්ලා සිටීමක්.

විවාද කළ දිනය: 1966 දෙසැම්බර් 6
තීන්දු කළ දිනය: 1966 දෙසැම්බර් 14

සර්ටියෝරේරයි සහ/හෝ වැළැක්වීමේ ආඥාවක් — සුළු නගර සභාවක සභාපතිවරයාට විරුඬව ඔඩිටර්-ජනරාල් වරයා අධිකත්වය ගෙවීමේ සහතික පත්‍රයක් දීම — ඇමතිවරයාට අභියාචනයක් කිරීම — අධිකත්වය අභියාචනයේ දී ද අනුමත වීම — අධිකත්වය ගෙවීමේ නියෝගය සහ ඇමතිවරයා ගේ නියෝගය අවලංගු කිරීමට සර්ටියෝරේරයි ආඥාවක් ඉල්ලීම — අධිකත්වය ගෙවීමේ නියෝගය ඉවත් කිරීම ප්‍රතික්ෂේප වීම — පෙත්සම් කරුට නො දන්වා අභියාචනයෙහි කටයුතු කිරීම නිසා ඇමතිවරයාගේ නියෝගය නිෂ්ප්‍රභාකොට එය නැවත වරක් පරීක්ෂණය සඳහා ආපසු යැවීම—අධිකත්වය ගෙවීමට ඇමතිවරයා විසින් දෙන ලද දෙවන නියෝගයට අභියෝගයක් ඉදිරිපත් නො වීම — මහේස්ත්‍රාත් උසාවියේ මාර්ගයෙන් එම අධිකත්වයේ මුදල ලබා ගැනීමට පළාත් පාලන කොමසාරිස්වරයා කළ ඉල්ලීමක් — සුළු නගර සභා ආඥා පනතේ (256 වන අධිකාරය) 181(1), 182(1), 182(2), 182(5) දරණ ඡේද.

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* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 7 වෙනි කා., 79 වෙනි පිට බලනු.

7.8.59 වන දින සුළු නගර සභා ආඥා පනතේ 181(1) වන ඡෙදයට අනුව ක්‍රියා කළ ඔඩිටර්-ජනරාල්වරයා (පළමුවන වගඋත්තරකරු) සුළු නගර සභාවක සභාපතිවරයකුගෙන් රු. 28,962/48 ක් අයකර ගැනීමේ නියෝගයක් නිකුත් කර තිබේ. පළාත් පාලන කොමසාරිස්වරයා (දෙවන වග උත්තරකරු) එම ආඥා පනතේ 182(5) වන ඡෙදය අනුව එම මුදල අයකර ගැනීමට මහේස්ත්‍රාත් උසාවියට ඉල්ලීමක් ඉදිරිපත් කෙළේ ය. ඉක්බිති අවුරුදු හයකට අධික කාලයක් ගත වූ පසු අධිකරණ ආඥා පනතේ 42 වන ඡෙදය යටතේ සර්ටියෝරේරයි ආඥාවක් සහ/හෝ වැළැක්වීමේ ආඥාවක් ලබා ගැනීම සඳහා මෙම ආයාචනය ඉදිරිපත් වී ඇත.

වර්ෂ 1959 දී පෙත්සම්කරු තමාට විවෘතව ඇති එක පිළිසරණක සහනය ලබා ගැනීම සඳහා ඇමතිවරයාට 182 වන ඡෙදය අනුව අභියාචනයක් ඉදිරිපත් කළ බව පිළිගති. මෙම ඇපැල ඇමතිවරයා විසින් නිෂ්ප්‍රභා කළ පසු, එකී අධිකත්වය ගෙවීමේ නියෝගය දුන් සහතික පත්‍රය සහ ඇමතිවරයා ගේ නියෝගය ද ඉවත් කිරීම පිණිස සර්ටියෝරේරයි ආඥාවක් ඉල්ලා තිබේ. මින් පළමුවන ඉල්ලීම ප්‍රතික්ෂේප කළ ශ්‍රේෂ්ඨාධිකරණය, ඇමතිවරයා පෙත්සම් කරුට නිවේදනයක් නොයවා අභියාචන පරීක්ෂණය පවත්වන ලද නිසා පෙත්සම්කරුට තමා ගේ අභියාචනය නිසි පරිදි විසඳවා ගැනීමට ප්‍රස්ථාවක් දීමේ අටියෙන් දෙවන ඉල්ලීමට ඉඩ දුන්නේ ය.

තීන්දුව: (1) අධිකත්වය ගෙවීමේ නියෝග සහතික පත්‍රය දී වර්ෂ හයකට පසුව මෙම ඉල්ලීම ඉදිරිපත් කළ බැවින් එය ප්‍රතික්ෂේප කළ යුතු ය.

(2) නීත්‍යානුකූල ගතයුතු පියවරක් ගත් දෙවන වගඋත්තරකරුට විරුඬව සර්ටියෝරේරයි ආඥාවක් හෝ වැළැක්වීමේ ආඥාවක් නිකුත් කිරීම කළ නො හැක.

(3) ඔහු ගේ කරුණුවලට කන් දීමෙන් පසු ඇමතිවරයා අභියාචනය ඉවත හෙළීමෙන් පසු එයට විරුඬව අභියෝග නො කිරීමෙන් නීතියට අනුව තමාට ලැබී ඇති පිළිසරණ පෙත්සම්කරු අහෝසිකර ගෙන තිබීම නිසා අධිකරණය මෙසේ ඉලලා සිටින ආඥාව නිකුත් නො කළ යුතු ය.

නීතිවේදියෝ: ඒ. සී. නඩරාජා මහතා, වික්ටර් මුණසිංහ මහතා සමග පෙත්සම්කරු වෙනුවෙන්.
රජයේ අධිනීතිඥ මර්වින් ප්‍රනාන්දු මහතා, වගඋත්තරකරු වෙනුවෙන්.

සිරිමාන්න විනිශ්චයකාරතුමා

මෙම නඩුවේ පෙත්සම්කරු මාදම්පේ සුළු නගර සභාවේ සභාපති වරයා ය. මෙහි වගඋත්තරකරු වූ ඔඩිටර්-ජනරාල්වරයා සුලු නගර සභා ආඥා පනතේ 181(1) ඡෙදයට අනුව ක්‍රියා කරමින් එම තැනැත්තාගෙන් රු: 28,962.48 ක් අධිකත්වයක් ලෙස අයවියයුතු යැයි 59.8.7 වැනි දින නියෝගයක් කළේ ය. 65.2.14 වන දින ඉදිරිපත් කරන ලද මෙම ඉල්ලීම් පත්‍රය ''සී'' දමා සළකුණු කරනු ලබා ඇති සහතික පත්‍රය එය වේ.

මෙහි දෙවන වග උත්තරකරු කර ඇත්තේ 256 වැනි අධිකාරයේ 182(5) ඡෙදයට අනුව ක්‍රියා කරමින් එම මුදල මෙම නඩුවේ පෙත්සම්කරුගෙන් ලබා ගැනීමට මහේස්ත්‍රාත් උසාවියට ඉල්ලීමක් ඉදිරිපත් කළ පළාත් පාලන කොමසාරිස්වරයා වේ. ඔහුට විරුඬව ද ආඥාවක් නිකුත් කරන ලෙස ඉල්ලීමක් කර ඇත.

මෙහි දී රජයේ උගත් අධිනීතිඥවරයා මූලික විරෝධයක් පාමින් කරුණු තුනක් ඉල්ලුම්කරුගේ පෙත්සමට විරුඬව ඉදිරිපත් කර තිබේ. එනම්:

(ඒ) මෙම ඉල්ලීම කිරීමේ දී අයථා ප්‍රමාදයන් සිදු වී තිබේ.

(බී) පෙත්සම්කරු මේ සම්බන්ධයෙන් තමාට ඇති සෑම පිළිසරණක් ම ලැබීමට ඇති අයිතිය අහෝසි කරගෙන තිබේ.

(සී) කොයි අන්දමින් සළකා බැලුවත් දෙවන වගඋත්තරකරුට විරුඬව ආඥාවක් නිකුත් කරවීමට නොහැකි ය.

3 වැනි කරුණ ගැන පළමුවෙන් ම සළකා බලමු. 256 වැනි අධිකාරයේ 182(5) වන ඡෙදය යටතේ පළාත් පාලන කොමසාරිස්වරයාගේ යුතුකම වී ඇත්තේ ගණන් පරීක්ෂකවරයා සහතික කරන ලද යම්කිසි මුදලක් නොගෙවා පැහැර හැර තිබෙන කල එය ලබා ගැනීමේ අටියෙන් මහේස්ත්‍රාත්වරයාට ඉල්ලීමක් ඉදිරිපත් කිරීම ය. 'සර්ටියෝරේරයි' ආඥාවක් හෝ වැළැක්වීමේ ආඥාවක් හෝ මේ නිසා ඔහුට විරුඬව ඉල්ලන්නේ කෙසේ දැයි මට නොපෙනේ. පෙත්සම්කරු වෙනුවෙන් පෙනී සිටින උගත් නීතිවේදියා විවාදයේ දී මේ සම්බන්ධයෙන් ප්‍රකාශකර සිටියේ පෙත්සම්කරුගේ ප්‍රධාන ඉල්ලීමට අනුව අධිකත්වය අයකර ගැනීමේ නියෝගය නිෂ්ප්‍රභා වූවොත් ඒ අනුව 2 වන වගඋත්තරකරු ද එයින් බැඳිය යුතුවූ නිසා මෙය ඔහු 'පාර්ශ්වකරුවෙක් වශයෙන් එකතු කිරීමක්'' පමණක් යැයි යන්න ය. ''පාර්ශ්ව

කරුවෙක්'' ලෙස නඩුවට ඇඳුවත් නැතත් එබඳු නියෝගයකින් ඔහු බැඳෙන නිසා ඔහුට විරුඬව දැනට කර ඇති මෙම ඉල්ලීම සාර්ථක නොවේ.

ප්‍රමාදය පිළිබඳව අධිකරණයට ඉදිරිපත් කළ කරුණු නිසාත්, මෙම ඉල්ලීම ප්‍රතික්ෂේප කළ යුතු යැයි මට සිතේ. අධිකත්වය සහතික කිරීමෙන් අවුරුදු 6 කට වඩා කාලයක් ගත වූ පසු මෙම ඉල්ලීම ඉදිරිපත් කර ඇති බව පෙනී යේ. මාස කිහිපයක ප්‍රමාදයක් ඇතිව සලකා බලන කලක පවා මෙම අධිකරණය එහි අභිමතය පරිදි පිළිසරණ නොවන බව කිහිපවිටක් ම පිළිවෙලින් නිගමනය කොට තිබේ.

මෙම නඩුවේ ඉතිහාසය ගැන සැකෙවින් පිරික්සා බැලූ විට පෙත්සම්කරුට තවත් නන් අයුරින් පිළිසරණ සෙවීමට අවස්ථාව තිබූ බව සහ ඒවා ඔහු විසින් අහෝසි කරගෙන ඇති බව පැහැදිලිව පෙනේ.

256 වන අධිකාරයේ 182(1) වන ඡේදයට අනුව අධිකත්වය ගෙවීමකින් කනස්සල්ලට පත් තැනැත්තකුට එයට විරුඬව ශ්‍රේෂ්ඨාධිකරණයට අභියාචනයක් ඉදිරිපත් කිරීමට පිළිවන. එම අධිකාරයේ ම 182(3) වන ඡේදය යටතේ එසේ කනස්සල්ලට පත් කෙනකුට එසේ අභියාචනයක් ඉදිරිපත් කරනු වෙනුවට පළාත් පාලන ඇමැතිවරයාට ඒ පිළිබඳව අභියාචනයක් ද ඉදිරිපත් කළ හැක.

වර්ෂ 1959 දී පෙත්සම්කරුට මේ මාර්ග දෙකින් එකක් තෝරා ගැනීමට අවස්ථාව තිබුණි. ඔහු ඉන් දෙවැනි මග තෝරාගත් නමුදු එය අසාර්ථක විය. ඉක්බිති ඔහු දැනට ඉදිරිපත්කොට ඇති මේ ඉල්ලීමට බෙහෙවින් සමාන ඉල්ලීමක් මෙම උසාවියට ඉදිරිපත් කළේ ය. අධිකත්වය පිළිබඳ දෙන ලද නියෝගයත් අභියාචනයේ දී එය ස්ථිර කරමින් ඇමැතිවරයා විසින් දෙන ලද නියෝගයක් අවලංගු කර දැමීමට යැයි ඔහු මෙම උසාවියෙන් 'සර්ටියෝරේරයි' ආඥාවක් ඉල්ලුවේ ය.

අධිකත්වය ගෙවීමට යැයි කරන ලද නියෝගය අවලංගු කිරීමටයැයි කරන ලද ඉල්ලීම ප්‍රතික්ෂේප වී තිබේ. කෙසේ වෙතත් ඇමැතිවරයා පෙත්සම්කරුට නිවේදනයක් නොයවා ඒ නිසා ම ඔහුට කරුණු සැපයීමට අවස්ථාවක් නොසලසා අභියාචනය ගැන ක්‍රියාකොට ඇති බව පෙනී ගොස් ඇත. එම නිසා ඇමැතිවරයාගේ නියෝගය සාමාන්‍යයෙන් යුක්තියේ ප්‍රඥප්තීන්ට පටහැනිව සිදු වී ඇතැයි සැලකූ මෙම උසාවිය එය නිෂ්ප්‍රභා කොට පෙත්සම්කරුගේ අභියාචනය යථා පරිදි විසඳවා ගැනීමට ඔහුට අවස්ථාවක් දී තිබේ. තම්බයියා විනිශ්චය කාරතුමා තමාගේ නඩු තීන්දුව දෙමින් මෙසේ ප්‍රකාශ කොට තිබේ. ''ඔඩිටර්–ජනරාල්වරයාගේ (පළමුවන වගඋත්තරකරු නියෝගය නිෂ්ප්‍රභා කිරීමට මම අදහස් නොකරමි. එයට හේතුව පෙත්සම්කරු ඔඩිටර්–ජනරාල්වරයාගේ නියෝගයට විරුඬව අභියාචනයක් ඉදිරිපත් කිරීමට කැමැති වී ඇති නිසා ය. පෙත්සම්කරුට ක්‍රියාත්මක කළ හැකි පිළිසරණ ලැබීමේ තවත් මාර්ගයන් ඇති විටෙක ඔහුට ''සර්ටියෝරේරයි'' ආඥාවක් ඉල්ලිය නොහැක.

මෙම අභියාචනය නැවත වාරයක් විසඳනු ලැබූ අවස්ථාවේ පෙත්සම්කරු එයට සහභාගි වී ඇති නමුදු නැවත වරක් එම අභියාචනය ද අසාර්ථක වී තිබේ.

ඇමැතිවරයා විසින් දෙන ලද දෙවන නියෝගය ආඥා බලයෙන් තොරව දෙන ලද්දක් බැවින් එය ක්‍රියාකාරී නොවන බලහීන නියෝගයක් යැයි කියමින් කරුණු සැලකළ නඩරාජා මහතා සමග මට එකඟවිය නොහේ. අනිත් අතින් බලන කල එය පෙත්සම්කරුගේ අභියාචනයට ලැබුන නීත්‍යානුකූල ක්‍රියාත්මක නියෝගය කැයි මම සිතමි.

සත්තාර් සහිර් එ. මදුරාසි රජය (1952 සමස්ත භාරතීය වාර්තා. මදුරාසිය. 605 වැනි පිටුව) කියැවුන නඩුවේ දී රාජමන්නාර් අග්‍රවිනිශ්චයකාරතුමා මෙසේ කියා තිබේ. ''මෙම උසාවිය විසින් එයට යථානුකූල පරිදි කරන ලද ඉල්ලීමක් අනුව පහළ විනිශ්චය මණ්ඩලයකින් කරන ලද කිසියම් නියෝගයක් එයට හේතුවූ කරුණු පිළිබඳ නොසළකා වෙනයම් කිසි බාහිර ප්‍රයෝජනයන් අනුව නිශ්ප්‍රභා කළ විට ඒ කරුණ නැවැත විසඳීමට එම පහළ විනිශ්චය මණ්ඩලයට අවසර තිබෙනු පමණක් නොව එය එම මණ්ඩලය පිට පැවැරී ඇති කාර්‍ය භාරයක්ය යන කරුන ගැන අපට අල්ප මාත්‍රයකුදු සැකයක් නැත්තේ ය.'' දැනට මෙති ඉදිරිපත් වී තිබෙන ඉල්ලීමේ එම නියෝගය (නීතිවේදියාගේ ප්‍රකාශය අනුව) මෙම ඉල්ලීමට අවුරුද්දකට පමණ පෙර නිකුත් වී ඇතත් එය අවලංගු කිරීම යැයි මෙහි ලා ඉල්ලීමක් කර නැති බව සළකා ගතයුතු දෙයකි.

ඇමැතිවරයා පෙත්සම්කරු කී කරුණුවලට කන් දී ඔහුගේ අභියාචනය නිෂ්ප්‍රභාකළ පසු පෙත්සම්කරු තමාට තිබුන පිළිසරණ මාර්ගයක් අහෝසි කර ගත්තේ ය.

මගේ මතයේ හැටියට යම්කිසි තැනැත්තෙක් පිළිසරණ දෙකක් තෝරාගෙන එය යැදීමෙන් ඔහුට විරුඬව තීරණය දුන් විට එම තීරණයට කිසි ම අභියෝගයක් නොකොට ආඥාවක් ඉල්ලූ කලෙක එම ආඥාව නිකුත් කිරීමට මෙම අධිකරණය එහි අභිමතය ක්‍රියාවේ නොයෙදිය යුතුයි.

මෙම ඉල්ලීම ගාස්තුවටත් යටත්කොට නිෂ්ප්‍රභා කරනු ලැබේ.

සමරවික්‍රම විනිශ්චයකාරතුමා:

මම එකඟ වෙමි.

ඉල්ලීම නිෂ්ප්‍රභා විය.

ගරු එච්. ඇන්. ජී. ප්‍රනාන්දු අග්‍ර විනිශ්චයකාරතුමා සහ ගරු සිරිමාන්න විනිශ්චයකාරතුමා ඉදිරිපිට

ඩී. පී. විජේසුන්දර එ. කුංජිමුහා සමාගම සහ තවත් අයෙක්*

නඩු අංකය: ශ්‍රෙ. අංක 481(F)/64 සහ මහනුවර දි. උ. අංක: ඇම්. ඇස්. 7101

විවාද වූ දිනය: 1967 අප්‍රියෙල් 28 වැනි දින
තීන්දු කළ දිනය: 1967 ජූනි 9 වැනි දින

විනිමය පත්‍ර ආඥා පනත, 49(12) සහ 50(2)(1)(v) වැනි වගන්ති — චැක් පත් බැංකුව විසින් ගරු නොකිරීම සම්බන්ධයෙන් දැන්වීම — එය වහාම දිය යුතුද? — ගෙවීම තහනම් කිරීම — ගරු නොකිරීම සම්බන්ධයෙන් දැන්වීම නුවුවමනා අවස්ථා.

පැමිණිලිකාර සමාගම විසින් 'ඒ' සහ 'බී' අකුරු ලකුණු කරන ලද චෙක් පත් දෙකක් පිට පළමු වැනි සහ දෙ වැනි වගඋත්තරකරුවන් දෙදෙනාට විරුඬව නඩු තීන්දුවක් ලබා ගන්නා ලදී. පළමු වැනි වගඋත්තරකරු පමණක් එම තීන්දුවට විරුඬව ඇපැල් ගෙන සිටී.

'ඒ' සලකුණ දරන චැක් පත රු: 1,000/- කට පළමු වැනි වගඋත්තරකරු විසින් දෙ වැනි වගඋත්තරකරු නමට නිකුත් කරන ලද්දකි. 'බී' සලකුණ දරණ චැක් පත ද එවැනිම මුදලක් සඳහා නාඳුනන පුද්ගලයකු විසින් නිකුත් කරනු ලැබ, එහෙත්, පළමු වැනි වගඋත්තරකරු විසින් දෙ වැනි වගඋත්තරකරු නමට පිට ලියා පවරනු ලැබුවකි. දෙ වැනි වගඋත්තරකරු එම චැක් පත් දෙකේම මුදල පැමිණිලිකාර සමාගමෙන් ලබාගෙන තිබේ. ගෙවීම සඳහා බැංකුවට ඉදිරිපත් කළ අවස්ථාවේ චැක් පත් දෙකම ගරු නොකරනු ලැබී ය.

'ඒ' සලකුන දරන චැක් පත 62.4.3 වැනි දින ගරු නොකරන ලද්දේ පළමු වැනි වගඋත්තරකරු විසින් එහි ගෙවීම තහනම් කළ හෙයින් ය. 'බී' සලකුන දරන චැක් පත 62.5.11 දින ගරු නොකරන ලද්දේ, බැංකුව විසින් පිට ලිවීමේ යොදා ඇති වචනවලින් ම කියතොත් ''අය නිෂ්කාෂණය වී නැති'' (effects not cleared) නිසා ය.

චැක් පත් දෙක ම සම්බන්ධයෙන් ගරු නොකිරීමේ දැන්වීම පළමු වැනි වගඋත්තරකරුට යවන ලද්දේ 64.6.11 වැනි දිනයේ දී ය.

තීන්දුව: (1) විනිමය පත්‍ර ආඥා පනතේ 49(12) වගන්තිය අනුව, ගරු නොකිරීම පිළිබඳ දැන්වීම, විනිමය පත්‍රයත් අත්සනින් පවරන්නාට හෝ අණදයිට හෝ විරුඬව නඩු පැවරීමේ අයිතියක් ලැබීමේ පෙරටුව යා යුතු කොන්දේසියකි.

(2) ගරු නොකිරීමෙන් මාසයකට පසු එම දැන්වීම යැවීම, ආඥා පනතේ වගන්තියේ රෙකුලාසි අනුව නොකෙරී ඇත.

(3) විනිමය පත්‍ර ආඥා පනතේ 50(2)(සී)(වී) වැනි වගන්තිය අනුව අණදයි විසින් ගෙවීම තහනම් කරනු ලැබූ විට ගරු නොකිරීම පිළිබඳ දැන්වීම ඕනෑ නැත. පළමු වැනි වගඋත්තරකරු 'ඒ' දරණ චැක් පතට වගකිව යුතු ය.

(4) නඩු තීන්දුවට විරුඬව දෙ වැනි වගඋත්තරකරු ඇපැල් ගෙන නැති නිසා ඔහුට විරුඬව තිබෙන නඩු තීන්දුව ඒ පරිද්දෙන් ම තිබීමට හැරිය යුතු ය.

ගරු සිරිමාන්න විනිශ්චයකාරතුමා

මෙම නඩුව, 'ඒ' සහ 'බී' වශයෙන් සලකුණු කර ඇති චැක් පත් දෙක අනුව තමන්ට අය විය යුතු බව කියන රු. 2000 ක් අය කර ගැනීම පිණිස පැමිණිලිකාර සමාගම විසින් වගඋත්තරකරුවන් දෙදෙනාට විරුඬව පවරනු ලැබුවකි.

'ඒ' සලකුණ දරණ චැක් පත රු. 1000 ක් සඳහා පළමුවැනි වගඋත්තරකරු විසින් දෙ වැනි වගඋත්තර කරු නමට නිකුත් කරන ලද්දකි. 'බී' සලකුණ දරණ

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 72 වෙනි කා., 83 වෙනි පිට බලනු.

වැක් පත ද එවැනි ම මුදලක් සඳහා නාඳුනන පුද්ගලයකු විසින් නිකුත් කරනු ලැබ, එහෙත්, පළමුවැනි වගඋත්තරකරු විසින් දෙවැනි වගඋත්තරකරු නමට පිට ලියා අත්සන්කර පවරනු ලැබුවකි. දෙවැනි වගඋත්තරකරු එම වැක් පත් දෙකේ ම මුදල් පැමිණිලිකාර සමාගමෙන් මාරුකර ලබාගෙන තිබේ. ගෙවීම සඳහා බැංකුවට ඉදිරිපත් කෙරුණු අවස්ථාවේ වැක්පත් දෙකම ගරු නොකරනු ලැබිය.

දිස්ත්‍රික් නඩුකාරතුමා, වගඋත්තරකරුවන් දෙදෙනාගේ අවාසියට නඩුව තීන්දු කළ අතර, පළමු වැනි වගඋත්තරකරු එම තීන්දුවට විරුඬව ඇපැල් ගෙන සිටි.

ඇපැල් විභාගයේ දී ඉදිරිපත් කරනු ලැබූ එක ම කරුණ වූයේ 82 වැනි අධිකාරිය වන විනිමය පත්‍ර ආඥා පනත ප්‍රකාර වැක් පත් ගරු නොකිරීම ගැන පළමු වැනි වගඋත්තරකරුට සාධාරණ කාල සීමාවක් තුළ දී දැන්වීමක් නොවීයයි යන්න ය.

එම පනතේ 49(12) වැනි වගන්තියෙන් මෙසේ නිර්දේශ කෙරේ:

''විනිමය පත්‍රයක් ගරු නොකෙරුණු වහාම ඒ ගැන දැන්වීම කළ හැකි වන අතර, ඉන් පසු සාධාරණ කාල සීමාවක් තුළ දී එම දැන්වීම කළ යුතු ය.

''(ඒ) දැන්වීම කරන්නා සහ දැන්වීම ලබන්නා එක ම ස්ථානයේ වෙසෙත් නම් දැන්වීම දීම හෝ යැවීම විනිමය පත්‍රය ගරු නොකරන ලද දිනයට පසු දිනයේ දී ලැබෙන සේ කල් වේලා ඇතිව ඉෂ්ට කිරීමෙන් හෝ,

(බී) දැන්වීම කරන්නා සහ දැන්වීම ලබන්නා වෙන් වෙන් ස්ථානවල වෙසෙත් නම් විනිමය පත්‍රය ගරු නොකරන ලද දිනයට පසු දින පහසු වේලාවක තැපැලක් ඇතොත් එදින හෝ එදින එවැනි තැපැලක් නොමැති විට පහසු වේලාවක තැපැලක් ඇති ඊළඟ දිනයේ දී දැන්වීම යැවීමෙන් හෝ,

තොරව කරනු ලබන දැන්වීමක්, විශේෂ කාරණයක් නොමැති වූ විට, සාධාරණ කාල සීමාවක් තුළ දී කරන ලද්දක් ලෙස නොසැලකේ.''

'ඒ' සලකුණ දරණ වැක් පත 62.4.3. දින ගරු නොකරනු ලැබූ අතර, 'බී' සලකුණ දරණ වැක්පත ගරු නොකරන ලද්දේ 62.5.11 වැනි දිනය. ගරු නොකිරීම, පිළිබඳ දැන්වීම, විනිමය පත්‍රයක් පිට අත්සන්කර පවරන්නකුට හෝ අණදයිට හෝ විරුද්ධව නඩු පැවරීමේ අයිතියක් ලැබීමේ පෙරාතුව යා යුතු කොන්දේසියකි.

වැක් පත් දෙක ම සම්බන්ධයෙන් එවැනි දැන්වීමක් 1 වැනි වගඋත්තරකරුට යවා තිබෙන්නේ මාසයක් පමණ කාලයකට පසුව ය. එනම්, 64.6.11 වැනි දින 'පී3' දරණ ලියමනෙනි. ඒ නිසා යට උපුටා දැක්වුණු වගන්තිය ප්‍රකාර දැන්වීමක් කෙරී නැති අතර එවැනි දැන්වීමක් නොකිරීම ගැන සමාව දිය හැකි විශේෂ කරුණක් ද නොමැත.

කෙසේ වුව ද, 'ඒ' සලකුණ දරණ වැක් පත සම්බන්ධයෙන් අණදයි (1 වැනි වගඋත්තරකරු) විසින් එහි ගෙවීම තහනම් කර තිබේ.

විනිමය පත්‍ර ආඥා පනතේ 50(2) (සී) (වී) වැනි වගන්තිය අනුව අණදයි විසින් ගෙවීම තහනම් කරනු ලැබූ විට ගරු නොකිරීම පිළිබඳ දියයුතු දැන්වීම ඕනෑ නැත.

ඒ නිසා ගරු නොකිරීම ගැන දැන්වීමක් නොතිබීම පිළිබඳ ප්‍රශ්නය 'ඒ' සලකුණ දරණ වැක්පත් සම්බන්ධයෙන් බල නොපාන මුත් 'බී' සලකුණ දරණ වැක්පත සම්බන්ධයෙන් බල පායි. එම වැක් පත පළමු වැනි වගඋත්තරකරු විසින් නිකුත් කරන ලද්දක් නොවන අතර එය ගරු නොකරනු ලැබුවේ, බැංකුව විසින් පිට ලිවීමේ යොද ඇති වචනවලින්ම කියතොත්, ''අය නිෂ්කාශනය වී නැති'' නිසා ය.

ගරු නොකිරීමේ දැන්වීම පිළිබඳ ප්‍රශ්නයේ දී දිස්ත්‍රික් නඩුකාරතුමා මෙම කරුණ නොතකා හැර, ගෙවීම තහනම් කිරීමේ හේතුව උඩ පළමු වැනි වගඋත්තරකරුට වැක් පත් දෙක සම්බන්ධයෙන් ගරු නොකිරීමේ දැන්වීම ලැබීමට අයිතියක් නැතැයි වැරදියට තීරණය කර ඇත.

තීන්දුවට විරුද්ධව දෙ වැනි වගඋත්තරකරු ඇපැල් ගෙන නැත. ඇත්ත වශයෙන් ඔහු පැමිණිලිකරුගේ වාසියට නඩු විභාගයේ දී සාක්කි දෙමින් ''වැක් පත් දෙක ගරු නොකරනු ලැබූ විට පැමිණිලිකරුවන් මා හමුවීමට පැමිණ වැක් පත්වල මුදල් ඔවුන්ට ගෙවන ලෙස ඉල්ලීය'' යි කියා තිබේ.

ඒ නිසා ඔහුට විරුඬව තිබෙන නඩු තීන්දුව ඒ පරිද්දෙන් ම තිබීමට හැරිය යුතු ය.

රුපියල් 1000 ක්, නඩු දිනයේ සිට එම මුදලට හිමි නීත්‍යානුකූල පොලිය හා පහළ උසාවියේ නඩු ගාස්තු සමග ගෙවීමට පළමු වැනි වගඋත්තරකරුට නියම කරමින් අපි ඒ අනුව ඔහුට විරුඬව ඇති තීන්දුව හා තීන්දු ප්‍රකාශය පමණක් වෙනස් කරමු.

දෙපක්ෂය ම කොටස් වශයෙන් නඩුව දිනූ නිසා ඇපැල් ගාස්තුව ගෙවීමක් නියම කරනු නොලැබේ.

ගරු එච්. ඇන්. ජී. ප්‍රනාන්දු අග්‍ර විනිශ්චයකාරතුමා

මම එකඟ වෙමි.

තීන්දුව වෙනස් කරන ලදී.

ගරු එච්. ඇන්. ජී. ප්‍රනාන්දු අග්‍ර විනිශ්චයකාරතුමා (සභාපති), ගරු අබේසුන්දර විනිශ්චයකාරතුමා, සහ ගරු මානික්කවාසගර් විනිශ්චයකාරතුමා ඉදිරිපිට

මහ රැජින එ. ජයසිංහ ආරච්චිගේ ඩෑන් ක්වින්ටස් අල්විස් ජයසිංහ*

අභියාචනා අංක 66 — වර්ෂ 1967 — ආයාචනා අංක 89 — වර්ෂ 1967 සමග
ශ්‍රෙ. අංක 222/66 — කොළඹ මහේස්ත්‍රාත් උසාවිය අංක 26783/සී

විවාද කොට තීන්දු කළ දිනය: වර්ෂ 1967 ජූලි 15 සහ 16
තීන්දුවට හේතු දැක් වූ දිනය: වර්ෂ 1967 අගෝස්තු 2

අපරාධ අභියාචන අධිකරණය—මිනිමැරීමක තත්ත්වයට නො වැටෙන අනියම් මිනිමැරීමක්—පැමිණිලි පක්ෂයේ සාක්ෂිකරුවකුගෙන් කෝන්තර ඇසීමට පැමිණිලි පක්ෂය විසින් ම ඉල්ලා සිටීම—මහේස්ත්‍රාත් උසාවියේ සාක්ෂි ප්‍රකාශය සහ පොලිසියට කළ ප්‍රකාශය සාක්ෂිකරුවා ලවා කියවනු ලැබීම — කෝන්තර ඇසීමට ඇති බලය සීමා සහිත බව — චෝදිතයාට අහිතකර ප්‍රකාශ ඔහු කී සාක්ෂියක පරස්පර විරෝධය ඔප්පු කිරීමට නොව වෙන අයුරකින් ප්‍රයෝජන ගැනීමට අනාවරණය කරවා ගැනීම — එහි නීති විරෝධි බව, කරුණට අදාල නො වන දේ සාක්ෂි වශයෙන් ඇතුළත් කළ නො හැකි බව — යෝග්‍ය පරිදි ජූරි සභාවට උපදෙස්දීම—නමුත් ජූරි සභාව නීතිවිරෝධි සාක්ෂි අනුව ක්‍රියා කරනු ලැබිය හැකිවීමේ අවදානම—සාක්ෂිකරු ඇත්ත කීමට පෙළඹවීම — පැමිණිල්ල මෙහෙයවීමේ අයිතිවාසිකම්වල සීමිත බව — සාක්ෂි ආඥා පනතේ (14 වන අධිකාරය) 154, 155(සී) සහ 155(ඒ), (බී), (ඩී), 140, 143, 145, 146, 147 සහ 152, 148, 149, 150 සහ 153 යන ඡෙද.

චෝදිත ඇපැල්කරුවන 'ජේ' මිනිමැරීමක තත්ත්වයට නො වැටෙන අනියම් මිනිමැරීමකට වරදකරු කරනු ලැබී ය. පැමිණිලි පක්ෂයත් විත්ති පක්ෂයත් මරණය සිදුවීමේ හේතු වශයෙන් මියගිය අයගේ පරස්පර විරෝධි ප්‍රකාශ දෙකක් ඔප්පු කරන ලදි.

සිඩිය පිළිබඳව පැමිණිලි පක්ෂයට නඩුවේ දී කෙළින් ම ඉදිරිපත් කළ හැකිව තිබුණු එක ම සාක්ෂිය 'පී' නමැති සාක්ෂිකරුගේ සාක්ෂිය පමණක් යයි පෙනී යන සේ ය. කටට උත්තරය දී ඇසූ ප්‍රශ්න හයකට ම පිළිතුරු දුන් මේ සාක්ෂිකරුවා අපරාධය සිදු වූ තැන චෝදිතයා සිටියේ නැතැයි කීවේ ය.

'පී' නමැත්තා විසින් චෝදිතයා එතැනට පැමිණ මියගිය අය සමග අඩ දබරයක් ඇති කර ගැනීම දුටුවේ දැයි රජයේ අධිනීතිඥවරයා විසින් අසන ලද තවත් ප්‍රශ්නයකට (අංක 24) ඔහු එය නුදුටුවේ යයි පිළිතුරු දුන් විට රජයේ අධිනීතිඥවරයා සාක්ෂි ආඥා පනතේ 154 වන ඡෙදය යටතේ ඔහුගෙන් ප්‍රශ්න කිරීමට අයැද සිටියෙන් ඊට ඉඩ ලැබිනි.

'පී' නමැති අයගෙන් තව දුරටත් ප්‍රශ්න ඇසීම සිදු වූයේ ඔහු විසින් මහේස්ත්‍රාත් උසාවියේදී කරන ලද සාක්ෂි ප්‍රකාශය ඔහුට කියවනු ලැබීමෙනි. චෝදිතයා එතැන සිටි බව කියැවෙන ප්‍රකාශය ඇතුළු එම පහළ උසාවියේ ප්‍රකාශය සම්පූර්ණයෙන් ම කළ බව සාක්ෂිකරු පිළිගත් අතර එම ස්ථානයට නො පැමිණි බව පිට පිටම කියා සිටි ඔහු මහේස්ත්‍රාත්වරයා ඉදිරියෙහි තමා කළ සාක්ෂි ප්‍රකාශය බොරු බවද කීවේ ය. 'පී' නමැති සාක්ෂිකරුවාට කියවන ලදුව ඔහු අසත්‍යයක් ලෙස වර්ග කළ එක් ප්‍රකාශයක් නම් ''මියගිය අයට චෝදිතයා පිහියෙන් අනිනු මම දුටුවෙමි'' (ප්‍ර. 63) යන්නයි.

මහේස්ත්‍රාත් තුමා ඉදිරියේ කරන ලද තමාගේ සාක්ෂි ප්‍රකාශයෙහි චෝදිතයා එම ස්ථානයෙහි සිටි බව හැඟෙන කරුණු ඔහු විසින් කියන ලද බව පමණක් නොව, චෝදිතයා චෝදනා ලබා ඇති අපරාධය කරන ලද බවත් මියගිය අයට විරුඬව යම්කිසි චේතනාවක් ඔහු කෙරෙහි තිබුණු බවත් ඔහු විසින් වැඩිදුරටත් දිවුරා කියන ලද බවත් ජූරි සභාවට දැනෙන සේ සාක්ෂි මේ ආකාරයෙන් ඉදිරිපත් කොට තිබෙන බව පෙනේ. 'පී' නමැත්තා පොලිසියට කරන ලද ප්‍රකාශය ද සම්පූර්ණයෙන් ම පැමිණිලි පක්ෂය විසින් ඔප්පුකොට තිබේ.

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 72 වෙනි කා., 109 වෙනි පිට බලනු.

තීන්දුව: (1) 'පී' නමැති සාක්ෂිකරු මහේස්ත්‍රාත් උසාවියේ දී චෝදිතයා එතැන සිටියේ යයි කී බව ඔප්පු කොට පැමිණිලි පක්ෂය ඉදිරිපත් කළ කරුණු වලට වී ඇති හානිය ප්‍රකෘතිමත්කර ගැනීමට පැමිණිලි පක්ෂයට සම්පූර්ණයෙන් බලය තිබේ. එම සාක්ෂිකරු ඇදහිය නොහැකි පුද්ගලයකු බවට පත් කිරීමට සහ ඔහු විසින් චෝදිතයා එතැන සිටියේ නැතැයි කී ප්‍රකාශය ගණන් නො ගන්නා ලෙස ජූරි සභාවට අයැදීමක් කිරීමට ඒ පිළිබඳව කලින් ඔහු විසින් කරන ලද ප්‍රකාශය ඔප්පු කිරීමට ප්‍රමාණවත් වන අතර ම එය අවශ්‍ය ද දෙයකි.

(2) චෝදිතයා විසින් මියගිය අයට පිහියෙන් අනිනු තමා දුටුවේ යයි (ප්‍ර. 63) කියන ප්‍රකාශය ඇතුළු අවශේෂ ප්‍රකාශ ඔප්පු කිරීමට පැමිණිලි පක්ෂයට අවස්ථාවක් මතු නොවූයේ ඒ ප්‍රකාශ ඉදිරිපත් කිරීම ඔහුගේ සාක්ෂිවලට ඉඳුරා විරුඬව ඔහු කලින් කරන ලද ප්‍රකාශ ඉදිරිපත් කිරීමක් නො වන නිසා ය. එපමණක් ද නොව සාක්ෂිකරු මෙම නඩු විභාගයේ දී එම කරුණු ගැන සාක්ෂි නුදුන් නිසා ඔහු පොලීසියට දුන් කටඋත්තර ඔප්පු කිරීමට ද පැමිණිලි පක්ෂයට අවස්ථාවක් ඇති නො වී ය.

(3) සාක්ෂි ආඥා පනතේ 155 (සී) ඡේදය 154 ඡේදය සමග එකට කිවූ කල එයින් කලින් අවස්ථාවක කරන ලද පරස්පර විරුඬ ප්‍රකාශයක් ඔප්පු කිරීමට එයින් බලය ලැබෙනු ඇත. නමුත් සාක්ෂිකරු පසුව කියාවි යයි පැමිණිලි පක්ෂයේ හිතියට හේතුවන සාක්ෂිවල ප්‍රතිවිරුඬ භාවය කලින් ම ඔප්පු කිරීමෙන් ජීවමාන නො වූ මකර අවතාර ඝාතනය කිරීමට එයින් බලයක් නො ලැබේ. මෙම නඩුවේ දී පැමිණිලි පක්ෂය විසින් සාක්ෂි ආඥා පනතේ 155(සී) ඡේදය නීති විරෝධි ලෙස පරිශීලනය කොට තිබේ.

අනුගමනය කළ නඩුව මහ රැජින එ. ප්‍රනාන්දු — අපරාධ අභියාචන අධිකරණ අංක 17 (වර්ෂ 1967)

(4) සාක්ෂි ආඥා පනතේ 154 වන ඡේදයේ පිළිසරණ එවකට සොයා නොමැති නිසා විනිශ්චයකාරවරයාගේ අවසරය නො ලබා රජයේ අධිනීතිඥවරයාට අංක 24 දරණ ප්‍රශ්නය ද ඇසිය නො හැකිව තිබුනි.

(5) තමාගේ ම සාක්ෂිකරුවාගේ සත්‍යතාවය බිඳීමට පැමිණිලි පක්ෂය දැරූ පරිශ්‍රමයයේ ප්‍රතිඵලයක් වූයේ මෙම සාක්ෂි ඒකාන්තයෙන් ම චෝදිතයාගේ සාපරාධී බවට අදාල නො වන සාක්ෂි වුවත්, ඒවා නීතියට අනුව සාක්ෂි ලෙස ඇතුළත් නො කළ හැකි දේ වුවත් එබඳු ප්‍රකාශ සඬ්ඛ්‍යාවක් ඔප්පු කරනු ලැබීමෙන් චෝදිතයාගේ සාපරාධී භාවය ගැන ජූරි සභාවට මනා සේ සෑහීමකට පත්වීමට හැකි තත්ත්වයක් ඇති වීම ය.

(6) එම ප්‍රකාශ චෝදිතයාට විරුඬව ගණන් ගැනීම නො කළ යුතු යයි නඩුව විනිශ්චය කළ විනිශ්චයකාරවරයා යෝග්‍ය අන්දමින් ජූරි සභාවට උපදෙස් දුන් නමුත්, එම ප්‍රකාශවල අන්තර්ගත වී ඇති චෝදිතයාගේ උග්‍ර සාපරාධී තත්ත්වය ගැන කල්පනාකර බලන විට විනිශ්චයකාරවරයාගේ එම උපදෙස්වලට සැලකිල්ලක් ජූරි සභාව විසින් දක්වන ලදැයි මෙම අධිකරණයට විශ්වාසය තබා සිතා ගැනීමට නො හැකි විය.

(7) චෝදිතයා ගැන සඳහන් නො කරමින් ප්‍රතිවිරුඬ ලෙස මියගිය අය ඇපොතිකරි මහතාට කළ ප්‍රකාශයට වඩා චෝදිතයා පටලවා මියගිය අය දෙස්තර මහතාට කළ ප්‍රකාශය පිළිගැනීමට ජූරි සභාව කැමති වූයේ 'පී' නමැති සාක්ෂිකරුවා මහේස්ත්‍රාත් උසාවියේ කී සාක්ෂිය ඔවුන්ට දැන ගැනීමට හැකිවූ නිසා යයි සිතීමට බොහෝ සේ ඉඩ තිබේ.

තීන්දුවෙන් අමතරව එච්. ඇන්. ජී. ප්‍රනාන්දු අග්‍ර විනිශ්චයකාරතුමා: ''.....එම පනතේ අංක 154 දරණ ඡේදයේ විෂය හා ක්‍රියාකාරිත්ත්වය පිළිබඳව කෙරෙන ගවේෂණයක දී පනතේ ඇති අංක 155(ඒ), (බී) සහ (ඩී), අංක 140, අංක 143, අංක 145, අංක 146, අංක 147 සහ 132, අංක 148, අංක 149, අංක 150, අංක 153 දරණ ඡේද සහ සමහර විට තවත් ඡේද ගැන ද සලකා බැලීමට සිදුවන බව අධිනීතිඥවරයා නිරනුමානව දැන සිටී.''

එච්. ඇන්. ජී. ප්‍රනාන්දු අග්‍ර විනිශ්චයකාරතුමා: ''සාක්ෂිකරුවකු ඇත්ත කීමට පෙළඹවීම පිණිස තමාගේ හැම පරිශ්‍රමයක්ම යෙදීම පැමිණිලි පක්ෂයේ යුතුකම වේයයි උගත් රජයේ ජ්‍යෙෂ්ඨ අධිනීතිඥවරයා කරුණු සැලකෙළේ ය. දැනට මතු වී තිබෙන පරිසරය අනුව යම් හෙයකින් සාක්ෂිකරුවකු චෝදිතයා වරදින් බැහැර වන අයුරින් සාක්ෂියක්

කී කලක ඒ නිසා එම සාක්ෂිය බොරුවක් හැටියට සලකා ගත යුතු බවකි. මෙම තර්කයෙන් තව දුරටත් අපේ නීති සම්ප්‍රදාය අනුව ඇති චෝදිතයකු වරද ඔප්පු වන තුරු නිදහස් පුද්ගලයකු ලෙස සලකා ගත යුතුය යන ප්‍රඥප්තියට ද පහර වදී. එයට හේතුව චෝදිත පුද්ගලයකු වරදින් බැහැර කිරීමේ සාක්ෂියක් අසත්‍ය යයි කලින් ම සිතාගත හැක්කේ චෝදිතයා වරදකරු යයි අදහස් කර ගත් විට පමණක් වීම ය.''

නීතිවේදියෝ:

ඊ. ආර්. ඇස්. ආර්. කුමාරස්වාමි මහතා, ඇම්. ඩී. කේ. කුලතුංග මහතා, ඇන්. විජේනාදන් මහතා ඩී. ජයවික්‍රම මහතා සහ ඇස්. සී. ක්‍රොසට් තම්බයියා (රජයෙන් පත් කරන ලද) මහතා සමග විත්තිකාර-ඇපල්කරු වෙනුවෙන්.

ඊ. ආර්. ද ඇස්. පොන්සේකා මහතා, රජයේ ජ්‍යෙෂ්ඨ අධිනීතිඥවරයා, ඇටෝර්නි ජනරාල්තුමා වෙනුවෙන්

එච්. ඇන්. ජී. ප්‍රනාන්දු අග්‍ර විනිශ්චයකාරතුමා:

මිනීමැරීමක තත්ත්වයට නො වැටෙන අනියම් මිනීමැරීමක වරදකට ජූරි සභාවක් විසින් අසන ලද නඩුවක දී චෝදිතයකු වරදට පත් කිරීමේ තීන්දුවකට විරුඬව මෙම අභියාචනය ඉදිරිපත් කොට තිබේ.

මෙම නඩුවේ දී පැමිණිලි පක්ෂය ඔප්පු කිරීමට බලාපොරොත්තු වූ හැටියට පෙනී යන්නේ වර්ෂ 1965 දෙසැම්බර් මස 1 වැනි දින සවස මියගිය අයත් තෙගෝනිස් සහ පින්තු නමැති සාක්ෂිකරුවනුත් චෝදිතයාත් එකට සිටි බව සහ ඔවුන් අතුරෙන් පුද්ගලයන් තිදෙනෙක් (මේ තිදෙනා අතර චෝදිතයා නැත) එක ම ගංජා සුරුට්ටුවක් හවුලේ ඉරූ බවත්, චෝදිතයා තමාට මෙයට හවුල් වීමට නුදුන් නිසා අනිත් අයට බැණ වැදුනු බවත්, මේ සිඩියට මඳ වේලාවකට පසු චෝදිතයා මියගිය අයට පිහියකින් අනින ලද බවත් ය. පිහියෙන් ඇන්න බව කියන මෙම සිඩිය ගැන පැමිණිලි පක්ෂයට කෙළින් ම ඉදිරිපත් කළ හැකි එක ම සාක්ෂිය පින්තු නමැති සාක්ෂිකරුවාගේ සාක්ෂිය බව පෙනී යන සේ ය. ඇත්ත වශයෙන් පැමිණිලි පක්ෂය විසින් කැඳවන ලද පළමුවන සාක්ෂිකරුවා පින්තු විය. ''මෙම දවසේ සවස 5 ට පමණ ඔබත් මියගිය අයත් තෙගෝනිස් නැමැත්තාත් ගංජා සුරුට්ටුවක් බීමට තීරණය කරන ලද්දේ ද?'' යනුවෙන් කටට උත්තරය දී අසන ලද ප්‍රශ්නයකට ''එසේයැ'' යි සාක්ෂිකරු පිළිතුරු දුනි. මෙයට ඉතා ම ස්වල්ප වේලාවකට පසු අසන ලද ''මියගිය අයත් මෙම චෝදිතයාත් තෙගෝනිස් සහ ඔබත් මෙම ගංජා සුරුට්ටුව බීමට සිටි අය වූවහු ද?'' යන ප්‍රශ්නයට විත්තිකරුගේ පිළිතුර වූයේ, ''චෝදිතයා එතැනට නො පැමිණියේ ය'' යනුයි. තවත් කටට උත්තරය දී අසන ලද ප්‍රශ්න 5කට සාක්ෂිකරුවා පිට පිට ම චෝදිතයා එම ස්ථානයට ආවේ නැති බවත් අනිත් තිදෙනා සමග ඔහු නො සිටි බවත් ප්‍රකාශ කළේ ය. ඉන්පසු උගත් රජයේ අධිනීතිඥවරයා පහත පෙනෙන පරිදි ප්‍රශ්නයක් ඇසී ය.

''24 ප්‍ර. ගංජා සුරුට්ටුවට හවුල් වීමට ඉඩ නුදුන් නිසා චෝදිතයා කොයි අවස්ථාවක හෝ මියගිය අය සමග අඬදබරයක් ඇති කරගත්තා ඔබ දුටුවෙහි ද?

උ. නැත.''

මේ අවස්ථාවේ දී රජයේ උගත් අධිනීතිඥවරයා සාක්ෂි ආඥා පණතේ 154 වන ඡෙදයේ ප්‍රතිපාදන අනුව සාක්ෂි කරුගෙන් ප්‍රශ්න ඇසීමට අවසර ඉල්ලා සිටියේ ය. නඩුව ඇසූ විනිශ්චයකාරවරයා මෙයට ඉඩ දී තිබේ.

මේ අනුව වැඩිදුරටත් සාක්ෂිකරුගෙන් රජයේ අධිනීතිඥවරයා විසින් ප්‍රශ්න ඇසීම කෙබඳු ද කියතොත් ඉන් සිදු වී ඇත්තේ සාක්ෂිකරු මහේස්ත්‍රාත් උසාවියේ දී ඇති සාක්ෂි ප්‍රකාශය ඔහුට කියැවීම සහ එහි ඇති ඔහුට කියන ලද වාක්‍ය ඔහු විසින් මහේස්ත්‍රාත් උසාවියේ දී දෙන ලද සාක්ෂියෙහි ඇතුළත් දේ බව ඔහු පිළිගැනීම ය. එසේ සාක්ෂිකරුවා විසින් පිළිගන්නා ලද එක් කරුණක් වූයේ ඇත්ත වශයෙන් ම සුරුට්ටුව අනිත් තිදෙනා උරන විට චෝදිතයා ද එහි සිටියේ යැයි තමා මහේස්ත්‍රාත්වරයාට කී බව ය. නමුත් මෙසේ වැඩිදුරටත් කරුණු ඇසීමේ දී මූලික අවස්ථාවේ ම අනිත් අය ගංජා සුරුට්ටුව උරන තැනට චෝදිතයා නො පැමිණි බව පිට පිට ම කියා අංක 44 දරණ ප්‍රශ්නයට පිළිතුරු දෙමින් සාක්ෂි කරු කීයේ එම සාක්ෂියට විරුඬව මහේස්ත්‍රාත්වරයා ඉදිරියෙහි තමා කරන ලද වෙනස් ප්‍රකාශය බොරුවක් බව ය. ඉන්පසු අසන ලද ප්‍රශ්න සහ එයට ලබන ලද උත්තර කිහිපයක් මම යළිත් උපුටා මෙහි දක්වමි.

''47 ප්‍ර. ගංජාවලට තමා ද මුදල් ගෙවූ නිසා චෝදිතයා තමාටත් හවුල් වීමට ඉඩ දෙන ලෙස තෙගෝනිස්ට කීවේ ද?

උ. ඔව්. මම එසේ කීවෙමි.

ප්‍ර. ඒ කියමනත් වැරදි ද?

උ. ඒක වැරදියි. ඒක බොරුවක්.

ප්‍ර. එතැන ඔබ සිටියා යැයි කීවේ ද?
උ. ඒක හරි.
ප්‍ර. එවිට තමාගේ ගංජා කොටස තමාට නො තැබූ නිසා චෝදිතයා මිය ගිය අයට බැණ වැදීමට පටන් ගත් බව ඔබ කීවෙහි ද?
උ. ඔව්. මම එසේ කීවා. ඒකත් බොරුවක්.
ප්‍ර. එතකොට ඔබ කර තිබෙන්නේ මහේස්ත්‍රාත්-වරයාට කුට්ටි වශයෙන් බොරු කියා සුළු වශයෙන් ඇත්ත කීමක් ද?
උ. ඔව්.
.....

62 ප්‍ර. ''කඩේ තිබුණු එළියෙන් චෝදිතයා සහ මියගිය අය මම පැහැදිලිව ම දුටුවෙමි'' යි ඔබ එසේ කීවෙහි ද?
උ. මා එසේ කීවා. නමුත් ඒක බොරුවක්.
ප්‍ර. ''චෝදිතයා මියගිය අයට පිහියෙන් අනිනවා මම දුටුවා'' ඔබ එසේ කීවෙහි ද?
උ. මා එහෙම කීවා. නමුත් ඒ බොරු.
ප්‍ර. මියගිය අය තමාගේ පපුව අල්ලාගෙන කඩේ දෙසට ඇවිත් බිම වැටුනා යැයි ඔබ කීවෙහි ද?
උ. මා එසේ කීවා. නමුත් ඒක බොරුවක්.
ප්‍ර. මම විත්තිකරු කඩේ දෙසට යනවා දුටුවෙමි.
උ. එහෙමත් කීවා. ඒ වුනාට ඒකත් බොරුවක්.

මෙම නඩුවේ ආරම්භයේ දී ම ඇති වූ තත්ත්වය හරියට ම මෑතක දී මෙම උසාවිය විසින් දෙන ලද මහ රැජින එ. ප්‍රනාන්දු (අපරාධ අභියාචන අධිකරණය වර්ෂ 1967 අප්‍රෙල් 18 වැනි දා) යන නඩුවෙහි තීන්දුවේ අවසාන ඡෙදයන්ගෙන් එකක අපේක්ෂා කොට ඇති තත්ත්වය ම ය. නමුත් මෙම නඩුව අසන අවස්ථාවේ එය විසඳූ විනිශ්චයකාරවරයා හෝ අධිනීතිඥවරයා හෝ එවකට වාර්තාගත නො වී තිබුණු එම නඩුව ගැන දැන නො සිටියහ. දැනට අප අතර ඇති නඩුවෙහි නියම වශයෙන් සිදු වී ඇත්තේ නඩුව විසඳෙන අවස්ථාවේ පින්තු නමැති සාක්ෂිකරුවා විසින් චෝදිතයා ඉහත කී ගංජා සුරුට්ටුව උරන අවස්ථාවේ ඒ උරන අය සමග නො සිටි බව කියා සිටි නිසා එම සාක්ෂිකරු මහේස්ත්‍රාත් වරයා ඉදිරියේ දෙන ලද සාක්ෂි ප්‍රකාශයෙන් චෝදිතයා එතැන සිටි බව කියන ලද බව පමණක් නොව ඔහුට විරුඬව නඩු පවරා ඇති අපරාධය කරන ලදැයි කියමින් කෙළින් ම සාක්ෂි දුන් බව ද චෝදිතයා තුළ මියගිය අයට විරුඬව යම්කිසි චේතනාවක් ඇති බව ද ජූරි සභාවට දැනගත හැකි සේ සාක්ෂි ඉදිරිපත් කිරීම ය.

මෙම සාක්ෂිකරුවා විසින් චෝදිතයා එතැන කොයි අන්දමකින්වත් නො සිටිය බව කියමින් පැමිණිලි පක්ෂයේ නඩුවට අලාභ හානි කර තිබෙන බවට කිසිදු සැකයක් නැත. එම සාක්ෂිකරුවාගේ සාක්ෂි කීමෙන් පසු සිදුවන මෙම පාඩුව උගත් රජයේ නීතිඥවරයාට ඉතා ම පැහැදිලි ලෙස පෙනීයන්නකි. ඒ මන්ද? ඔහුගේ තෙගෝනිස් නමැති අනිත් සාක්ෂිකරුවා එම ගංජා සුරුට්ටුව උරන අවස්ථාවේ චෝදිතයා එතැන සිටි බව කීමට සිතා සිටින බව ඔහු දැන සිටි නිසා ය. තවම පාඩුව ඇත්ත වශයෙන් ම පින්තු නමැති සාක්ෂිකරුවා මහේස්ත්‍රාත් උසාවියේ සාක්ෂිදෙමින් චෝදිතයා එහි සිටි බව කී බව ඔප්පු කරමින් ඒ අනුව සාක්ෂිකරු විසින් කලින් මහේස්ත්‍රාත් උසාවියේ දී කරන ලද ප්‍රකාශය ඉදිරිපත් කළේ නම් සාක්ෂිකරු පිළිගත යුතු කෙනකු නො වේ යැයි සනාථ කිරීමට ප්‍රමාණවත් එමෙන් ම අවශ්‍ය දෙයක් ද වනු ඇත. මෙසේ කළ පසු ජූරි සභාවට සාක්ෂිකරුවා විසින් චෝදිතයා එතැන නො සිටියා යැයි කීම ගැන සැළකිල්ලක් නො දක්වන ලෙස ආයාචනා කිරීමට පුළුවන් කමක් තිබුණි.

චෝදිතයාගේ නීතිවේදියා විසින් කර සිටිය පැමිණිල්ල ප්‍රධාන වශයෙන් එල්ල වන්නේ මා විසින් ඉහත උපුටා දක්වන ලද අංක 47 දරණ ප්‍රශ්නයට සහ ඉන්පසු අසන ලද ප්‍රශ්නයන්ට ය. ඒ අවස්ථාවට පෙරාතුව විරෝධය දැක්වීමට තිබුනේ එක ප්‍රකාශයකි. එක ප්‍රකාශයක් ම පමණකි. එයට විරෝධය දක්වන ලදී. නමුත් ඒ අවස්ථාවෙන් පසු මෙම නඩුව පවරා ඇති සිඩිය සම්බන්ධ අවබෝධ කිරීමට කෙළින් ම අදාල වන කිසි ම සාක්ෂියක් සාක්ෂිකරුවා විසින් අධිකරණයේ දී කියා නැත. උදාහරණයක් වශයෙන් චෝදිතයකු අනික් පුද්ගලයන්ට බැණ නො වැදුනු බවක් සාක්ෂිකරු කියා නැත. එම නිසා එම සාක්ෂියට විරුඬව ඔහු විසින් කලින් කරන ලද ප්‍රකාශයක් උසාවියෙහි දී ඔප්පු කිරීමට පැමිණිලි පක්ෂයට අවස්ථාවක් පැන නැගී නැත. මීටත් වඩා සැළකිය යුතු ප්‍රශ්නයක් වන අංක 63 දරණ ප්‍රශ්නය ගැන ද කියයුත්තේ මෙම කරුණු ය.

තවදුරටත් සළකා බලන කල පින්තු නමැති සාක්ෂිකරු පොලීසියට දෙන ලද සම්පූර්ණ ප්‍රකාශය පැමිණිලි පක්ෂය විසින් නඩුවෙහි දී අනාවරණය කොට ඔප්පු කොට තිබේ. මෙම ප්‍රකාශයෙහි චෝදිතයා බීමත්ව සිටි බව සඳහන් ප්‍රකාශ ද ඇතුළත් ය. එපමණක් නොව සාක්ෂිකරුවා ද චෝදිතයාට බය වූ බව එහි ඇතුළත් ය. මෙය ඉදිරිපත් කර ඇත්තේ සාක්ෂිකරුවා ඉහළ උසාවියේ නඩුවේ දී චෝදිතයා බීමත් කමින් තොරව සිටි පුද්ගලයෙකැ යි හෝ ඔහු චෝදිතයාට කියා නැතැ යි යනුවෙන් හෝ කියා නැති අවස්ථාවක දී ය.

මේ අනුව සිතා බලන විට (චෝදිතයා එතැන නො සිටි බව කී කරුණ ගැන හැර සාක්ෂි ආඥා පනතේ 155 වන ඡෙදය උපයෝගීකොට ගෙන ඇත්තේ ඉහළ උසාවියේ

දුන් සාක්ෂිය පරස්පර විරෝධියැයි පෙන්වීමට නොව පසුව පැමිණිලි පක්ෂය විසින් කැඳවන සාක්ෂිකරුවන් විසින් දිය හැකි සාක්ෂිවලට විරුඬව ඇති ප්‍රකාශ ඉදිරිපත් කොට කලින් ම එම සාක්ෂි වලට පරස්පර විරෝධීව මෙම සාක්ෂිකරු පහළ උසාවියේ දී කියා ඇති බව ඔප්පු කිරීමට ය. යම්කිසි නඩුවක සාක්ෂිකරුවකු සාක්ෂි දුන් වේලාවක සාක්ෂියට වෙනස්ව ඔහු ඊට කලින් කියා ඇති ප්‍රකාශයන් ඔප්පු කිරීමට සාක්ෂි ආඥා පනතේ 155(සී) ඡෙදය 154 ඡෙදය සමග එකට කියැ වූ කල අවසර ලැබෙන නමුත් 154(සී) ඡෙදයෙන් එවකට ජීවමාන නො වන මකර අවතාර විනාශ කිරීමට ඉඩ නො ලැබේ.

එසේ ම නඩුව විනිශ්චය කළ විනිශ්චයකාරවරයාගෙන් අවසර නො ගෙන 24 වන ප්‍රශ්නය ඇසීමට රජයේ අධිනීතිඥවරයාට බලයක් නොමැති බව ද මෙහි ලා අප විසින් ප්‍රකාශ කළ යුතු ය. එයට හේතුව එම අවස්ථාවේ දී රජයේ අධිනීතිඥවරයා විසින් සාක්ෂි ආඥා පනතේ 154 වන ඡෙදයෙහි පිළිසරණ පතා නො තිබීම ය. සාක්ෂිකරුවා විසින් ''X'' නැමැත්තාගේ එතැනට පැමිණීම නො වී යැයි තරයේ කියා සිටිය දී ''X'' නැමැත්තා එතැන යම්කිසිවක් කළේ දැයි සාක්ෂිකරු ගෙන් ඇසීම නීතියට පමණක් නොව සාමාන්‍ය බුඩියට ද අනුකූල නො වන කරුණකි.

පැමිණිලි පක්ෂය විසින් තමාගේ ම සාක්ෂිකරුවා ඇදහිය නො හැකි තැනැත්තකු බවට පත්කිරීමට දරණ ලද මෙම ආයාසයෙන් ඇති වී තිබෙන ප්‍රතිඵලය චෝදිතයා වරදකරු ලෙස ජූරි සභාවට මනා සේ සෑහීමකට පත් වීමට හැකි වන ලෙස චෝදිතයා විසින් කරන ලද ප්‍රකාශ සංඛ්‍යාවක් නඩුවෙහි දී ඔප්පු කිරීම ය. නමුත් නීතිය අනුව සලකන කල කලින් කෙරුනු මේ ප්‍රකාශ ඔහු වරද කළ බව ඔප්පු වන ලෙස ගත හැකි සාක්ෂි ලෙස අදාල වන දේ නො වේ. ඉතා යෝග්‍ය අන්දමින් උගත් විනිශ්චයකාරවරයා මේ ප්‍රකාශ චෝදිතයාට විරුඬව කල්පනාවට ගත යුතු නො වේ යයි ජූරි සභාවට උපදෙස් දී ඇති නමුදු මේ ප්‍රකාශ චෝදිතයා උග්‍ර සාපරාධී තත්ත්වයකට හෙළීමට තරම් වන නිසා විනිශ්චයකාර වරයාගේ උපදේශය ජූරි සභාව ගණන් ගන්නා ලදැ යි අපට විශ්වාසය තබා සිතා ගැනීමට නුපුළුවන.

අපරාධ නඩුවක් නියම වශයෙන් උචිත පරිදි විභාග වන ලදැයි කිව හැක්කේ එහි පැමිණිලි පක්ෂය කරුණට අදාළ, **චෝදනා කොට ඇති අපරාධය ඔප්පු කිරීම** පිණිස නීතිය අනුව ඇතුළත් කළ හැකි කරුණු පමණක් ඉදිරිපත් කරන, ඒ හේතුව නිසා ම සාක්ෂිවලින් අනාවරණය වූ සෑම කරුණක් ම සලකා බැලීමට සහජයෙන් ඇති මානුෂික ගැම්ම යටපත් කර ගැනීමට යයි විනිශ්චය කාරවරයාට එම ජූරි සභාවට උපදෙස් දීමට අවස්ථාවක් පැන නො නගින ලෙස විසඳුනු නඩුවකි. මෙබඳු උපදෙස් දීමක් වැළැක්විය නො හැකි ලෙස සිදුවන ප්‍රධාන අවස්ථාවක් නම් පුද්ගලයන් දෙදෙනකු හෝ ඊට වැඩි ගණනක් චෝදනා එල්ලව සිටින විට ඔවුන් අතුරින් එක් කෙනකු ගේ පාපොච්චාරණයක් ඔප්පු කෙරෙන නඩුවකි. නියම සම්ප්‍රදායානුකූල නඩුවකින් බැහැරව කෙරෙන විශේෂ යක් හැටියට මෙයට අපේ අපරාධ නීති සංවිධාන ක්‍රමයෙන් ඉඩ ලැබී ඇති අතර එබඳු අවස්ථාවක දී ඒ ඒ අයට වෙනම නඩු පැවරීමට යයි විධාන කිරීමට ද අධිකරණයට බලය තිබේ. සාක්ෂි ආඥා පනතේ 155(සී) ඡෙදයෙහි ද මෙයට අවසර දෙන ප්‍රතිපාදනයක් ඇතත් බෙහෙවින් ම එය ප්‍රයෝජනයට ගනු ලබන්නේ විත්ති පක්ෂය විසිනි. නමුත් මෙම නඩුවේ දී එය ප්‍රයෝජනය පිණිස ගැනීමට සැරසුනේ පැමිණිලි පක්ෂයයි. එපමණක් නොව එසේ ගෙන එය යොදවා තිබෙන්නේ ද නීති විරෝධී ක්‍රමයකට ය. මේ නිසා පැමිණිලි පක්ෂය විසින් බොහෝ සෙයින් කරුණු ඇසීමේ දී මතුකරවා ගෙන ඇති කරුණු නීතියට අනුව සාක්ෂිවලට ඇතුළත් කළ හැකි දේ නො වේ.

සාක්ෂිකරුවකු ඇත්ත කීමට පෙළඹවීම පිණිස තමාගේ හැම පරිශ්‍රමයක් ම යෙදීම පැමිණිලි පක්ෂයේ යුතුකම වේ යයි උගත් රජයේ ජ්‍යෙෂ්ඨ නීතිඥවරයා කරුණු සැල කළේ ය. දැනට මතු වී තිබෙන පරිසරය අනුව මෙනෙහි කරන විට ඒ තර්කය ගෙන හැර පාන්නේ යම් හෙයකින් සාක්ෂිකරුවකු චෝදිතයා වරදින් බැහැර වන අයුරින් සාක්ෂියක් කී කලක ඒ නිසා එම සාක්ෂිය බොරුවක් හැටියට සලකා ගත යුතු බවකි. මෙම තර්කයෙන් තවදුරටත් අපේ නීති සම්ප්‍රදායය අනුව ඇති චෝදිතයකු වරද ඔප්පු වන තුරු **නිදහස් පුද්ගලයකු** ලෙස සලකා ගත යුතු ය යන ප්‍රඥප්තියට ද පහර වදී. එයට හේතුව චෝදිත පුද්ගලයකු වරදින් බැහැර කිරීමේ සාක්ෂියක් අසත්‍ය යයි කලින් ම සිතා ගත හැක්කේ චෝදිතයා වරදකරු යයි අදහස් කර ගත්විට පමණක් වීම ය.

මේ අධිකරණය විසින් නොබෝදා දෙන ලද නඩු තීන්දුවේ ගැබ්වී ඇති සීමා කිරීම් සහ මෙම නඩුවෙහි අභියාචනය විසඳීමේ දී සඳහන් කළ සීමා කිරීම් වලින් බඳිනු ලැබූ විට සාක්ෂි ආඥා පණතේ 154 වන ඡෙදය අනුව අපේ මතයේ හැටියට අවසර ලැබෙන්නේ කිනම්

ප්‍රශ්න වලට දැයි අසමින් උගත් රජයේ ජ්‍යෙෂ්ඨ අධිනීතිඥවරයා ගෞරව සම්ප්‍රයුක්තව වුව ද ඇසූයේ කුපිත කරන සුලු ප්‍රශ්නයකි. මෙම අභියාචන විසඳීමේ දී ඔහුගේ විමසීමට පිළිතුරක් දුනහොත් එය නඩුවේ දිය යුතු විනිශ්චයට ඇතුළත් නො වන බාහිර දෙයක් වනු ඇත. මන්ද? නොබෝ දා මෙම අධිකරණයෙන් දෙන ලද නඩු තීන්දුවක් දැනට අප විසින් ප්‍රකාශ කරන මෙම නඩු තීන්දුවත් යන දෙකින් ම කථනය කෙරෙන්නේ සාක්ෂි ආඥා පනතේ 155(සී) දරණ ඡෙදය යටතේ ඔප්පු කළ හැකි කරුණු මොනවා ද යන්න යි. නමුත් එම පනතේ අංක 154 දරණ ඡෙදයේ විෂම හා ක්‍රියාකාරිත්වය පිළිබඳව කෙරෙන ගවේෂණයක දී පනතේ ඇති අංක 155(ඒ), (බී) සහ (ඩී), අංක 140, අංක 143, අංක 145, අංක 149, අංක 150, අංක 153 දරණ ඡෙද සහ සමහර විට තවත් ඡෙද ගැන ද සලකා බැලීමට සිදුවන බව අධිනීතිඥවරයා නිරනුමානව දැන සිටී. එකී ඡෙදවලින් යම්කිසිවක් 154 වන ඡෙදය සමග ගෙන අර්ථ කථනය කිරීමට අවස්ථාව සැලසුන විට මෙබඳු ගවේෂනයක ප්‍රතිඵල ඉදිරිපත් වේ යයි අපට සලකා ගත හැක.

සාකච්ඡාවට භාජන වූ කරුණු වලින් ඉවත්ව යාමට පෙර මෙම නඩුවේ ඉතා ම මුල් අවදියේ මතුවුනු තත්ත්වය වැනි තත්ත්වයක් සමහර විට නඩුව විනිශ්චය කළ විනිශ්චයකාරවරයා ඔහුගේ අභිමතය පරිදි මැදහත්ව සිට සුදුසු යයි සැලකුවේ නම් හෝ පැමිණිල්ල සාක්ෂි ආඥා පනතේ 154 වන ඡෙදය එහි 155(සී) ඡෙදයෙන් පැණවෙන අන්දමට පරිශීලනය නො කොට වෙන අයුරකින් පරිශීලනය කෙළේ නම් මග හරවා ගැනීමට තිබුණු බව අප විසින් සිතා මතා ගත යුතු ය. උදාහරණයක් වශයෙන් කිවහොත් සාක්ෂිකරු විසින් කලින් කරණ ලද ප්‍රකාශ ගැන අධිකරණය දැන සිටී යැයි කීමෙන් හෝ ඔහුගේ සිත තුළ තිබෙන සමහර කරුණු සඟවා ගැනීමට යම්කිසි හේතුවක් සාක්ෂිකරුවාට තිබිය හැකිය යන අදහසක් දීමෙන් හෝ ඇතැම් විට කරුණු එළිදරවු කිරීමට අකැමැති සාක්ෂිකරුවකු තරමක් මොළොක් බවකට පොළඹවා ගත හැක. නමුත් එබඳු සැළකීමකින් පින්තූ නමැති සාක්ෂිකරුවාගෙන් මනා සේ පිළිතුරු නො ලැබේය යනු පැහැදිලි ය.

පැමිණිලි පක්ෂයෙන් මෙම නඩුවේ දී පහත සඳහන් කරුණු සම්බන්ධයෙන් සාක්ෂි ඉදිරිපත් වී තිබේ.

(1) මෙම නඩුවෙහි දී තෙගෝනිස් නැමැති සාක්ෂිකරුවා චෝදිතයා දුම්බොන කට්ටියට සම්බන්ධව සිටි යේ යැයි කී බව සහ දුම්බීමට ඔහුට හවුල් වීමට ඉඩ නො ලැබුණු නිසා ඔහු අනිත් අයට බැණ වැදුනු බව.

(2) දුම් බීව කට්ටිය විසිරී ගිය පසු චෝදිතයා තමාගෙන් දුනු පිහියක් ඉල්ලා ගත්තේ යැයි ද තෙගෝනිස් කී බව.

(3) මියගිය අය පිහියකින් අනිනු ලැබ දුම් බීව තැනට මදක් දුරින් වැටී සිටි බව.

(4) ආරෝග්‍යශාලාවේ දී තමාට චෝදිතයා විසින් පිහියෙන් අනින ලද බව කියමින් මියගිය තැනැත්තා විසින් දොස්තර මහතාට ප්‍රකාශයක් කර ඇති බව.

ඉහත සඳහන් ලේඛනයේ ඇති කරුණු වලින් වැදගත් ම දෙය දොස්තර මහතාට කරන ලද ප්‍රකාශය යි. නමුත් ඊට විනාඩි කිහිපයකට කලින් මියගිය තැනැත්තා තමා වී කුඹුරක වැටීමෙන් තුවාල සිදු වූ බව ඇපොතිකරි මහතාට කියා තිබීම නිසා එහි වටිනාකම බොහෝ සේ අඩු වේ. මියගිය තැනැත්තා ගෙන් සුරා ගඳ නික්මුණු බව ඇපොතිකරිවරයාට දැනගත හැකිව තිබුණි. මෙම ප්‍රකාශ දෙකෙහි ඇති පරස්පර විරෝධි භාවය සළකන විට අපට මියගිය අය විසින් ඇපොතිකරිතැනට කළ ප්‍රකාශයට වඩා දොස්තර මහතාට කළ ප්‍රකාශය පිළිගැනීමට කැමැත්තක් ජූරි සභාව දැක් වූයේ මන්දැයි තේරුම් ගැනීම අපහසු ය. ජූරි සභාවේ මෙම පිළිගැනීම කෙරෙහි බලපවත්වන ලද්දේ පින්තූ නමැති සාක්ෂිකරුවා විසින් මහේස්ත්‍රාත් උසාවියෙහි දී දෙන ලද සාක්ෂි ගැන ඔවුනට ලැබුණු දැනීම නිසා ම විය හැකි යැයි අපට සිතා ගත හැකි ය. එම ප්‍රකාශ දැන් අප නිගමනයට බැස තිබෙන අන්දමට නඩුවේ දී ඉදිරිපත් නො කළ යුතු දේ ය. මේ කරුණු අනුව මෙම නඩුව නැවත වරක් ඇසීමට යයි නියෝග කිරීමට සුදුසු නඩුවක් යැයි අපි නො සිතුවෙමු.

ඉහත සඳහන් හේතූන් නිසා අභියාචනයට ඉඩ දුන් අපි චෝදිතයා නිදහස් කිරීමේ තීන්දුව වාර්තාගත කළ යුතු යැයි නිර්දේශ දුන්නෙමු.

චෝදිතයා නිදහස් කරන ලදී.